

TOWARD A FUNCTIONAL
UNDERSTANDING OF STANDING

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By: Vikramaditya S. Khanna [†]

Abstract

In this paper I provide a functional analysis of standing. The paper begins by focusing on a function for standing rules – to reduce or control undesirable litigation. However, there are many ways in which we could control or reduce undesirable litigation. We could permit anyone to initiate sue but limit remedies to only certain litigants, or we could limit remedies and restrict standing to only certain litigants, or we could deny remedies to and impose penalties on certain litigants while granting anyone permission to initiate a suit. There are a host of other possible responses as well. An important question is then: why choose to restrict standing as opposed to relying on these other ways of addressing undesirable litigation? This paper discusses this question.

After briefly defining undesirable litigation, I discuss the various methods of controlling undesirable litigation and note that they are all essentially supplements to the basic method of controlling undesirable litigation – denying undesirable litigants a remedy. It is when this basic method fails that there is a need to consider supplements such as restrictive standing rules or penalties on litigants. I discuss when the basic method is likely to fail and in each of those cases consider which supplement would be most desirable.

The analysis suggests that two factors are of great importance in determining which supplements to use. First, the likely number of difficult to deter undesirable litigants in a particular area of law and second, the relative accuracy of the various methods. If there are many difficult to deter undesirable litigants it may prove useful to rely on a restrictive standing rule to prevent them from bringing suit. Further, the more accurate a method is relative to its alternatives the greater the desire to rely on that method. These two factors, along with a few other matters (e.g., how easy is it to satisfy a standing rule), form an analytical matrix that one can use to analyze standing rules. There appears to be broad congruence between existing standing rules and the matrix developed in this paper.

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I. INTRODUCTION

Standing is a most enigmatic and frequently debated subject.¹ Although fundamentally important, there is still little agreement as to its basic purpose,² historical pedigree,³ constituent elements,⁴ or on the application of

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¹ See, e.g., JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 71 – 88 (4th ed. 1991) (describing the historical developments of standing); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 385-87 (2d ed., 1988) (summarizing the issues associated with standing); Kenneth C. Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 450-56 (1970) (discussing the new approach to the law of standing); Richard H. Fallon, *Of Justiciability, Remedies, and Public Law Litigation*, 59 N.Y.U.L.REV. 1, 5 (1984) (noting that the decision in *City of Los Angeles v. Lyons* restrained the doctrine of standing); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224-28 (1988) (discussing the origins of modern standing law); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1266 (1961) (noting that the question of standing of a citizen is one of great difficulty and of great importance); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885-88 (1983) (describing changes in standing doctrine); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1434-51 (1988) [hereinafter *Standing*] (summarizing the evolution of standing doctrine); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries", and Article III*, 91 MICH. L. REV. 163, 173-77 (1992) [hereinafter *Lujan*] (giving the history of standing in the United States); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1375-82 (1988) (describing various conundrums associated with standing).

² See, e.g., TRIBE, *supra* note 1, at 108-09, 111-12; Fletcher, *supra* note 1, at 228 – 239 (discussing injury in fact and the possibility of standing being a screen of sorts on the merits of the case); William M. Landes & Richard A. Posner, *The Economics of Anticipatory Adjudication*, 23 J. LEGAL STUD. 683, 715 - 19 (1994) (describing the concept of standing as a limitation on anticipatory adjudication); Martin H. Redish, *The Passive Virtues, The Counter-Majoritarian Principle, and the "Judicial-Political" Model of Constitutional Adjudication*, 22 CONN. L. REV. 647, 649 - 669 (1990) (discussing the values in allowing standing); Sunstein, *Lujan*, *supra* note 1, at 197 –

these elements.⁵ In light of this, it is hardly surprising that there has been a tremendous outpouring of literature analyzing and critiquing standing rules in their various forms.⁶ Indeed, there are many important and insightful

206(outlining the purpose of the doctrine of standing); Maxwell Stearns, *Standing Back From the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1309 - 86 (1995)[hereinafter *Forest*](analyzing standing under the theory of social choice); Maxwell Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PENN. L. REV. 309, 309 - 48 (1995)[hereinafter *Historical Evidence*](further analyzing the social choice theory of standing).

³ See, e.g., Jaffe, *supra* note 1, 1276 (noting that “[t]he very considerable weight of authority now supports the citizen mandamus suit.”); Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 261 – 89 (1961) (discussing “The Development of the Federal Law of Standing”); Fletcher, *supra* note 1, at 224 - 28, 265 - 72 (discussing cases categorized as federal taxpayer cases and suggesting that the taxpayer status of the plaintiff has little to do with the standing determinations in those cases); Sunstein, Lujan, *supra* note 1, at 168 - 97; TRIBE, *supra* note 1, at 385-87 (same as Jaffe); Stearns, *Forest*, *supra* note 2, at 1401 – 13(commenting on the historical context of standing); Stearns, *Historical Evidence*, *supra* note 2, at 348 – 462(same as *Forest*). See also David Friedman, *Making Sense of English Law Enforcement in the Eighteenth Century*, 2 U. CHI. L. SCH. ROUNDTABLE 475, 483-92 (1995)(discussing the logic of private enforcement); Davis, *supra* note 1, at 450 – 56 (discussing “The Four Key Cases”). For a discussion of standing rules in Europe see MAURO CAPPELLETTI & WILLIAM COHEN, *COMPARATIVE CONSTITUTIONAL LAW* 76 - 85 (1979).

⁴ See, e.g., Sunstein, Lujan, *supra* note 1, at 183 - 97 (discussing the movement in standing jurisprudence from an emphasis on “legal injury” to “injury in fact”, causation, redressability, and separation of powers concerns under Article II); TRIBE, *supra* note 1, at 107 - 09, 127 - 29 (discussing the apparently conflicting opinions in taxpayer standing cases such as *Flast v. Cohen*, 392 US 83 (1968) and *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 US 464 (1982)). For cases discussing notions of environmental injury see Lujan v. Defenders of Wildlife, 112 S.Ct 2130 (1992); 504 U.S. 555 (1992); Northwest Environmental Defense Ctr. V. BPA, 117 F.3d 1520, 1529 (9th Cir. 1997) (noting that injury to fish suffices as proof of injury to persons if persons regularly used river in the past); *Sierra Club v. Thomas*, 105 F.3d 248 (6th Cir. 1997) (noting that a land management plan constitutes concrete injury because it controls future action with respect to that land); *Idaho Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir. 1992)(noting that if areas to be logged are not specified, 100,000 acres is not so large as to necessarily transform claim into a generalized injury). See also Miles A. Yanick, *Loss of Protection as Injury in Fact: An Approach to Establishing Standing to Challenge Environmental Planning Decisions*, 29 U. MICH. J.L. REFORM 857 (1996).

⁵ See cites in *supra* note 4; Fletcher, *supra* note 1, at 239 – 47 (discussing taxpayer standing cases); TRIBE, *supra* note 1, at 106 – 45(discussing separation of powers).

This state of affairs is troublesome at best and confusing at worst. Furthermore, recent decisions have arguably done little to quell criticism or to clarify the law. See, e.g., Sunstein, Lujan, *supra* note 1, at 197 - 234; Stearns, *Forest*, *supra* note 2, at 1403 (noting that the doctrine of standing is destined to promote academic skepticism). Some recent decisions include Lujan, *supra* note 4 and *Bennett, et al. v. Spear, et al.*, 117 S.Ct 1154 (1997); *Federal Elections Comm’n v. Akins*, 524 U.S. 11 (1998). See also Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 616 (1999) (noting that Akins is an important recent decision on the general issue of standing).

⁶ See, e.g., NOWAK & ROTUNDA, *supra* note 1 (noting the history of standing); TRIBE, *supra* note 1, at 385-464 (discussing standing generally); Davis, *supra* note 1, at 450 (summarizing the new law of standing); Fallon, , *supra* note 1 (discussing remedial standing); Fletcher, *supra* note 1 (describing the structure of standing); Jaffe, *supra* note 1 (commenting on standing in public actions);Scalia, *supra* note 1, (noting changes in standing doctrine); Sunstein, *Standing*, *supra* note

discussions of standing that examine it from a constitutional law perspective, amongst others.⁷ However, only a few papers, notably Kenneth Scott's seminal article in the 1973 *Harvard Law Review*, examine standing through a functional lens.⁸ This is so even though strong arguments have been made about the value of a functional analysis of standing both in case law and in earlier academic writings.⁹ It is precisely this paucity in the functionally oriented literature on standing that this article is designed to address and, as such, the article does not address other kinds of arguments.

A functional inquiry requires setting out what function(s) or purpose(s) of standing are being examined. It is important to note at the outset that, from a functional perspective, standing discussions are composed of two related, yet distinct, questions. First, who should enforce the law – the victims, the government, or other parties. Second, assuming that we have decided who we

1, (discussing private law and its relation to standing); Sunstein, Lujan, *supra* note 1 (examining the law of standing after Lujan); Winter, *supra* note 1 (noting the origins of the public rights model).

⁷ See Davis, *supra* note 1, at 450 (noting that recent developments in the law of standing have increased the doctrine's complexity); Fallon, *supra* note 1 (discussing remedial standing as limiting Congress's ability to empower federal courts to enforce the legal interests it may create); Fletcher, *supra* note 1 (discussing Article III limitations on statutory grants of standing); Jaffe, *supra* note 1 (examining the background of public actions); Scalia, *supra* note 1, (analyzing separation of powers as it applies to standing); Sunstein, *Standing*, *supra* note 1, (tracing the evolution of standing doctrine from its roots in the Constitution); Winter, *supra* note 1 (examining the "case or controversy" clause with regard to justiciable actions).

⁸ See Kenneth E. Scott, *Standing in the Supreme Court -- A Functional Analysis*, 86 HARV. L. REV. 645, 669-90 (1973) (analyzing the doctrine of standing from a functional perspective); Michael C. Jensen, William H. Meckling, & Clifford G. Holderness, *Analysis of Alternate Standing Doctrines*, 6 INT'L REV. LAW & ECON. 205, 210-11 (1986) (analyzing the relationship between standing and efficiency); Landes & Posner, *supra* note 2, at 715 - 18 (discussing the economic rationale for the doctrine of standing); Stearns, *Forest*, *supra* note 2; Stearns, *Historical Evidence*, *supra* note 2 (using a social choice framework to discuss standing). My approach in this paper is to treat standing as a method for controlling or regulating undesirable litigation and to compare it against the other methods of doing so in order to set out when restrictive standing rules may be preferable. The other papers do not discuss this aspect in a comprehensive manner.

⁹ See *Wooten v. Loshbough*, 951 F.2d 768, 769 (1991) (Posner, C.J.) (noting that "the concept of standing has a broader significance. It is a gatekeeper regulating the flow of litigation arising out of an injurious act or a series of such acts ..."); Jensen, Meckling, & Holderness, *supra* note 8, at 1 & 1 n.2 (noting the "Supreme Court's admonition that standing decisions should be predicated not only upon constitutional considerations but also on 'practicalities and prudential consequences'" and citing *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 n. 11 (1980) and *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982)). For the prior academic writings utilizing a functional approach to standing see Scott, *supra* note 8, *passim*; Jensen, Meckling, Holderness, *supra* note 8, *passim*; Stearns, *Forest*, *supra* note 2, *passim*; Stearns, *Historical*, *supra* note 2, *passim*; Landes & Posner, *supra* note 2, *passim*.

want to enforce the law how do we ensure that only those people initiate suit.¹⁰

The first question is normally addressed in the functionally oriented literature under the rubric of public versus private enforcement of law.¹¹ For example, after careful analysis we may conclude that for a certain area of law victims, rather than the government, should enforce the law. However, this, by itself, does not tell us what the standing rule should be for this area of law. We only know that victims must be granted standing, but we do not know exactly what to do with non-victims. We could, for example, deny non-victims standing to bring suit or we could grant them standing and deny them a remedy (e.g., damages) even if they were to prove all the other elements of their cause of action at trial. There are a host of other possible responses to non-victims that could be pursued as well. Deciding which option is to be preferred is the gist of the second question and is the focus of this paper. In other words, this paper examines which of the litigation control techniques (e.g., restricting standing to, denying remedies to, or imposing penalties on certain litigant groups) should be used to control undesirable litigation and when, assuming we have decided which group(s) of potential litigants we want to enforce the law.

This paper thus focuses on standing's function as a method of controlling or regulating undesirable litigation (i.e., standing as a litigation screen),¹² amongst its many possible functions.¹³ Phrasing standing's function in this manner raises three questions -- (i) what does undesirable litigation

¹⁰ I am treating these questions as being determined in sequential order. In other words we first determine who should enforce the law and then think of ways to ensure that only those people bring suit. In reality these decisions are intertwined.

¹¹ See A. Mitchell Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105, 115 - 20 (1980); William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 10 -16, 31 -33 (1975); Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1, 6-16 (1974)(proposing two models on how to improve enforcement); David Friedman, *Efficient Institutions for the Private Enforcement of Law*, 13 J. LEGAL STUD. 379, 385-89 (1984)(arguing that minor changes in private enforcement institutions can lead to a more efficient outcome); Steven Shavell, *Liability for Harm versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 366-71 (1984)(discussing activities controlled mainly by liability and those subject to significant regulation); Jennifer F. Reinganum, *Plea Bargaining and Prosecutorial Discretion*, 78 AM. ECON. REV. 713 (1988)(discussing prosecutorial discretion to enforce); Jeannette L. Austin, *The Rise of the Citizen-Suit Enforcement in Environmental law: Reconciling Private and Public Attorneys General*, 81 N.W.U.L.REV. 220, 224 (1987)(noting the enforcement of federal environmental statutes); Mark A. Cohen & Paul H. Rubin, *Private Enforcement of Public Policy*, 3 YALE J. ON REG. 167, 173-85 (1985)(proposing private enforcement in historically regulated areas).

¹² See Scott, *supra* note 8, at 670 - 72 (discussing one of standing's functions as being to screen access to the courts).

¹³ See *infra* note 20 for a discussion of some alternative objects of standing not considered in this paper.

mean, (ii) what alternatives exist for controlling undesirable litigation besides restricting or denying standing and (iii) when will restricting standing be the preferred technique or supplement compared to granting standing broadly and relying on these other alternatives.

Part II.A argues that litigation is undesirable, for our purposes, when the litigant's net private benefits of bringing suit are positive and the net social benefits of bringing suit are negative.¹⁴ In other words, society would not desire suit, but the private litigant would. Other types of social and private divergence are possible and are briefly discussed.

Part II.B then briefly sets out some methods of controlling the social costs arising from undesirable litigation, such as restrictive standing rules, denial of remedy regimes, and penalty (i.e., sanctions) regimes. A common thread to all of these methods is the denial of remedy regime. For example, even if we restrict standing to only certain litigants that does not mean that those granted standing are immediately awarded a remedy. Litigants must still establish, to the court's satisfaction, that they merit a remedy. *Thus, a standing regime is in reality simply a denial of remedy regime coupled with a standing determination.* The other litigation control techniques can also be described in a similar fashion. Consequently, a denial of remedy regime is the primary means of controlling undesirable litigation. Restrictive standing rules, penalties, and other methods are *supplements* to the basic denial of remedy regime. This is important because it then becomes critical to establish when a denial of remedy regime is likely to fail as only then would it be necessary to consider supplements.

Part III conducts this inquiry by asking when might a denial of remedy regime prove insufficient to control undesirable litigation. The analysis concludes, building on prior work in the optimal law enforcement literature, that there are essentially four instances (or combinations of these four) where a denial of remedy regime may need to be supplemented. First, if a denial of remedy regime does not sort litigants into desirable and undesirable ones with perfect accuracy. Second, when litigants are motivated by gains independent of the official remedy. Third, when litigants misperceive the level of court accuracy in a denial of remedy regime. Fourth, when litigants misperceive whether they are desirable or undesirable litigants.

¹⁴ See Steven Shavell, *The Fundamental Divergence between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 577 – 79 (1997) (identifying instances where the divergence leads to private incentives being greater than social incentives and also instances where social incentives to bring suit may be greater than the private incentives to bring suit.) I focus only on the former because restrictive standing rules only address this.

Part IV discusses how each of these reasons affects our choice of supplemental litigation filters by focusing specifically on penalties and standing filters. My primary conclusions are that two broad factors are important in this choice – the relative accuracy of each supplement (i.e., how well does each filter sort litigants into desirable and undesirable litigants) and the likely litigant population in an area of law (e.g., what proportion of litigants are undesirable, how many may be deterred by the prospect of a penalty).

The focus on accuracy and likely litigant populations has much intuitive appeal and captures many elements that have been shown to be of importance in prior analyses. First, as most supplements attempt to sort litigants into desirable and undesirable litigant groups (say, victims and non-victims) one would expect that the sorting accuracy of each supplement would be important. Because most of the alternatives to standing (e.g., imposing penalties) normally occur after trial, or at least later than most standing determinations, they are likely to have more information about litigants, and hence be more accurate, than standing determinations.¹⁵ More accurate regimes, relative to less accurate regimes, tend to induce more victims to bring suit (as their prospects increase with better accuracy) and deter more non-victims from bringing suit (as their prospects decrease with better accuracy).¹⁶ Thus, subject to the administrative costs of such filters, the more important accuracy is as a factor and the greater the gap in accuracy between standing and penalty filters the more likely we are to favor a penalty filter.

The likely litigant population for an area of law also reveals information about how effective each supplement is likely to be. In particular, the number of difficult-to-deter undesirable litigants is important. For example, in certain areas of law some undesirable litigants may receive gains independent of the official remedy that are so large that even our largest imposable penalties might not deter them from bringing suit. A penalty supplement is ineffective in such

¹⁵ In general, more information leads to more accurate results. See, e.g., Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477 (1999); Louis Kaplow & Steven Shavell, *Accuracy in the Assessment of Damages*, 39 J.L. & ECON. 191 (1996); Louis Kaplow & Steven Shavell, *Accuracy in the Determination of Liability*, 37 J.L. & ECON. 1 (1994); Louis Kaplow, *The Value of Accuracy of Adjudication: An Economic Analysis*, 23 J.LEGAL STUD. 37 (1994); Stephen McG. Bundy, *Valuing Accuracy—Filling Out the Framework: Comment on Kaplow*, 23 J. LEGAL STUD. 411 (1994); Eleanor Swift, *Smoke and Mirrors: The Failure of the Supreme Court's Accuracy Rationale in White v. Illinois Requires a New Look at Confrontation*, 22 CAP. U.L. REV. 145 (1993); Jonathan J. Koehler & Daniel Shavero, *Veridical Verdicts: Increasing Verdict Accuracy Through the Use of Overtly Probabilistic Evidence and Methods*, 75 CORNELL L. REV. 247 (1990). Note that standing determinations may sometimes occur towards the end of the trial.

¹⁶ See Kaplow, *supra* note 15, at 312-20 (discussing the relationship between information and accuracy); Kaplow & Shavell, *supra* note 15, at 11 (discussing how accuracy involves individuals' choices among acts); John E. Calfee and Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 995-1000 (1984) (exploring the effects of uncertainty in legal contexts).

an area of law,¹⁷ however, a standing supplement might be effective because it could prevent such a litigant from proceeding with a suit. Consequently, the greater the number of these difficult-to-deter undesirable litigants the more we should prefer to prevent them from bringing suit by denying them standing. Of course, as there are fewer such litigants our preference for relying on a standing filter should decrease.

Part V relaxes some of the assumptions made in the bulk of the analysis and finds the room for a standing filter increases in some instances. For example, the presence of porous standing filters is important. A porous standing filter prevents only a handful of undesirable litigants from continuing with suit, while permitting all desirable and most undesirable litigants to continue with suit. These kinds of standing filters may be useful in many instances. Further, if we can rely on more than one filter for an area of law the use of standing should also increase. Taking these and other factors plus accuracy and likely litigant populations, I develop a matrix for examining supplemental litigation control techniques.¹⁸

Part VI then examines the current diaspora of standing-like rules and whether they exhibit any congruence with the approach developed here.¹⁹ I argue that there is broad congruence. Part VII concludes.

In summary, this paper makes at least four points that go towards furthering a functional analysis of standing. First, that standing discussions, from a functional perspective, are composed of two questions – who should enforce the law and second how do we go about and ensure that only these people enforce the law? Our focus is on the second question as there has been little discussion of it, whilst there has been (and continues to be) much discussion of the first. Second, that standing is one of many potential supplements to a basic denial of remedy regime that serves to deter or prevent undesirable litigation. In the process the paper discusses ways in which denial of remedy regimes may fail to deter undesirable litigation (and hence generate a need for supplements) and some other methods of supplementing such a regimes (e.g., penalty regimes, court access fees). Third, standing and the other litigation filters are compared in terms of when they would be the best supplemental filter. This provides a matrix of factors to consider when trying to decide which supplemental litigation filter to rely upon. Finally, current

¹⁷ See Steven Shavell, *The Optimal Structure of Law Enforcement*, 36 J.L. & ECON. 255, 266 (1993).

¹⁸ See Part VI.

¹⁹ Note that the object of this paper is not to suggest that all standing case law can be reconciled with my approach. Whether such reconciliation is possible is something left to future writings. For arguments that discuss the desirability of such consistency see Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

standing-like rules are examined to ascertain if they appear consistent with the approach developed here and the paper concludes that they do.

Before delving into the analysis a few words of clarification may be in order. First, the primary object of this paper is conceptual in nature. The primary object is *not* to weave a theory that explains all of private and public law standing. Second, the analysis and matrix developed here are designed for use in considering categories of litigants, not specific litigants that come before the courts. I would assume that such “category” decisions are undertaken at the level of Congress or, perhaps, the Supreme Court (or both) and not by individual courts who are trying to determine whether a particular litigant in the case before them should be permitted to bring suit.

II. DEVELOPING A FUNCTIONAL FRAMEWORK FOR ANALYZING STANDING RULES

When developing a functional framework for examining standing rules we must first identify what functions might be served by restricting standing. Although standing rules may serve many plausible functions,²⁰ this article considers their role as methods of controlling or regulating (i.e., screening out) socially undesirable litigation.²¹

This approach is consistent with the earlier functionally oriented writing on standing.²² Kenneth Scott,²³ Maxwell Stearns,²⁴ and Judge Richard

²⁰ For discussion of some of the other functions of standing such as allocating decision making authority, the unitary executive, and separation of powers see Scott, *supra* note 8, at 683 - 90; Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1810-21 (1993)(applying the unitary executive theory to citizen suits); Eric J. Segall, *Standing Between the Court and the Commentators: A Necessity Rationale for Public Actions*, 54 U. PITT.L.REV. 351, 355-57 (1993)(examining standing using separations of powers analysis). Note that standing's other functions (e.g., separation of powers) can be brought into the analysis by treating a reduction from the optimal level of separation of powers as a social cost.

²¹ This is in some sense similar to Kenneth Scott's treatment of standing as at least a partial means to screen access to the courts. See Scott, *supra* note 8. My approach is broader in that I compare standing with other methods of controlling court access (or regulating undesirable litigation) and also focus on standing in most areas of law not only the arena of judicial review of government action.

²² Professors Jensen, Meckling, and Holderness have also argued, in a paper discussing standing rules in disputes between private parties, that standing rules influence the transfer of resources. See Jensen, et al., *supra* note 8, at 205 - 08, 210 -12. The more liberalized the standing doctrine (i.e., the more parties who can bring suit) the more difficult resource transfers become because there are more people to negotiate with and hence the transactions costs become higher and may discourage the exchange of certain resources. See *id.*, at 207 - 08. I agree with their analysis, and the difficulty identified by these authors is treated as a cost of a broad standing regime in my analysis (i.e., duplicative efforts and wasteful races). See, e.g., Rob Atkinson, *Unsettled Standing: Who (Else) Should Enforce the Duties of Charitable Fiduciaries?*, 23 J. CORP. L. 655 (1998); Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1 (1995); Jean Wegman Burns, *The Paradox of Antitrust and Lanham Act Standing*, 42 UCLA L. REV. 47 (1994); Ann E. Carlson, *Standing for the Environment*,

Posner have argued, separately, that standing serves as a litigation screen of some sort.²⁵ My approach builds on their work by suggesting that standing should screen undesirable litigation (as defined in Section A) and then compares standing with alternate methods of controlling undesirable litigation.

With our focus on controlling undesirable litigation three basic questions need to be asked. First, what is meant by the phrase undesirable litigation? Second, what other methods of controlling or regulating undesirable litigation are available besides restrictive standing rules? Third, when is restricting standing a preferable alternative or supplement compared to those other methods? The first two questions are discussed in this Part and the third question is left to Parts III through V for more detailed discussion.

A. *Defining Undesirable Litigation*

Undesirable litigation refers to litigation where the net private benefits of suit to the litigant (private benefits less private costs) are positive, but the net social benefits of suit (social benefits less social costs) are negative.²⁶ In other

45 UCLA L. REV. 931 (1998); C. Douglas Floyd, *Antitrust Victims Without Antitrust Remedies: The Narrowing of Standing in Private Antitrust Actions*, 82 MINN. L. REV. 1 (1997); John F. Hartmann, Note, *Horizontal Mergers, Competitors, and Antitrust Standing Under Section 16 of the Clayton Act: Fruitless Searches for Antitrust Injury*, 70 MINN. L. REV. 931 (1986); Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276 (1998); Joseph Mendelsohn, *Should Animals Have Standing? A Review of Standing Under the Animal Welfare Act*, 24 B.C. ENVTL. AFF. L. REV. 795 (1997); Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613 (1999).

²³ See Scott, *supra*, note 8 (arguing that the standing doctrine serves two functions: the rationing of scarce judicial resources and the determination of the judiciary's proper policymaking role).

²⁴ Professor Maxwell Stearns has also argued that standing may serve to reduce the amount of path manipulation engaged in by various organizations, usually public interest groups. See Stearns, *Forest*, *supra* note 2, at 1318 – 20. Path manipulation refers to “the ability of litigants to manipulate the substantive evolution of legal doctrine by controlling the order, or ‘path’, of case decisions” Stearns, *Forest*, *supra* note 2, at 1318. This is done to maximize the chances that courts will make rulings that lead to the results such litigants desire. *See id.* Standing, Stearns argues, restricts the ability of public interest groups to engage in path manipulation by requiring that a member be injured in some way. *See id.* This argument is, in effect, a version of standing as a screen for a particular type of undesirable litigation - path manipulative litigation.

²⁵ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 570 (5th ed., 1998)(discussing standing as a method of controlling access to the courts); *Wooten*, *supra* note 9, at 770 (Posner, C.J. suggesting that antitrust injury serves as a gatekeeper on litigation and also “minimizes the burden on the courts”); Scott, *supra* note 8, at 670 – 83 (noting that standing in judicial review settings can serve as an “access screen”.) Landes and Posner have also suggested that standing may serve as a means to reinforce property rights. *See also* Landes & Posner, *supra* note 2, at 718 (noting that in some cases rules of standing are necessary in order to allocate property rights to legal claims).

²⁶ See generally Shavell, *supra* note 14; Shavell, *infra* note 32, at 333 (noting that the private cost of a suit is less than the social cost suggesting a tendency towards excessive litigation); Kaplow, *infra* note 32, at 376 (on the same point).

words, undesirable litigation involves suits that society does not want to be brought, but that the private litigant would want to bring. This, however, is not the only way in which private and social incentives to bring suit may diverge. The private – social divergences can be categorized into the following four groups.

1. The net social benefits of litigation are negative, but the net private benefits of litigation are positive. In other words, private litigants want to bring suits that society does not want them to bring. This is the quintessential case of undesirable litigation.²⁷
2. The net social benefits of litigation are negative, and the net private benefits are also negative (but not the same as the net social benefits). Here society does not want private litigants to bring suit and the private litigants have little incentive to bring suit.²⁸
3. The net social benefits of litigation are positive, and the net private benefits are also positive (but not the same as the net social benefits). Here society wants litigants to bring suit and they also will bring suit.²⁹
4. The net social benefits of litigation are positive, but the net private benefits are negative. Here society wants the litigants to bring suit, but the litigants do not have sufficient incentive to do so.³⁰

Scenarios 1 and 4 are analytically the more interesting cases because private and social incentives move in opposing directions. My attention, however, is focused on areas where scenario 1 applies (i.e., the case of undesirable litigation) because it is only then that there is a need to *curtail*

²⁷ See Shavell, *supra* note 14, at 578. For example, let the social benefits and costs of litigation be 10 and 11 while the private benefits and costs are 20 and 8. Here the net social benefit is -1 and the net private benefit is 12 and private litigants will bring suit that society does not want. This is undesirable litigation.

²⁸ See *id.*, at 583. For example, let the social benefits and costs of litigation be 10 and 14 and the private benefits and costs be 9 and 12. Here the net social benefit is -4 and the net private benefit is -3. In this happy world litigants do not bring suit and society does not want them to bring suit.

²⁹ See *id.*, at 584-85. For example, let the social benefits and costs of litigation be 12 and 11 and the private benefits and costs be 20 and 6. Here the net social benefit is 1 and the net private benefit is 14. This litigation is desirable from both society's and the private litigant's perspectives.

³⁰ See *id.*, at 585. For example, let the social benefits and costs of litigation be 10 and 8 and the private benefits and costs be 5 and 6. Here net social benefit is 2 and net private benefit is -1. In this world society wants suit, but the litigant will not bring it. This is undesirable non-litigation.

socially undesirable litigation – something which *restrictive standing* may be able to do.³¹

Even though scenario 1 is our only concern it may prove illustrative to discuss some reasons for why a divergence may arise between private and social incentives to bring suit. Understanding the reasons for the divergence seems a natural prelude to considering methods of addressing the consequences of that divergence.

To explore this further let us unpack private and social costs and benefits of litigation. I treat deterrence as the main social benefit from suit although there may be other benefits such as clarifying the law and so forth.³² The private benefits of suit to the litigant are the remedy (e.g., damages), collateral advantages (e.g., increased business opportunities), and psychic benefits (e.g., satisfaction received from just bringing the suit) that litigants expect to receive, rather than simply the deterrent effects.³³ Because private litigants do not fully internalize all the social gains from bringing suit (and

³¹ Note that it may be possible for undesirable non-litigation (i.e., desirable litigants not bringing suit) to be affected by standing rules. If we have very broad standing then defendants may respond by taking a tough litigation stand, which may deter many desirable litigants. See Stephen J. Spurr, *An Economic Analysis of Collateral Estoppel*, 11 INT'L REV. L. & ECON. 47, 50–59 (1991) (discussing why defendants may “fight harder” when stakes larger). However, a tighter standing regime may reduce the incentive to be so “tough” in litigation and hence encourage more desirable litigants to bring suit because now they do not face such an ardent foe.

³² See Shavell, *supra* note 14, at 578. For discussions on deterrence as a benefit of litigation see *City of Riverside v. Rivera*, 477 U.S. 561, 574 – 75 (1986); *Lumbert v. Illinois Department of Corrections*, 827 F.2d 257, 259 (7th Cir. 1987); *Quesada v. Thomason*, 850 F.2d 537, 543 (9th Cir. 1988); Eugene J. Kuzinski, Note, *The End of the Prison Law Firm: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995*, 29 RUTGERS L.J. 361, 399 (1998); Steven Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333 (1982); Louis Kaplow, *Private Versus Social Costs in Bringing Suits*, 15 J. LEGAL STUD. 371 (1986); Keith N. Hylton, *Litigation Costs and the Economic Theory of Tort Law*, 46 U. MIAMI L. REV. 111 (1991); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 693, 696 (1986).

³³ See Shavell, *supra* note 17, at 256 - 57. The psychic advantages may not always be considered social gains. Cf. Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1248 (1985). I do not discuss the possibility that there may be some gain, either to the litigant or society, from adhering to social norms on litigation. For discussion of social norms more generally, see Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 610 (noting that social meaning is something people value) (1998); Eric A. Posner, *Symbols, Signals, and the Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765, 792 (discussing behavioral effect of social norms) (1998); Richard A. Posner, *Social Norms, Social Meaning, and Economic Analysis of the Law: A Comment*, 27 J. LEGAL STUD. 553, 554 – 57 (commenting on how social pressures affect decisions) (1998).

because some private gains may not be considered social gains) there may be a divergence between the private and social benefits of suit.³⁴

Bringing suit also entails a host of possible social costs such as the costs of using the courts and litigation costs to the parties.³⁵ The private costs to a litigant are the costs of litigation, in terms of time and resources, to that person.³⁶ This does not include many of the social costs of suit (e.g., cost of courts to society),³⁷ and leads to a divergence in the private and social costs of suit.³⁸ Thus, both private and social benefits and private and social costs are likely to diverge and sometimes this will result in undesirable litigation.

Undesirable litigation can be socially costly in many ways. First, undesirable litigation may overdeter the behavior over which litigation ensues. For example, if there is undesirable litigation in contract law that would increase the costs of entering or drafting a contract and might deter some people from entering or drafting contracts. Another cost associated with undesirable litigation would be the administrative costs associated with more suits. Further, as undesirable litigation increases we have more potential enforcers and that leads to more people expending resources to obtain relevant

³⁴ See Shavell, *supra* note 14, at 578. This leads to a divergence in private and social benefits of suit because:

The motive of a person who brings suit ... is usually to obtain compensation for harm or other relief. Therefore, the plaintiff's benefit from suit does not bear a close connection to the social benefit [i.e., deterrence] associated with it and may bear almost no connection at all . . . it could be that the plaintiff's benefit from suit exceeds the social deterrent benefit (suppose that damages are high but that deterrence is slight because there is little injurers can do to reduce harm). Or it could be that the plaintiff's return from suit is less than its deterrent effect (suppose that damages would be small but that deterrence would be significant because injurers can exercise cheap and effective precautions).

Shavell, *supra* note 14, at 578.

³⁵ See Shavell, *supra* note 14, at 577 - 78; Scott, *supra* note 8, at 673 - 74.

³⁶ See Shavell, *supra* note 14, at 577 - 78.

³⁷ See *id.*, at 577 - 79. For example, when a private litigant brings suit:

[H]e bears only his own legal expenses; he does not take into account that his suit will cause the defendant and possibly the court to incur legal expenses as well; a bias toward excessive suit is thus engendered. Similarly, once suit has been brought when either litigant considers making a particular expenditure on litigation, he will not count as a cost to himself the expense that the opposing side and the court may be forced to bear as a consequence; this leads to an excessive level of litigation expenditures.

Shavell, *supra* note 14, at 578.

³⁸ See *id.*, at 575.

enforcement information.³⁹ However, only the first to the courthouse will be permitted to recover and thus, the enforcement expenditures by those who are not first to the courthouse are often wasteful from society's perspective.⁴⁰ Other possible costs may also arise,⁴¹ but for simplicity we limit our focus to wasteful races.⁴²

³⁹ See Polinsky, *supra* note 11, at 115 - 20; Landes & Posner, *supra* note 11, at 10-16, 31-33.

⁴⁰ As Shavell and Polinsky point out this is "akin to excessive effort to catch fish from a common pool." A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, Discussion Paper No. 235, Harvard Law School. John M. Olin Center for Law, Economics, and Business 3 (May, 1998). Also, "private parties may find it hard to capture fully the benefits of developing expensive, but socially worthwhile, information systems (such as computerized databases of fingerprint records)" (*Id.*, at 3) and this leads to the standard free-riding problem.

I have assumed that the first party to the court obtains all the benefits of bringing suit and people who are second or later receive none. The race to the courthouse is then engendered. We could make alternative assumptions about enforcement structure so that the first person to the courthouse gets 50% of the benefits, the second gets 25%, and so on. However, in order to maintain analytical simplicity I have not made that assumption.

⁴¹ For example, as more people are permitted to bring suit the transference of certain property might become more difficult because the seller may then need to deal with multiple parties rather than just the injured party. See Jensen, et al., *supra* note 8. The transaction costs may then increase making transfers of property potentially more difficult and costly. See *id.*, at 207-08, 210 - 12.

⁴² Note that the breadth of standing rules could have numerous effects on the likely amount of undesirable litigation through how it influences the social benefits and costs of litigation. First, as the number of potential litigants increases with broad standing then there are more and more litigants who may bring suit thereby increasing the probability of suit (and, implicitly, the probability of being sanctioned). See Polinsky, *supra* note 11, at 120-24 (discussing broadening enforcement to the competitive level (i.e., anyone can sue) and the chances for enhanced deterrence). As the probability of being sanctioned increases the expected sanction, which is the actual sanction times the probability of being sanctioned, increases and so might deterrence (the primary social benefit of litigation). Cf. Louis Kaplow & Steven Shavell, *Accuracy in the Determination of Liability*, 37 J.L. & ECON. 1, 2 - 3 (1994).

On the other hand, when many litigants are permitted to bring suit social costs are likely to rise. For example, as there are more potential enforcers we increase the prospects of more people expending resources to obtain relevant enforcement information. For further discussion see Polinsky, *supra* note 11, at 115 - 120; Landes & Posner, *supra* note 11, at 10 - 16, 31-33 (1975). For discussion of chilling and overcompliance see Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORG'N 279, 279 - 80 (1986) (discussing the link between uncertain legal standards and suboptimal compliance); Thomas M. Jorde & David J. Teece, *Innovation, Cooperation and Antitrust: Striking the Right Balance*, 4 HIGH TECH L.J. 1, 49 (1989) (noting that some provisions in antitrust law may deter innovation). For some discussion on collusive suits see Landes & Posner, *supra* note 8, at 718 - 19. However, only the first to the courthouse will be permitted to recover and thus, the enforcement expenditures by those who are not first to the courthouse are often wasteful from society's perspective. As Shavell and Polinsky point out this is "akin to excessive effort to catch fish from a common pool." Polinsky & Shavell, *supra* note 40. Also, "private parties may find it hard to capture fully the benefits of developing expensive, but socially worthwhile, information systems (such as computerized databases of fingerprint records)" (*Id.*, at 3) and this leads to the standard free-riding problem.

Other possible costs may arise with expanded standing, but for simplicity we limit our focus to wasteful races. For example, as more people are permitted to bring suit the transference of certain property might become more difficult because the seller may then need to deal with multiple parties rather than just the injured party. See Jensen, et al., *supra* note 8. The transaction

The presence and costs of undesirable litigation lead us to inquire into at least two matters. First, what is undesirable litigation or more simply who should enforce the law – the victims, the government or someone else? ⁴³ This inquiry may, for example, lead us to decide that certain litigant groups or kinds of litigation are desirable and others are not (e.g., victims are desirable litigants). Second, once we have identified in broad measure what is undesirable litigation (e.g., non-victims bringing suit) then the issue becomes how do we go about and either prevent or deter this kind of undesirable litigation. The functional literature on the first question is growing quickly and as such I do not discuss it in any great depth. The second question is little explored and is the focus of this paper.

B. Methods of Controlling Undesirable Litigation.

Given the presence and social costs of undesirable litigation it becomes important to consider how to control or minimize such litigation. There are many ways to regulate undesirable litigation, but I will focus on only the more salient ones.⁴⁴ For simplicity I will refer to victims as desirable litigants and non-victims as undesirable litigants.

Let us start with a denial of remedy regime. Under this regime all litigants (victims and non-victims) are permitted to bring suit and at the end of the trial the court will determine whether the litigant should receive a remedy. If the litigant wins at the end of trial then she receives a remedy and if not then she receives nothing and incurs the costs of bringing suit.

A standing rule permits non-victims and victims to file suit and if a litigant's standing is challenged (usually quite early in the trial process) then a determination arises where the court decides whether the litigant is a victim or

costs may then increase making transfers of property potentially more difficult and costly. *See id.*, at 207-08, 210 – 12. I expect that the costs of wasteful races to the courthouse and other costs would increase with the number of undesirable litigants who bring suit (which in turn rises with the breadth of the standing rule).

⁴³ Note that if we decided that an area of law should not be subject to litigation (i.e., it is a kind of undesirable litigation) then that can be re-conceptualized as an area where there are no desirable litigants or an area where no one should be allowed to enforce the law in court.

⁴⁴ There are many other methods of controlling undesirable litigation. For example, we could grant standing to everyone, but permit some government agency (i.e., not the courts) to screen the suits (as the Department of Justice is supposed to in the case of Qui Tam litigation under the False Claims Act of 1986). *See* 31 USC §§ 3729 - 3731 (1994). *See* William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 LOYOLA L.A. L. REV. 1799, 1799 – 1808, 1817 – 18, 1820 (1996).

not.⁴⁵ If that person is considered a non-victim then he is denied standing and the suit terminates. If the person is considered a victim the suit continues until the end of trial where the court determines if the litigant should receive a remedy. If the litigant wins at the remedy determination stage he receives a remedy. If the litigant loses he receives nothing.

A penalty regime allows victims and non-victims to sue, but penalizes non-victims after trial for having initiated suit.⁴⁶ Thus, litigants initiate suit and proceed to final judgment. If the litigant (X) wins at the remedy determination stage she receives a remedy and if not she receives nothing. Following the end of the trial the other side (Y) can file suit in a separate proceeding asking the court to determine if the litigant (X) is a victim or not. The court then gathers information and decides.⁴⁷ If X is categorized as a non-victim then a penalty is imposed on X and if not then no penalty is imposed. This later suit may be brought regardless of whether X won at the remedy determination stage. I also assume that the penalty imposed on non-victims is set to align the private and social incentives to bring suit (i.e., penalty = net private benefits – net social benefits) and that non-victims are aware of this.⁴⁸

⁴⁵ The standing determination need not be raised by either party to a dispute, and can be (is) determined without argument. In comparison, Rule 11 of the Federal Rules of Civil Procedure contemplates both a motion for sanctions and a hearing. Fed. R. Civ. P. 11 (c)(1)(A).

⁴⁶ A penalty regime is very similar to what we see at present with the torts of malicious prosecution and abuse of process and Rule 11. See PROSSER & KEETON, TORTS 870 – 89 (discussing malicious prosecution), 889 – 97 (discussing wrongful civil proceedings), 897 – 900 (discussing abuse of process) (5th ed., 1984); Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PENN. L. REV. 519, 532 (1997) (discussing frivolous lawsuits as defined by Rule 11); Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 INDIANA L.J. 59, 113-16 (1997) (analyzing how Rule 11 encourages meritorious suits and discourages meritless ones); A. Mitchell Polinsky & Daniel L. Rubinfeld, *Sanctioning Frivolous Suits: An Economic Analysis*, 82 GEO.L.J. 397, 397 - 403 (1993) (discussing Rule 11 and sanctioning frivolous litigants and the similarities and differences).

⁴⁷ I assume for much of the analysis that the net private and social benefits of suit are obtained only upon completion of, although not necessarily success in, the original trial, except for the cost of the sanctioning proceedings which are incurred if the sanctioning proceedings are triggered.

Note that my analysis does not preclude relying on other measures to control for litigants who get large benefits just from the initiation of a suit. Cf. Shavell, *supra* note 14, at 586 – 88 (noting that the state can discourage excessive litigation by imposing a properly chosen fee for bringing suit); PROSSER & KEETON, *supra* note 46, at 771 – 848 (discussing defamation generally).

⁴⁸ I make this assumption so that in the perfect state of the world the penalty regime would result in no undesirable litigants bringing suit. Cf. Polinsky & Rubinfeld, *supra* note 46, at 404 - 17. See generally, Lucian Arye Bebchuk and Howard F. Chang, *An Analysis of Fee-Shifting Based on the Margin of Victory: On Frivolous Suits, Meritorious Suits, and the Role of Rule 11*, 25 J. LEGAL STUD. 371 (1996); Bruce H. Kobayashi and Jeffrey S. Parker, *No Armistic at 11: A Commentary on the Supreme Court's 1993 Amendment to Rule 11 of the Federal Rules of Civil Procedure*, 3 SUP. CT. ECON. REV. 93 (1993); Joseph B. Maher, Comment, *Survival of the Common Law Abuse of Process Tort in the Face of a Noerr-Pennington Defense*, 65 U. CHIC. L. REV. 627 (1998).

A one way fee-shifting filter imposes the costs of the defendant's legal fees on losing plaintiffs.⁴⁹ If a defendant loses in the initial trial there is no fee-shifting.⁵⁰ One way fee-shifting can be viewed as simply a penalty filter⁵¹ where (1) the penalty is set at the amount of the defendant's legal fees rather than the amount needed to equate private and social incentives to sue⁵² (2)

⁴⁹ I focus only on one-way fee-shifting because our concern is with cases where the undesirability arises from excessive suit as that is what standing can combat. Other kinds of undesirability (insufficient incentive to bring suit) could be regulated by other kinds of fee-shifting. For greater discussion of the variety of fee-shifting regimes see, e.g., Amy Farmer & Paul Pecorino, *A Reputation for Being a Nuisance: Frivolous Lawsuits and Fee Shifting in a Repeated Play Game*, 18 INT'L REV. L. & ECON. 147 (1998) (discussing fee-shifting in general and concluding that in the context of a reputation-based model, fee-shifting is highly effective in reducing the number of lawyers engaged in nuisance suits); Bebchuk & Chang, *supra* note 48; Clinton F. Beckner III & Avery Katz, *The Incentive Effects of Litigation Fee-Shifting When Legal Standards Are Uncertain*, 15 INT'L REV. L. & ECON. 205 (1995) (discussing the incentive effects of cost-shifting on substantive behavior, and concluding that neither the American rule nor the British rule is unequivocally better at promoting efficient substantive behavior); Keith N. Hylton, *Fee Shifting and Predictability of Law*, 71 CHI.-KENT L. REV. 427 (1995); Eric Talley, *Liability-Based Fee Shifting Rules and Settlement Mechanisms Under Incomplete Information*, 71 CHI.-KENT L. REV. 461 (1995); Pamela S. Karlan, *Fee Shifting in Criminal Cases*, 71 CHI.-KENT L. REV. 583 (1995).

⁵⁰ Fee-shifting regimes can vary depending on when fees are shifted and what amount of fees are shifted. On the issue of the amount of fees that should be shifted we might note two approaches to the issue. First, fees might just be the defendant's legal fees and second, they might include court costs as well as the defendant's legal fees. Cf. POSNER, *supra* note 25, at 633-34 (discussing fully compensatory filing fees). These are both slightly different versions of the same regime.

⁵¹ Fee-shifting has a similar sort of result to penalties (it imposes penalties on the undesirable litigant after the suit) and hence its analysis will be similar. See, e.g., Hylton, *supra* note 49, at 452-56 (discussing a pro-plaintiff rule of cost allocation); Talley, *supra* note 49, at 484-87 (commenting on fee shifting regimes); Bruce L. Hay, *Fee Awards and Optimal Deterrence*, 71 CHICAGO-KENT LAW REVIEW 505, 511 (1995) (analyzing a model of optimal fee-awards); Polinsky & Rubinfeld, *supra* note 46, at 422 - 24 (noting that frivolous plaintiffs can be discouraged from suing if a penalty is made large enough); John J. Donohue III, Commentary, *Opting for the British Rule, Or if Posner and Shavell Can't Remember the Coase Theorem, Who Will?*, 104 HARV. L. REV. 1093, 1096-99 (1991) (discussing the American and British rules of fee-shifting); Avery Katz, *Measuring Demand for Litigation: is the English Rule Really Cheaper?*, 3 J.L. ECO. & ORG'N 143, 145-49 (1987) (outlining an economic approach to litigants' decisions); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternate Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 58-62 (1982) (comparing the American and British systems of fee-shifting); Lucian A. Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEGAL STUD. 1, 19 (1996) (explaining the allocation of litigation costs when a plaintiff bears both parties' litigations costs if he or she loses); Harold J. Krent, *Explaining One Way Fee-Shifting*, 79 VA. L. REV. 2039, 2045-75 (1993) (discussing the rationale for one-way fee-shifting).

⁵² Paying this amount will not eliminate the divergence between private and social incentives to sue if there are other reasons, besides the plaintiff not bearing the defendant's legal fees, that cause the divergence (e.g., plaintiff not bearing court costs of suit, a misalignment of private and social benefits of suit). If the fees the plaintiff pays are both the defendant's legal costs and court costs then the divergence may occur less frequently, but it might still occur (when private benefits exceed social benefits, but social benefits are less than social costs). Cf. POSNER, *supra* note 25, at 634.

It is worth noting that the fee-shifting scheme does not aid us in getting all the desirable litigants to bring suit because there may still be some desirable litigants who would not bring

the penalty is determined at the end of trial, but not in separate later proceedings (i.e., accuracy is the same as a denial of remedy regime) and (3) the penalty is determined at a lesser cost per case than with a full blown penalty filter because there are no separate proceedings.⁵³

A court access fee filter is when plaintiffs are required to pay a fee to the court before they are permitted to bring suit.⁵⁴ Once this fee is paid the litigants proceed to the remedy determination stage.⁵⁵ If the litigant wins she receives a remedy and if she loses she receives nothing and bears her costs of litigation.

These regimes have certain features in common. In particular, all regimes ask at the end of trial whether or not the litigant should be given a remedy.⁵⁶ Thus, under a denial of standing to non-victims regime if someone

suit -- the benefit to them is small and costs of litigation are large (i.e., standard class action type case) (see Shavell, *supra* note 14, at 583 - 84) -- and these litigants will still not bring suit under a one-way fee-shifting scheme (there is no recouping of fees if you as the plaintiff win). Of course, restricting standing does not appear to help such desirable litigants either.

⁵³ One might expect that the costs of fee-shifting per case are less than the costs of a standing determinations per case. However, we might expect to see more fee-shifting than separate sanctioning proceedings or standing determinations because fee-shifting occurs automatically when the plaintiff loses whereas sanctioning proceedings/standing determinations only occur if the defendant desires to bring such an action which is tempered by the higher costs of pursuing sanctioning proceedings/standing determinations. This might lead to scenarios where in some cases fee-shifting had lower total administrative costs and in others where sanctioning or standing regimes had lower total administrative costs. See A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW & ECONOMICS 50 (2d. ed. 1989) (noting that administrative costs depend both on the number of cases litigated and on the cost of resolving each case); Steven Shavell, *Liability and the Incentive to Obtain Information About Risk*, 21 J. LEGAL STUD. 259, 269 (1992) (discussing administrative costs under different negligence rules).

⁵⁴ See Shavell, *supra* note 14, at 587 (discussing the policy of making those who sue pay for state's litigation costs). This "fee" could be in the form of actual cash payments or in the form of stricter procedural, evidentiary, or proof standards that would cause a litigant, who wishes to succeed, to expend more effort or resources than before. Actually one suspects that higher evidentiary standards are not a set fee. Higher evidentiary standards should be felt more by those who have weaker cases rather than those with stronger cases.

⁵⁵ The fee need not be specifically monetary - it just needs to be anything that would increase the costs of suit (in terms of time, effort, or money). There are examples of the usage of fees overseas. See, e.g., Christopher E. Austin, *Due Process, Court Access Fees, and the Right to Litigate*, 57 N.Y.U.L. REV. 768 (1982); Martin D. Beier, *Economics Awry: Using Access Fees for Caseload Diversion*, 138 U. PENN. L. REV. 1175 (1990).

⁵⁶ There are many instances of attempts to adjust remedies to influence litigant incentives. Some of the more well known examples are punitive damages in tort and treble damages in antitrust, which have the effect of increasing the private benefits plaintiffs face and encouraging suit. See, e.g., Brodley, *supra* note 22; Robert E. Cooter, *Punitive Damages, Social Norms, and Economic Analysis*, 60 LAW & CONTEMP. PROBS. 73 (1997); Theodore Eisenberg, John Goerdt, Brian Ostrum, David Rottman, Martin T. Wells, *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623 (1997); Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115 (1993); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998); A. Mitchell Polinsky, *Are Punitive Damages Really Insignificant*,

is granted standing that does not mean that she is automatically entitled to a remedy. She must still prove that she deserves a remedy at trial. Thus, a standing regime is simply a denial of remedy regime coupled with an early decision on standing (this is similar to motions for summary judgment). Similarly, under a court access fee regime, after the litigant pays the fee that person must still prove that a remedy is merited. Decisions on remedy are thus a common feature to all regimes. Further, most litigants presumably bring suit to recover a remedy.⁵⁷ In light of this, we might assume that denial of remedy is the primary means of controlling undesirable litigation. Standing restrictions, fees, or penalties should be used only as supplements when they can help improve the results over a simple denial of remedy regime. Consequently, it is important to start with an understanding of when a denial of remedy regime is likely to be inadequate, by itself, in deterring undesirable litigation.⁵⁸

Predictable, and Rational? A Comment on Eisenberg et al, 26 J. LEGAL STUD. 663 (1998); A. Mitchell Polinsky, *Detrebling Versus Decoupling Antitrust Damages: Lessons From the Theory of Enforcement*, 74 GEO. L.J. 1231 (1986); Cass R. Sunstein, Daniel Kahneman, & David Schkade, *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071 (1998); Note, *An Economic Analysis of the Plaintiff's Windfall in Punitive Damage Litigation*, 105 HARV. L. REV. 1900 (1992).

On the other hand, there are also examples of reducing private benefits of suit through reduced damages or nominal damages for certain litigant groups, such as bounty provisions (which award less than actual damages) in the False Claims Act and nominal recovery provisions in certain areas of Civil Rights. See, e.g., 31 U.S.C. § 3730 (1994); Gretchen L. Forney, Note, *Qui Tam Suits: Defining the Rights and Roles of the Government and the Relator Under the False Claims Act*, 82 MINN. L. REV. 1357 (1998); Michael Waldman, "Damage Control" *A Defendant's Approach to the Damage and Penalty Provisions of the Civil False Claims Act*, 21 PUB. CONT. L.J. 131 (1992).

⁵⁷ See Eric Kades, *Windfalls*, 108 YALE L.J. 1489 (1999); Marvin A. Kotler, *Motivation and Tort Law: Acting for Economic Gain as a Suspect Motive*, 41 VAND. L. REV. 63 (1988); Steven Shavell, *The Level of Litigation: Private Versus Social Optimality of Suit and of Settlement*, 19 INT'L REV. L. & ECON. 99 (1999); Shavell, *supra* note 14.

⁵⁸ Note that the way I have defined a standing regime and a denial of remedy regime is perhaps a little too tight. Under a denial of remedy regime one party may seek summary judgment. See FED. R. CIV. P. 56. This decision will be based on the information provided in the pleading (as would a standing determination). See Fed. R. Civ. P. 7(a), FED. R. CIV. P. 56(c) (stating that summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories and admissions, together with the affidavits, show that there is no genuine issue as to any material fact). If being a non-victim might lead to dismissal of the case under summary judgment then the distinction between a denial of remedy regime with summary judgment and a denial of remedy regime with a standing filter is thin. This is because both are based on similar information – is the plaintiff an injured party as per the pleadings – and occur at nearly the same time. See STEPHEN C. YEAZELL, CIVIL PROCEDURE 39-40 (4th Ed. 1996) (noting that although Fed. R. Civ. P. 56 allows motions for summary judgment at any stage of the proceedings, such motions are "not ordinarily granted until after...discovery.").

The distinction may still exist because summary judgment could be granted on things besides whether the litigant is a victim or not, whereas standing focuses only on this. See Fed. R. Civ. P. 56(c) (predicating an award of summary judgment upon the absence of any issue of material fact, a standard which seems a bit different from lack of injury). Note that it would appear that standing determinations and motions for summary judgment do not often occur at the same time and are not often based on the same information and thus the distinction remains. See Katherine B. Steuer and Robin L. Juni, *Court Access for Environmental Plaintiffs: Standing Doctrine*

Before beginning the analysis just a quick note. Throughout the analysis I assume that settlement does not occur. In addition, I do not comment on how the potential population of suits comes before the courts. For example, I ignore the effects of arbitration agreements or waivers of litigation on the population of cases before the courts.⁵⁹ I make these assumptions for analytical simplicity and because they are unlikely to change the primary factors of importance.⁶⁰

III. WHEN MIGHT A DENIAL OF REMEDY REGIME FAIL?

If the denial of remedy regime is a common thread to all other regimes then our primary issue is: when is a denial of remedy regime insufficient to deter undesirable litigation? It is only when this regime fails that we need to consider a supplement like a standing filter. To examine this in greater detail I begin with a highly stylized scenario to provide a benchmark case. From there I begin to peel back some critical assumptions in order to provide a richer set of situations in which a denial of remedy regime might fail. Once we have this, then we can begin to examine what supplementary techniques might be desirable.

A. *The Benchmark Case*

in Lujan v. National Wildlife Federation, 15 HARV. ENVTL. L. REV. 187, 202 (1991) (noting that on a motion to dismiss a plaintiff may simply allege facts specific enough to satisfy standing requirements but on a motion for summary judgment, affidavits must be provided to support the specific allegations of the claim).

Throughout the analysis I have assumed that standing determinations take place early in trial which leads to them being made with less information than damages determinations (which occur at the end of trial). This leads to standing being a less accurate sorting mechanism. However, in reality, sometimes objections to the litigants' standing are made (or revisited) in the middle of trial or at later points in the trial. *See Bender v. Williamsport Area School Dist.*, 476 U.S. 534 (1985); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979). Although this may not be the norm, it may still occur frequently enough that it merits discussion. Let us consider two quick cases to obtain some feel for what effect this has on the analysis.

If standing determinations are made at the same time as damages determinations then the information before the courts should be the same under both regimes. This should lead to identical accuracy effects. If standing determinations occur during trial (i.e., after trial starts but before the damages determination stage) then as a general matter the information at the standing stage will still be less than the damages stage.

⁵⁹ *See* Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, Draft, 1999.

⁶⁰ *Cf.* Polinsky & Rubinfeld, *supra* note 46, at 404 n.17 (noting a similar assumption and saying that “[t]here is no reason to think that our principal conclusions would be affected if we took the possibility of settlement into account because the settlement amount would reflect what would happen at trial. The analysis, would, however, be much more complicated”). Further extensions undoubtedly could, and should, be done to the analysis here to take into account the potential effects of settlements.

The first case I consider makes four critical assumptions that will be relaxed as the analysis progresses. First, I assume that a denial of remedy regime categorizes litigants into victims (desirable litigants) and non-victims (undesirable litigants) with perfect accuracy.⁶¹ Second, I assume that litigants know that the courts work with perfect accuracy. Third, I assume that litigants are aware of what kinds of litigants they are (victims or non-victims).⁶² Finally, I assume that the expected private benefits of litigation are largely determined by the official remedy.⁶³ These assumptions build on prior work in the optimal law enforcement literature.⁶⁴

Let us then consider the results with these assumptions. First, under a denial of remedy regime non-victims know that they will be categorized as non-victims at the remedy determination stage. Initiating suit is a waste of resources for them because they receive no benefit from the suit (i.e., no remedy and all expected private gains derive from the remedy) yet bear some trial costs. Non-victims would not bring suit. Further, all victims know that by bringing suit they would be guaranteed a remedy. Victims will then bring suit if the certain private benefits they receive exceed their private trial costs. I will assume, for now, that all victims meet this condition.

In addition, administrative costs for non-victim suits would be zero (as no non-victim bring suits), and there would be few wasteful races to the courthouse because wasteful races increase with the number of non-victim suits (which are zero here).⁶⁵ Under these sets of assumptions it is unnecessary

⁶¹ Cf. Shavell, *supra* note 14, at 603-05 (noting that differences in information or beliefs about the trial outcome affect a litigant's decision to go to trial); Kaplow, *supra* note 15, at 312-15 (discussing that individuals when contemplating how to act will choose to become more informed depending on the degree of accuracy they expect in adjudication).

⁶² See Kaplow, *supra* note 15, at 406 (noting a similar assumption). Cf. Louis Kaplow, *Optimal Deterrence, Uninformed Individuals, and Acquiring Information About Whether Acts Are Subject to Sanction*, 3 J.L. ECON. & ORG. 93, 96 (1990) (noting that a portion of the population is uninformed at the time they decide whether to act).

⁶³ This may happen in at least two ways. First, if there are trivial collateral and psychic gains from suit, or, second, where there are non-trivial collateral and psychic gains but they only arise if the litigant receives a remedy or are correlated with the magnitude of that remedy. However, at this point it may be helpful to define what I mean by gains being tied to the official remedy. This does not mean that the only gains a litigant receives are the remedies (e.g., damages). What I mean is that the only gains litigants receive are both the likely remedy and any non-remedy related benefits that are triggered by the presence of the remedy. For example, a litigant may receive \$100 in remedies and another \$50 in non-remedy collateral gains. However, if these \$50 obtain only if the litigant receives the remedy (or vary in proportion to it) then this \$50 is treated as part of the remedy. This is because by denying the official remedy we also, *ex hypothesi*, deny the collateral advantage.

⁶⁴ See Shavell, *supra* note 17 *passim*; Kaplow, *supra* note 15, at 406; Kaplow, *supra* note 62; Shavell, *supra* note 14, at 603 - 05.

⁶⁵ It is possible that desirable litigants might raise concerns with races to the courthouse, but this may only be a definitional issue. If we define desirable litigants to be those who are

to supplement the denial of remedy regime with any other litigation control technique.

Indeed, it can be shown that supplementing a denial of remedy regime with another litigation control technique may actually worsen the overall result. This is because supplements can only increase the private costs of litigation (by the amount of litigation costs or fees associated with the supplement) and this increase in costs may deter some victims from bringing suit who, absent the supplement, would have brought suit.⁶⁶ Thus, with a supplement there are fewer victims suing and no change in the number of non-victims suing (i.e., zero). This is not an improvement over relying on the denial of remedy regime by itself.

B. Relaxing Assumptions – Categorization Is Not Perfect.

The assumptions made above are rarely likely to be satisfied. Let us then try to relax these assumptions and examine how that influences our analysis. I begin by relaxing the assumption that courts perfectly categorize litigants and further assume that errors occur in both directions (i.e., some victims are denied a remedy and some non-victims are granted a remedy).⁶⁷

This suggests that a simple denial of remedies regime may result in some non-victims bringing suit (as they are encouraged by the prospect of receiving a remedy due to categorization errors) and some succeeding in suit (due to errors

desirable after taking into account their effects on races to the courthouse then if only desirable litigants bring suit we have no concern with wasteful races to the courthouse. If, however, we define desirable litigants not to take into account their effects on races to the courthouse then it is possible that desirable litigants bringing suit might raise some concern with races to the courthouse. Nonetheless, in most cases this concern with wasteful races should be less than when both desirable and undesirable litigants brought suit.

⁶⁶ Consider what effects a standing filter would have under the assumptions in the text. Non-victims know that they will be categorized as non-victims and denied standing before trial commences. For them initiating suit is a waste of resources because they receive no benefit from the suit (i.e., no damages) yet bear some cost (i.e., the costs incurred prior to and including the costs of a standing determination). Non-victims would not bring suit here, which is the same as with a denial of remedy regime.

However, there may be some victims who will not bring suit. Earlier I assumed that victims had sufficient private benefits to exceed their private costs of the initial trial, but the extra layer of filtering obtained by a standing regime may impose some cost on the victims (the costs of an occasional standing determination) and deter some from bringing suit. Further, even if the standing filter does not reduce the number of victims suing it also does not improve on the results of a denial of remedy regime.

⁶⁷ Furthermore, litigants might also make errors in guessing what they will be categorized as, but they may know on average how courts are likely to categorize them. See Calfee & Craswell, *supra* note 16, at 968 (noting that chance of error always exists in the legal system)

in categorization).⁶⁸ Further, some victims may fail to bring suit (as they are deterred by the prospect of losing due to categorization errors) and some victims bringing suit may fail to secure a remedy (due to categorization errors).⁶⁹ Relative to perfect categorization, there are (i) greater social losses because more non-victims bring suit and fewer victims bring suit, (ii) greater administrative costs from non-victim suits (as some non-victims bring suit), and (iii) more wasteful races to the courthouse (as some non-victims bring suit). These results raise the possibility that an additional litigation filter may be able to reduce the number of non-victims bringing and succeeding in suit and their accompanying social costs. Thus, categorization inaccuracy is one reason for considering a supplement to a denial of remedy regime.

C. Relaxing Assumptions – Expected Private Benefits Are Not Driven Solely By The Official Remedy

To proceed further in the analysis let us relax another assumption from the benchmark in section A. This time let us assume that categorization is perfect, litigants are aware of their own litigant type and that litigants are aware of the court's perfect accuracy in categorization. However, the expected private benefits from litigation are no longer driven by the official remedy only. I assume that some litigants' gains may be independent of the official remedy.⁷⁰ For example, litigants who are repeat players might often derive large benefits that may not be linked to the amount of damages they expect to receive in a particular case.⁷¹ Further, some litigants might be willing to bear the costs of litigation in order to obtain the collateral or psychic benefits from suit even if

⁶⁸ Cf. Kaplow, *supra* note 15, at 322 (noting that when an individual anticipates an error a court will make, a litigant may behave incorrectly); Calfee & Craswell, *supra* note 16, at 970 (noting the difficulties parties may have in determining the actual distribution of probabilities of error).

⁶⁹ Cf. Kaplow, *supra* note 15, at 322; Calfee & Craswell, *supra* note 16, at 970.

⁷⁰ In some instances litigants may derive substantial collateral and psychic benefits from litigation that are not linked to the presence or magnitude of the remedy. See Ron Cass, *Principle and Interest in Libel Law After New York Times*, in *THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS* 69 – 120 (Everett Dennis & Eli Noam Eds., 1989); Edward L. Rubin, *Putting Rational Actors in their Place: Economics and Phenomenology*, 51 *VAND. L. REV.* 1705, 1721 (1998) (discussing how deontological values affect human behavior regardless of material consequences); Paula Batt Wilson, *Attorney Investment in Class Action Litigation The Agent Orange Example*, 45 *CASE W. RES. L. REV.* 291, 325 (1994) (noting that parties' attorneys may be "repeat players" anxious to create or maintain reputations for toughness which will benefit them in the current case).

⁷¹ Cf. Judith Resnik, *Whose Judgment? Vacating Judgment, Preferences for Settlement, and The Role of Adjudication at the Close of the Twentieth Century*, 41 *UCLA. L. REV.* 1471, 1487 (1994) (noting that cases that involve vacatur are of interest to some litigants, particularly repeat players); Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 *CORNELL L. REV.* 589, 613 (1991) (discussing how repeat litigants prefer vacatur because federal courts have been increasingly willing to apply collateral estoppel).

they receive no official remedy.⁷² Let us also assume that the collateral and psychic gains are obtained only upon completion of, although not necessarily success in, trial.⁷³

Now, under a denial of remedy regime non-victims know they will be denied damages if they win at trial, but some will still receive their collateral and psychic benefits if they pursue a trial. If these collateral and psychic benefits exceed the private costs of litigation for these litigants they will still initiate suit. Consequently, the denial of remedy approach may have some non-victims initiating suit.⁷⁴ This will lead to increased administrative costs from non-victim suits and more costs associated with wasteful races to the courthouse as more non-victims bring suit. Thus, the presence of non-victims raises the prospect of some advantage in considering supplemental litigation control techniques, even if all victims continue to sue.

D. Relaxing Assumptions – Litigants Misperceive The Degree Of Court Accuracy.

Throughout the analysis I assumed that litigants knew on average how accurate courts were in categorizing them as “victims” or “non-victims”. However, litigants may sometimes misperceive court accuracy in categorizing litigants. This misperception is likely to affect the success of a denial of remedy regime even if courts are perfect in categorizing litigants, litigants are aware of

⁷² See Edmond Costantini & Mary Paul Nash, *SLAPP/SLAPPBACK: The Misuse of Libel Law for Political Purposes and A Countersuit Response*, 7 J.L. & POL. 417, 471 (1991) (discussing a proposal that would provide potential libel litigants with methods of settling and restoring falsely damaged reputations without resorting to trials by jury for monetary awards).

⁷³ There are a couple of alternative assumptions. First, the collateral and psychic gains might only arise if the litigant wins. If this is the case then these collateral and psychic gains are not independent of the official remedy. An alternative assumption is that such gains are independent of the official remedy, but that such collateral and psychic gains occur throughout the trial rather than only at its completion. Two scenarios may prove illustrative. First, when litigants derive most of their collateral and psychic gains before the standing stage (e.g., feeling vindicated even if they do not win). Second, when litigants derive some of the benefits before the standing stage and some after.

In the first scenario, denying standing and denying damages to non-victims often have equivalent effects because both options *do not* prevent the litigant from receiving their collateral and psychic gains. Thus, even if categorization is perfect at both stages, we will still have some non-victims initiating suit, under both regimes.

In the second scenario, where the collateral and psychic gains arise partly before and partly after the standing stage, a great deal depends on where the bulk of these gains arise. If enough arise before the standing stage (enough to warrant the litigant bearing their own litigation costs) then the situation is the same as when all the benefits are obtained before a standing determination (i.e., the case in the above paragraph) because denying standing will not reduce most of the collateral and psychic gains.

⁷⁴ Let us assume, for now, that all victims have sufficient private benefits to exceed their private costs (including the costs of a full blown trial).

their own litigant type, and the expected private benefits of suit are driven by the official remedy.

This is because litigation decisions depend not only on the actual accuracy of the court system, but also on the litigant's *perceptions* of how accurate the courts are.⁷⁵ For example, if litigants perceive courts to be basically inaccurate (even though they are highly accurate in reality) then many non-victims will initiate suit. At the remedy determination stage these non-victims will be denied a remedy. However, because these litigants pursued a trial to completion the administrative costs and costs associated with wasteful races to the courthouse increase. An analogous effect might also be observed for victims (i.e., fewer of them may initiate suit) because they think they may mistakenly be denied standing. In such a situation there are grounds for considering supplemental litigation filters.

Note, however, that litigant misperception about court accuracy might be something that could be addressed and corrected over time. One would expect that the perceived level of accuracy should be related to the actual level of accuracy in some way. Thus, if litigants misperceive the level of court accuracy one would expect that over time (and with experience with the court system) that misperception should be reduced.⁷⁶ Nonetheless, to the extent that a misperception remains there is some room for considering supplementary litigation filters.

E. Relaxing Assumptions – Litigants Misperceive Their Own Litigant Type.

Litigants may also misperceive whether they are desirable (victim) or undesirable (non-victim) litigants when they initiate a suit.⁷⁷ This is not difficult to imagine because many litigants may be unaware of the social gains and losses associated with their bringing suit. This means that a litigant who thinks he is a desirable litigant (although he is really an undesirable litigant) is unlikely to be deterred by the prospect of a very accurate court system. The litigant may think that the perfectly accurate sanction will not be imposed on him (as the litigant thinks he is not undesirable) so that he will not be deterred.

⁷⁵ Cf. Louis Kaplow, *Optimal Deterrence, Uninformed Individuals and Acquiring Information about Whether Acts are Subject to Sanctions*, 6 J.L.ECO. & ORG'N 93, 93 – 100 (1990).

⁷⁶ Cf. Louis Kaplow, *Accuracy, Complexity, and the Income Tax*, 14 J. L. ECON & ORG. 61 (1998) (distinguishing between those litigants whose uncertainty about their taxable income is due to their uncertainty about their true income, and those litigants whose uncertainty about their taxable income is due to their uncertainty about inaccuracies in government tax assessment methods).

At a minimum the attorneys for the litigants would have a more accurate perception of court accuracy.

⁷⁷ See Kaplow, *supra* note 15, at 312-14; Louis Kaplow & Steven Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 565, 590 – 93 (1989) (discussing whether advice is desirable when sanctions may be adjusted).

⁷⁸ Even some victims may mistakenly think they are non-victims and be deterred by this from bringing suit. Thus, even if courts are perfect in categorization, litigants are aware of this, and expected private benefits of litigation are driven by the official remedy we may still have some undesirable litigants bringing suit. Such litigants will not be deterred by just a denial of remedy regime. We may then need to consider supplemental litigation filters.⁷⁹

In summary, a denial of remedy regime may fail for a number of reasons. First, if courts are not perfect in sorting or categorizing litigants at the end of a trial. Second, when litigants are motivated by gains independent of the official remedy. Third, when litigants misperceive the level of court accuracy in sorting or categorizing litigants. Fourth, and finally, when litigants misperceive their own litigant type. In each of these cases a denial of remedy regime is likely to result in some non-victims bringing suit and potentially some victims not bringing suit. In these situations there may be a need to have a supplemental litigation filter.

IV. WHICH SUPPLEMENTAL LITIGATION FILTER TO CHOOSE?

There are a number of litigation filters we can consider to supplement a denial of remedy regime. However, when considering supplemental litigation filters two questions merit consideration: should we supplement a denial of remedy regime and second, with what? The fact that a denial of remedy regime may be imperfect at times is not a reason, by itself, to adopt some supplementary filtering device. A supplement is desirable only if the added deterrence gains obtained through relying on it outweigh the added costs of doing so.⁸⁰ It might be that no supplement provides enough gains to warrant its additional cost and that the imperfect denial of remedy regime alone might be the best, amongst the available options. If, however, some supplements do have *net* benefits the issue is then which one to use first – a standing filter, a penalty filter, a fee-shifting filter, a court access filter, or some combination of

⁷⁸ This is directly analogous to Kaplow's point on people being informed *ex ante* of the improvement or general level of accuracy. See Kaplow, *supra* note 15, at 307, 314-15. Cf. Shavell, *supra* note 17, at 261 - 65.

⁷⁹ Note that this conclusion hinges on two important points. See Shavell, *supra* note 17, at 264 (noting this requires "that a social authority ... have superior information of risk and that the social authority is [unable] to apprise individuals about that risk").

Note that this section discusses the consequences of asymmetry between the courts and litigants, not between the litigants *per se*. Further, I do not discuss the effects of asymmetric costs and stakes between litigants. This is largely for analytical simplicity and because these have been discussed in depth elsewhere. See Spurr, *supra* note 31. Note also that one of the factors I consider critical – the likely litigant population – is likely to capture many of these effects.

⁸⁰ Cf. V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1497 (1996) (discussing a similar point with respect to sanctioning tools). Cf. also Shavell, *supra* note 17, at 265 – 66 (discussing similar considerations for the use of imprisonment as a sanction).

these.⁸¹ The following parts assume that some kind of supplement is desirable and examine which one to rely on first. The analysis builds on and uses prior analyses in the optimal law enforcement literature.⁸²

One final note, for much of the analysis in this Part I will compare only penalty filters and standing filters, not court access fees and one way fee shifting. This is to provide a simpler framework for comparison and because I will discuss how court access fees and one way fee-shifting may influence the analysis in Part V. Let us then begin with the case where court inaccuracy is the driving need for a supplemental litigation filter.

A. *Court Inaccuracy in Categorizing Litigants at the End of Trial*

If we are concerned with the inaccuracy of a denial of remedy regime then one approach is to simply enhance the accuracy of the court process. We might be able to achieve a greater level of accuracy than currently exists by expending more resources on remedy determination.⁸³ The added deterrence gains from increased accuracy might outweigh the added costs of accuracy (e.g., more detailed procedures) and make such an alternative worthy of

⁸¹ Cf. Khanna, *supra* note 80, at 1497 – 1512 (discussing “Sanctioning Characteristics”); 1512 – 20 (discussing “Procedural Characteristics”); 1520 – 32 (discussing “Enforcement Characteristics,” including sub-section “D. Cost Savings and Prosecutorial Convenience”); 1531-32 (discussing “Message Sending Characteristics.”)

⁸² See Shavell, *supra* note 17 *passim*; Kaplow, *supra* note 15, at 406; Kaplow, *supra* note 62; Shavell, *supra* note 14, at 603 – 05. I am assuming, in this Part, that the litigant does not receive a benefit simply by initiating suit independent of the official remedy (e.g., embarrassment of the defendant or other collateral benefits that occur early on, say, the defendant’s reputational loss). Cf. Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J.L. & ECON. 757 (1993) (arguing that, based on the change in the value of various companies’ stock following allegations of fraud, that the value of average reputational losses far exceeds the expected legal expenses and fines imposed under the federal sentencing guidelines). Although such benefits might exist and would lead to some people bringing suit to achieve such benefits I do not examine them until later. For a discussion of such other benefits see George W. Pring & Penelope Canan, *Strategic Lawsuits Against Public Participation (SLAPPS): An Introduction for Bench, Bar, and Bystanders*, 12 BRIDGEPORT L. REV. 937 (1992) (discussing lawsuits allegedly filed to quiet public protest over corporate and government practices, and concluding that such suits threaten the democratic model of public participation); Thomas A. Waldman, *SLAPP Suits: Weaknesses in First Amendment Law and in Courts’ Response to Frivolous Litigation*, 39 U.C.L.A. L. REV. 979 (1992) (discussing SLAPP suits, tort defenses to such suits, and existing remedies, and proposing a two-part test courts could use to identify SLAPPS); Joseph W. Beatty, Note, *The Legal Literature on SLAPPS: A Look Behind the Smoke Nine Years After Professors Pring and Canan First Yelled “Fire!”*, 9 U. FLA.J.L. & PUB. POL’Y 85 (1997) (arguing that use of the term “SLAPP” inappropriately limits the debate over plaintiff’s and defendant’s rights in defamation suits more generally, and that state legislatures must not tip the balance of constitutional rights any further in favor of defamation defendants in attempting to address SLAPPS).

⁸³ See generally Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD 307 (1994) (arguing that the effects of accuracy depend largely on the legal setting, and distinguishing between accuracy in assessment of damages, accuracy in determining liability, and accuracy in determining future rights and duties).

consideration.⁸⁴ If the net gains from improving accuracy exceed those of other options (e.g., restricting standing) then it might be the most preferred alternative. Indeed, this particular alternative has the advantage of simplicity – if the concern is with inaccuracy then the “cure” is to improve accuracy.

However, I will ignore the possibility of improving the accuracy of the remedy determination process because many complex and interesting issues involving accuracy have been discussed at length elsewhere.⁸⁵ Further, this will not affect my primary conclusions because the results of the analysis can be easily extended to improving accuracy.⁸⁶

I will also assume, for simplicity, that litigants know what kinds of litigants they are, litigants are aware of the level of court accuracy and that litigants’ expected private benefits of litigation are driven largely by the official remedy. The only assumption being changed from the benchmark in Part III.A. is the assumption that courts perfectly categorize litigants as victims or non-victims at the end of trial.

Given our concern with accuracy one would expect that we might prefer a supplementary litigation filter that is more accurate than a denial of remedy regime. This should enhance accuracy and hence deterrence. The accuracy of each of the filters would seem related to when the filter largely operates. Thus, the earlier in the trial process the less accurate the filter is likely to be because at that point the courts have less information about the litigants.

⁸⁴ See *id.*, at 348-357 (discussing the relationship between deterrence and accuracy in determining liability, and noting that accuracy can be most cheaply increased in a regime where enforcement effort is low and sanctions are high).

⁸⁵ See, e.g., Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994); Shavell, *supra* note 15, at 1-14 (discussing greater accuracy in the model of law enforcement); McG. Bundy, *supra* note 15, at 414-19 (commenting on the value of accuracy).

⁸⁶ In fact, throughout the analysis I will assume that the level of accuracy of any given filter is fixed. Thus, when comparing a standing filter I will assume that its level of accuracy is fixed or more simply, that increasing its accuracy is a losing proposition.

Finally, a note on why we might prefer to improve accuracy by relying on more accurate filters (e.g., sanctions) rather than on improving the accuracy of the entire remedy determination process. Improving accuracy of remedy determination involves expending resources in all cases, whereas selective accuracy improvement (e.g., sanctions which must be triggered by someone seeking them against the opposing party) may not involve resources on every case. The reduction in the total number of cases in which resources may need to be expended to improve results would be a strong advantage of relying on sanctions and standing filters rather than improving accuracy of the whole remedy determination process. *Cf.* Shavell, *The Appeals Process As a Means of Error Correction*, 24 J. LEGAL STUD. 379 (1995) (arguing that allowing litigants to appeal is cheaper than permitting a higher tribunal to review any case at its discretion because, assuming litigants possess information about the occurrence of error, courts will have to review only those cases in which errors were probably made).

The most accurate filter is probably the one that comes latest in the process because it permits for gathering the most information about litigants.⁸⁷

The penalty filter comes later than all the other filters (and later than the denial of remedy determination) and hence should be more accurate than all the other methods.⁸⁸ Standing determinations occur earlier than denial of remedy determinations and hence should generally be less accurate than the denial of remedy regime alone.⁸⁹ In light of this, one would not expect standing filters to normally enhance the accuracy of a denial of remedy regime.⁹⁰ Thus,

⁸⁷ I am assuming that relevant information is gathered through the trial process and thus that later in time filters have more information than earlier in time filters and hence are more likely to be accurate.

⁸⁸ See Shavell, *supra* note 17, at 263 - 65, 271 - 72. Cf. Kaplow & Shavell, *supra* note 77, at 567 (discussing the social desirability of lawyers' ability to assist clients in the selection of information to present to the tribunal, and arguing that greater exchange of information between lawyers and clients does not necessarily result in tribunals receiving more information, and that it is sometimes socially optimal for tribunals to receive less information about the parties than would be possible). For a discussion of how parties may respond when they sometimes incorrectly guess how they will be characterized (i.e., victim or not), but they know that accuracy is better after trial than before see Kaplow, *supra* note 83, at 329 (noting that adjudication provides useful information to litigants); Lucian Arye Bebchuk & Louis Kaplow, *Optimal Sanctions When Individuals Are Imperfectly Informed About the Probability of Apprehension*, 21 J. LEGAL STUD. 365, 367-70 (1992)(discussing the relationship between an individual's errors in estimating the probability of apprehension and the actual probability).

Note that one way fee shifting occurs at the same time as the denial of remedy regime, which means that it is no more accurate than the denial of remedy regime. Further, a court access fee occurs earlier than all the others and hence should be the least accurate.

⁸⁹ See Shavell, *supra* note 17, at 263-64 (noting importance of the information the state has and the connection of this to the timing of the enforcement device); Carl E. Bruch, *Where the Twain Shall Meet: Standing and Remedy in Alaska Center for the Environment v. Browner*, 6 DUKE ENVTL. L. & POL'Y. F. 157, 166 (1996) (discussing how many courts are denying standing outright instead of granting standing but otherwise limiting plaintiff's remedy).

⁹⁰ Standing regimes generally reduce overall accuracy (relative to a denial of remedy regime). This is because a denial of remedy regime by itself would result in a certain number of victims and non-victims suing. Presumably, more victims than non-victims bring suit (if it were otherwise we may consider having no cause of action). If so, then the inaccuracy of a standing regime is likely visited on the victims more than the non-victims. We are then reducing the number of desirable litigants by more than we are reducing the number of undesirable litigants and this should reduce overall social welfare in most cases. An example may prove illustrative.

Assume that under a denial of remedy regime 100 victims bring suit and 30 non-victims bring suit. Assume that a standing filter is added that is 50% accurate and that all non-victims have their standing challenged and 50% of victims have their standing challenged. The reason more non-victims have their standing challenged is because I assume those raising the challenge tend to do it more when think it is likely to succeed. This means that 25 victims will be denied standing (100(.50)(.50)) and 15 non-victims will be denied standing (30(.50)). If we assume that the social gains from each victim suit are about the same as the social losses from each non-victim suit this trade off is socially welfare reducing (without even considering any administrative costs). Thus, a standing filter will not generally enhance accuracy and hence should not be added to a denial of remedy regime if accuracy is our only concern.

I have assumed that the information available at the sanctioning stage and the standing stage (and other early in time stages) is significantly different.

if we are concerned with accuracy we would normally prefer to rely on a penalty filter.⁹¹ We will discuss qualifications to this in Part V.A and B.

B. Litigants are Motivated by Gains Independent of the Official Remedy

Let us then consider the implications of relaxing our next assumption – that litigant’s expected private gains from litigation are entirely dependent on the official remedy. I will assume in this Section that the other assumptions are still in tact – that is, the court system perfectly categorizes litigants at the end of the trial, litigants are aware of this and aware of their own litigant type (victim or not).

In many instances, litigants might be motivated by things besides the official remedy. For example, a litigant may derive great pleasure from simply forcing his opponent to show up in court and defend himself regardless of whether the litigant wins or not. Litigants may also receive collateral gains from bringing suit, regardless of whether they win or not. For example, delaying a competitor in starting a new business (by making it the subject of litigation) may be enough of a benefit to induce a litigant to bring a suit that he is likely to lose.⁹² We know (from Part III.C) that a denial of remedy regime, even if perfectly administered, will not stop some of these litigants and that raises the specter of a supplement that might improve upon a simple denial of remedy regime.

To analyze this situation further let us start with a few more assumptions that may help to explicate what factors are important. Let us assume that not only are denial of remedy regimes perfectly accurate, but also so are penalty filters and standing filters.⁹³ It is not difficult to imagine that a penalty filter would be perfectly accurate, given that denial of remedy regimes are assumed to be perfect, because penalty filters come later than denial of remedy determinations and hence should be at least as accurate. The assumption about a standing filter being perfectly accurate (i.e., as accurate as a denial of remedy regime) seems a little heroic, but provides a useful starting

⁹¹ See Kaplow, *supra* note 83, at 307 (discussing the effect of inaccuracy on the implementation of legal norms, the administrative costs of inaccuracy, and costs arising from the imposition of sanctions, and assuming throughout that greater information leads to greater accuracy in adjudication). Note that the administrative costs of a penalty filter would need to be considered as well as its accuracy, but I am assuming that even bringing these costs into account would lead to a net gain for this filter. This is consistent with the assumption that there is a net gain to the filters. See *supra* text accompanying notes 80 – 82.

⁹² See Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, 74 S.CAL. L. REV. 657, 701 (2001) (suggesting that intent requirements may constrain rent-seeking behavior as they limit the ability of litigants (whether plaintiffs or prosecutors) to threaten to bring suits in the antitrust context).

⁹³ Let us assume that the gains independent of the official remedy arise after the standing determination.

point for the analysis. I also assume that we can impose any size penalty on litigants. This is obviously unrealistic, but again it provides a useful starting point. Also, for simplicity, assume that the non-remedy related gains arise only at the end of the trial.

On these assumptions, non-victims would not bring suit under a standing filter because they realize they would incur the costs up to a standing determination, but never receive any private benefits (whether remedy related or not). Further, as no non-victims initiate suit there are fewer administrative costs associated with them and fewer wasteful races to the courthouse. Let us further assume that all victims bring suit.⁹⁴ In this scenario the standing filter along with a denial of remedy regime would obtain first best results.

Similarly, under a penalty filter no non-victims would bring suit. This is because they would realize that even though they may receive some private gains from bringing the suit (i.e., non-remedy related) they would be penalized so severely that these gains would all be lost and they would be left bearing the costs of the litigation. Consequently, under either filter non-victims would not bring suit.

This result derives from the assumptions we have made and let us consider what relaxing one assumption might do to the analysis. Let us assume that we cannot impose any size penalty we desire. This might be for a number of reasons such as that we can only penalize a litigant up to his total wealth or that there may be social or political constraints that limit the penalty size.⁹⁵ We probably could not, for example, impose draconian penalties on undesirable litigation as that might not be accepted by the rest of the polity.⁹⁶ For all these reasons and potentially others we might expect that there is an upper limit on the size of the penalty that we can impose.

If litigants expect to receive gains (non-remedy related) that exceed the sum of the maximum expected imposable penalty and the private costs of litigation then the litigant will not be deterred from bringing suit. Thus, some non-victims may bring suit under a perfect penalty filter that had an upper limit on the maximum imposable penalty. In such a case the perfectly accurate standing filter is superior as it still obtains first best results.

⁹⁴ This result might change if we thought there were some victims who would otherwise bring suit, but would not bring suit if forced to bear the costs of a standing determination. If so then the standing regime may deter some desirable litigants and the loss of their suits would need to be considered.

⁹⁵ I am assuming non-monetary penalties are not available for undesirable litigation.

⁹⁶ Indeed, we rarely impose sanctions equal to someone's total wealth. See Shavell, *supra* note 17, at 262 (discussing what determines the potential amount of sanctions).

Of course, assuming standing filters are perfectly accurate is unrealistic and relaxing that assumption will influence our analysis as well. However, because standing's inaccuracy is a factor of relevance in Sections C and D as well I defer discussion of it until after those sections to focus on the other factors in those sections.

C. *Litigants Misperceive the Level of Court Accuracy*

Let us then consider the implications of relaxing our next assumption – litigants having perfect knowledge about the level of court accuracy at the remedy determination stage. We know from Part III.D that if litigants misperceive the level of court accuracy then some non-victims will bring suit. The issue is then which supplement to rely on in these circumstances.

The most direct method of addressing this problem is to inform litigants about the level of court accuracy. Courts or some other source could inform the general public that courts have a certain level of accuracy. This option might be untenable, however, because of difficulties associated with making credible claims in this context. This is because courts may have an incentive to convey perfection even when that is not truly the case and people may therefore suspect such declarations by the courts or their associates.⁹⁷

However, even if courts can not make credible claims one might anticipate that over time litigants would become aware of the level of court accuracy by simply observing whether the level of court accuracy matches their prior beliefs. If so, then this concern should be self-correcting. There may, however, be some reasons for believing that litigant misperception will not be totally cured.⁹⁸ This is because knowing whether a case was appropriately decided (i.e. was the court decision accurate) may not be that easy to ascertain in many cases and errors may well be likely.⁹⁹ As a result, some subset of litigants may persist in misperceiving the level of court accuracy. This means that some non-victims will continue to initiate suit and some victims may be deterred from bringing suit.

In such a situation, might the supplemental filters improve upon matters? Let us start with a penalty filter. A penalty filter increases the

⁹⁷ Cf. Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U.L.REV. 687, 712 – 17 (1997) (discussing an analogous credibility concern in the corporate context).

⁹⁸ Cf. Louis Kaplow, *Accuracy, Complexity, and the Income Tax*, 14 J. L. ECON & ORG. 61 (1998) (distinguishing between those litigants whose uncertainty about their taxable income is due to their uncertainty about their true income, and those litigants whose uncertainty about their taxable income is due to their uncertainty about inaccuracies in government tax assessment methods).

⁹⁹ Attorneys may help to ameliorate this, but one would not expect it to be complete.

expected cost associated with bringing suit (by the amount of the expected penalty) and should reduce the incentive to bring suit for non-victims. However, penalties may have upper limits and that might put a cap on the expected cost that can be imposed. If this capped expected cost is insufficient to deter non-victims then we will have some non-victims bringing suit. This argument is analogous to that developed in Section IV.B. The following example may prove illustrative.

Assume litigants know their own litigant type, misperceive court accuracy (i.e., think the court is 90% accurate when it is really 100% accurate), receive gains only from the official remedy, and courts have perfect accuracy at the remedy determination stage. Further assume that the private gains from winning the suit are 110 and the private costs of bringing suit to the non-victim litigant are 5. On these numbers a non-victim thinks that he has a 10% chance of receiving 110 (i.e., an expected gain of 11) and spends 5. This means the non-victim *believes* he receives a net gain of 6 by bringing suit and will bring suit under a denial of remedy regime. In reality the litigant loses 5 because he never receives the 110 and spends 5.

Let us then add a penalty filter that imposes a penalty on non-victims of 10 and is perceived by litigants to be 90% accurate (even though it is in reality perfectly accurate). This changes the litigant's expected calculation. Now the litigant believes that he has a 10% chance of receiving 110 and spends 5 on litigation costs and an additional 9 as an expected sanction (90% chance of paying 10). This means he expects to gain 11 and lose 14 – a loss of 3 by bringing suit and hence will not bring suit. The penalty filter has some success here. The critical reason for this is that the penalty increases the expected cost of bringing suit for a non-victim and this may tip the balance in favor of not bringing suit for some litigants.

However, the penalty may not in some cases be sufficient to deter the non-victim litigant. Continuing with the previous example assume that the expected litigation costs are 5 and that the maximum penalty that can be imposed is 5 (for whatever reason). This means that the litigant expects to gain 11 by bringing suit and expects to lose 9.5 (i.e., 5 in litigation costs and 4.5 in expected penalty – 90% times 5). This represents an expected gain of 1.5 even with a penalty filter.

Thus, a penalty filter may deter some non-victim litigants and not others. Which is more likely largely depends on the litigant population for a particular area of law. If we think many non-victim litigants would find the penalty an important factor in changing their litigation decisions then a penalty filter may work well, but absent that it may not be terribly useful.

A standing filter, on the other hand, works by preventing certain litigants from bringing suit beyond a certain point. If a standing filter operates with perfect accuracy then even if non-victim litigants misperceive its accuracy they will still be prevented from progressing further in suit and generating social losses.¹⁰⁰ In such a case the perfectly accurate standing filter is the preferable route. However, standing filters in reality are unlikely to be perfect and in such cases we would expect the analysis to change. I defer discussion of this until the end of Section D.

Before proceeding to Section D, two points are noteworthy. First, *victims* may also misperceive the level of accuracy for a penalty filter and a standing filter. This means that some victims may also be deterred under each regime even though both regimes are assumed to be perfectly accurate. The social gains foregone from the victims deterred from bringing suit are an additional cost with both filters that would need to be considered.

Second, so far in the analysis I have assumed that the penalty has no effect on litigants' efforts to get informed about the level of court accuracy. It is possible that if a litigant faces a penalty that may induce the litigant to get informed about the actual level of court accuracy.¹⁰¹ I do not discuss this in any depth, except to note that a penalty should induce some efforts to become informed (to avoid the penalty). The intuition is that litigants would prefer to avoid bearing a loss by bringing suit and part of this involves investigating their case and the likelihood of its success (implicitly the level of court accuracy).¹⁰² A penalty increases the costs associated with bringing and losing a suit and should induce further effort by the litigant to become informed about the actual level of court accuracy and their suit more generally.¹⁰³ Thus, a properly set penalty may help to provide sufficient incentives to ameliorate the misperception problem. Of course this is limited by the concern that penalties may have upper limits and if we reach that limit before litigants determine the true level of court accuracy we may still have some non-victims bringing suit (and some victims not bringing suit).¹⁰⁴

D. *Litigants are Not Fully Aware of Their Own Litigant Type*

¹⁰⁰ Throughout I am assuming that if litigants know that standing determinations are accurate they will seek to challenge the standing of the other party (or the court will *sua sponte*). This decision in reality is tempered by the perceived cost of raising a standing challenge by the opposing party, but I ignore this issue to focus on the broader issues being discussed above.

¹⁰¹ See Kaplow & Shavell, *supra* note 77, at 586 – 593.

¹⁰² See *id.*

¹⁰³ See *id.*

¹⁰⁴ See *id.* An analogous argument may be made for the costs of a standing determination (which may operate as a penalty), but I assume that these costs are normally less than that of a penalty under a penalty filter.

Let us now relax our last assumption so that litigants may misperceive their own litigant types. The other assumptions are in tact (i.e., courts are perfect at the remedy determination stage, litigant perceptions of court accuracy is perfect and expected gains only come from the official remedy). If litigants are not always aware of their own litigant type then we have seen that denial of remedy regimes may not be sufficient from Part III.E.

Litigants may be unaware of whether they would be desirable or undesirable litigants because they may not be fully aware of the social benefits and costs of litigation. As such they may mistakenly believe themselves to be one kind of litigant when they are indeed another kind of litigant. One may think he is a “victim”, but in reality is not. Further, one may think she has not been injured whilst in reality she may have been injured.

In such cases we know that the denial of remedy regime will not be perfect. The issue is then which filter to rely upon. To tease this out a bit further, let us assume that a non-victim mistakenly believes that he is *definitely* a victim. For such a litigant the size of the penalty is of little relevance – he does not anticipate bearing it and hence is unlikely to be deterred by it. For such litigants a standing filter is really the only option.

Let us now assume that the non-victim litigant is not certain that he is a victim, but is not sure that he is a non-victim either. For example, a litigant may think before initiating a suit that there is 50% chance that he is a non-victim and a 50% chance that he is a victim. If this is the case then the penalty filter could have some beneficial effects. This is because it increases the expected costs of bringing suit for non-victims. For example, assume that if the litigant wins he receives 100 and the litigant believes there is a 50% chance he is a victim. Further, assume that the private costs of bringing suit are 45. Thus, the litigant expects to gain 50 and lose 45 thereby making a gain of 5. He will bring suit. However, if a penalty filter is added then the results may change. For example, if the penalty is 20 and the litigant believes it is always imposed on non-victims then there is a 50% chance of the litigant bearing this penalty. Thus, the litigant expects to gain 50 and lose 55 (45 in litigation costs and 10 (20 times 50%) in an expected sanction). The litigant loses 5 by bringing suit and thus will not bring suit.

However, if the penalty has an upper limit (say no more than 9) then it will not deter this litigant. Thus, a penalty filter faces the same problems and advantages that it had in sections B and C. Namely, that a penalty may increase the expected cost of suit and hence change the expected cost calculation. An increase in the expected cost of litigation should reduce the amount of litigation. However, this may not be enough if a sizable portion of

the litigant population would not be deterred by the maximum imposable penalty (e.g., the penalty has an upper limit).

On the other hand, a standing filter prevents certain litigants from bringing suit. Thus, a perfectly accurate standing filter should provide better results than the penalty filter. However, as in sections B and C, standing filters are not perfectly accurate and this will change the analysis. I discuss this in a few moments, but would like to address a few other matters first.

First, *victims* may also misperceive their own litigant type and this may lead some of them to not bring suit. The social gains foregone from the victims deterred from bringing suit are an additional concern that we should note.

Second, I have not discussed the impact of a penalty on the incentive of litigants to become more informed about their own litigant type. A penalty regime increases the benefit to the litigant of becoming informed about his own litigant type and as a result may induce some litigants to expend resources to become informed (by themselves or through their attorneys).¹⁰⁵ Once they are informed some may then avoid bringing suit as they realize what kind of litigants they are.¹⁰⁶ If a penalty regime does induce this behavior, then litigant misperception may be a solvable problem that does not require a standing filter. However, a penalty filter may face a penalty limit and this limits how effective it may be in inducing litigants to become informed about their own litigant type.¹⁰⁷

Let us now consider the effect of a standing filter's potential inaccuracy on the analysis. If standing filters are not perfectly accurate that means that some non-victims will bring suit because they believe they will survive the standing determination. They may proceed with suit because they receive non-remedy related gains or misperceive court accuracy or misperceive their own litigant type. Some of these litigants will be denied standing, but some will continue through to the end of trial. Similarly, some victims will not bring suit because they believe they will be mistakenly denied standing and some of the victims who bring suit will actually be denied standing. The administrative costs will also increase as there is a need to have standing determinations. Thus, the standing filter will not result in first best results.

Of course, penalty filters are probably not perfectly accurate either. If not then they also will permit some non-victim suits and deter some victim suits due to inaccuracy. They will also have the administrative costs of some

¹⁰⁵ See Kaplow & Shavell, *supra* note 77, at 586 - 593.

¹⁰⁶ See *id.*

¹⁰⁷ See *id.* A standing determination's cost is also an issue to consider and the analysis would be similar to that in *supra* note 104.

penalty proceedings. We would, however, anticipate that penalty filters are more accurate than standing filters (as they occur later in time as per Section IV.A).

In light of this we have a trade off between an inaccurate penalty filter with limits on penalty size and an even more inaccurate standing filter. Opting for a penalty filter means that we must believe that the social costs associated with the non-victims who bring suit because of the penalty limit and the costs associated with the non-victims bringing suit (and victims not bringing suit) due to penalty filter's inaccuracy are less than the social costs associated with the non-victims bringing suit (and victims not bringing suit) because of a standing filter's inaccuracy. Similarly, opting for a standing filter suggests that the opposite must be true. This will largely be determined by the kind of litigant population we anticipate for a particular area of law and the relative accuracy of standing and penalty filters.

For example, if we believe most non-victims in an area of law will have enough sanctionable assets that the penalty limit is not important, then the preference for a penalty filter increases. On the other hand, if we believe the penalty limit is likely to be important in many cases then we might prefer the standing filter.¹⁰⁸

Further, if we believe that the accuracy gap between standing and penalty filters is small then the downside of a standing filter is reduced and our preference for it increases. On the other hand, if the accuracy gap is quite wide then the costs associated with a standing filter are likely to increase and hence we might tend to prefer the penalty filter. Thus, likely litigant populations and relative accuracy are both important.

From the analysis thus far we can say a few things. First, if accuracy is our concern the penalty filter is normally preferable to all others, subject to a few qualifications discussed in Part V. Second, for the other areas of concern (litigants receive non-remedy related gains, misperceive court accuracy, and misperceive their own litigant type) a penalty filter is desirable when the losses due to an upper limit on penalties and its inaccuracy are less than the losses due to the standing filter's greater inaccuracy. This determination depends largely on the accuracy gap between the filters and the likely litigant population for an area of law. For example, if the litigant population possesses many people who are not deterrable by a penalty (due to a penalty upper limit)

¹⁰⁸ See Shavell, *supra* note 17, at 261 - 62. If the number of judgment proof litigants increases deterrence is bound to suffer. See *id.*, at 261 - 62. In such a scenario it may prove preferable to prevent, for example through a standing regime, rather than deter through a sanctions regime. See *id.*, at 257 - 58 (discussing when prevention may prove preferable).

then we have an increasing preference for a standing filter. Thus, the number of undeterrable or hard to deter litigants is an important factor to consider.

These two factors – relative accuracy and likely litigant populations form the primary matters of importance in choosing between penalties and standing filters.¹⁰⁹ The last section of this Part examines how the private costs imposed by the litigation filters might operate to deter certain litigants too.

E. Other Ways That Filters Can Improve On Results Without Effecting Accuracy Per Se.

The presence of a filter means that litigants may sometimes have to bear the costs of the filter (e.g., the costs of a standing determination). This added cost may deter some victims and non-victims from bringing suit. In particular it deters those litigants whose expected net private benefits of litigation are so small that the additional expected costs of that filter are sufficient to make bringing suit a losing proposition.¹¹⁰

Thus, for each filter we must also be cognizant of its private costs for litigants. Further, we must make some assessment as to the likely social losses avoided by deterring certain non-victims and the social gains forgone by deterring certain victims. This will depend on the likely litigant population for a particular area of law.

The reasons for this are straightforward. The benefit of a filter is in deterring non-victims. If the number of non-victims likely to be deterred by a filter increases or the social losses avoided by deterring them increases the preference for that filter will increase. Similarly, the primary costs of a filter (ignoring administrative costs) are in deterring victims. Thus, as the number of victims likely to be deterred increases or as the social gains lost from deterring

¹⁰⁹ See, e.g., Louis Kaplow, *Accuracy, Complexity, and the Income Tax*, 14 J. L. ECON & ORG. 61 (1998) (distinguishing between those litigants whose uncertainty about their taxable income is due to their uncertainty about their true income, and those litigants whose uncertainty about their taxable income is due to their uncertainty about inaccuracies in government tax assessment methods); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L. J. 557 (1992) (distinguishing between those litigants for whom the perceived benefits of following their lawyer's advice exceeds the costs of doing so, and vice versa); Shavell, *supra* note 14, at 575 (distinguishing between litigants based on individual and net gain from bringing suit); Steven Shavell, *On Offence History and the Theory of Deterrence*, 18 INT'L REV. L. & ECON. 305 (1998) (distinguishing between first-time and repeat offenders).

¹¹⁰ See Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA L. REV. 309, 282 (1995) (arguing that standing was "a low cost mechanism that enabled the New Deal Court to stave off unwelcome challenges to new Deal Programs without having to incur the political costs—or embarrassment—associated with determinations on the merits that differed widely from those of a recent era typified by *Lochner*.").

them increases the less preferable a filter becomes.¹¹¹ In light of this, a filter's desirability may depend on what kind of litigant population is likely for a particular area of law.¹¹² This is consistent with the general analysis.

V. DISCUSSION OF SOME ASSUMPTIONS & EXTENSIONS

Throughout the foregoing analysis numerous matters were either assumed away or suppressed in the analysis. In this Part I examine what effect, if any, relaxing some of these assumptions or bringing certain matters into the forefront may have on the analysis.

A. *Are the Filters Mutually Exclusive?*

The analysis so far may convey the impression that each litigation filter is mutually exclusive. In other words, we cannot both have a standing filter and a penalty filter supplementing a denial of remedy regime for a particular area of law. This is not true – we may have many filters applied to a particular area of law. My analysis does not preclude this possibility, but it does not discuss it in depth either. However, a few comments may be in order.

It is possible that some areas of law may have such a mix of litigants that no one particular filter is likely to work *better than* a combination of filters. For example, let us assume that for a certain area of law there are two kinds of litigants. There are litigants who tend to bring desirable suits (the “good guys” or GGs), although they occasionally bring undesirable suits, and there are the litigants who almost always bring undesirable suits (the “bad guys” or BGs) and are very difficult to deter with the threat of a penalty. Furthermore, let us assume that courts can identify GGs and BGs reasonably well (i.e., accurately) early on in trial. The BGs should be denied standing. However, let us further

¹¹¹ Note the connection between accuracy and ease of deterrability. I am assuming that being deterred by the costs of a standing determination is based on having small expected net private benefits prior to consideration of the costs of a standing determination. As these are expected benefits they are influenced by how likely the litigant believes it is that she will receive the benefits (i.e., how much do they expect). The litigant's expectations will depend on the level of accuracy in categorization. For example, for a very accurate denial of remedy regime there should be fewer victims deterred by small additional litigation costs in the form of standing determination than under a less accurate regime because accuracy improves the chances of victim success. Further, there should be more easy-to-deter non-victims relative to a less accurate regime because non-victims chances of success increase with inaccuracy. However, to simplify the analysis I am assuming the accuracy effect has already been taken into consideration when I describe a group as being deterred by the costs of the litigation filter.

¹¹² The text may appear to refer to litigants in bi-polar categories (e.g., large social losses and small social losses). This is a simplification to aid the analysis. In reality, there would be a continuum of litigant types (e.g., some large social losses, some large to medium social losses, some medium social losses, some medium to small social losses, and some small social losses and possibly even finer gradations). Also note that litigants may differ in many respects besides those identified in the text.

assume that prior to a full trial courts cannot identify whether a GG litigant will bring desirable or undesirable suits. After trial, and in separate proceedings, courts seem able to determine in most cases whether the GG suit was desirable or not. GGs should therefore be granted standing and we should rely upon a penalty regime to cull out the undesirable litigants within the GG group. Thus, we could expect to see the methods of regulating undesirable litigation in a layered form in some areas.¹¹³

B. Porous Filters.

Earlier I noted that standing filters tend to be less accurate than penalty filters because they occur much earlier in the trial process and hence are often based on less information than the later in time filters (e.g., penalty filters). Although this is a good general statement a few qualifications are perhaps in order.

I begin by noting that one can partially ameliorate the effects of the inaccuracy of a standing regime by creating a porous standing filter. For example, only requiring litigants to allege (rather than prove) injury to allow them to bring suit or allowing many things to be considered “injury”. In fact, both methods are in use today.¹¹⁴ This means that all victims and most non-victims will easily get standing. Only a handful of non-victims will be denied standing. Thus, all victims who would bring suit under the denial of remedy regime, by itself, continue to bring suit and only a few non-victims who would bring suit under a denial of remedy regime, by itself, do not (as they are deterred) and a few who do bring suit are denied standing.

¹¹³ We should not expect one technique to solve all the divergences between private and social incentives to sue - the divergences occur for a variety of reasons and hence may merit a variety of responses. See Shavell, *supra* note 14, at 591 - 94, 611 - 12. The example with good and bad litigants could easily reflect an area where victims (i.e., GGs) have standing, but non-victims (i.e., BGs) do not. Furthermore, although victims can sue they can be sanctioned for bringing frivolous or harassing suits or for bringing malicious and baseless cases (e.g., Rule 11 and tort of malicious prosecution). See Thomas A. Waldman, *SLAPP Suits: Weaknesses in First Amendment Law and in the Courts' Responses to Frivolous Litigation*, 39 UCLA L. REV. 979, 1036 (1992) (noting that plaintiffs with colorable claims can be sanctioned); Polinsky & Rubinfeld, *supra* note 46, *passim*.

¹¹⁴ See *Heart of America Northwest v. Westinghouse Hanford Co.*, 820 F. Supp. 1265, (E.D. Wash. 1999) (holding that plaintiffs had standing even though they only alleged injury); Matthew R. Schultz, *Bennett v. Spear*, 26 ECOLOGY L. Q. 683 (1999) (noting that the court in *Lujan* was unclear as to how relaxed standards on standing should be); Gene R. Nichol Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 72 (noting that the court on occasion hears cases where there is no particularized injury); Elizabeth Rae Potts, *A Proposal for an Alternative to the Private Enforcement of Environmental Regulations and Statutes Through Citizen Suits: Transferable Property Rights in Common Resource*, 36 SAN DIEGO L. REV. 547, 570 (1999) (noting that many types of harms, including economic, aesthetic, and environmental harms have been deemed acceptable injuries).

The advantage of such a screen (over a denial of remedy regime by itself) is that, because it deters virtually no victims, any reduction in non-victims bringing suit is an advantage that can be weighed against the administrative costs of the filter. This may often turn out to favor using a porous standing filter. The primary concern with a porous standing filter is that it may let too many non-victims proceed with suit. If the social losses associated with these suits are high then we would prefer a tighter standing filter relative to a porous one. Thus, absent some reason to believe that non-victims are likely to bring suits generating large social losses, we might opt for a porous standing filter in many areas of law.

However, such a porous filter can be replicated in a penalty regime. We could, for example, devise a penalty regime that never punished victims and only once in a while punished non-victims. Once again, all victims who would bring suit under a denial of remedy regime, by itself, continue to bring suit and only a few non-victims who would bring suit under a denial of remedy regime, by itself, do not (as they are deterred). We can then compare the advantages of deterring these non-victims with the administrative costs of the system. This may often favor relying on a porous penalty filter. The primary concern would be where we thought non-victims were likely to bring suits generating large social losses (much the same as with a porous standing filter).

Thus, we have both a porous standing filter and a porous penalty filter that enhance deterrence at some additional administrative expenditure. At this point there are two things to note. First, if litigation filters can be layered on top of one another (as suggested by Part V.A) then we can rely on more than one for an area of law. This seems quite likely in reality and hence we may be able to rely on both porous filters. However, for purposes of the analysis I discuss how we would choose between the two porous filters if needed.

Choosing between the porous filters depends on factors we have seen before. We know that the penalty filter should be more accurate than the standing filter as it comes later in the process. However, greater accuracy generally comes at a cost – greater administrative costs per case. For example, if we gather more information during a penalty proceeding than during a standing determination that means we have expended more to gather more information and, presumably, spent more time and resources processing that information.¹¹⁵ Consequently, on a per case basis, a penalty proceeding should be more expensive than a standing determination. The issue is then how might

¹¹⁵ See Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307 (1994) (discussing the effect of inaccuracy on the implementation of legal norms, the administrative costs of inaccuracy, and costs arising from the imposition of sanctions, and assuming throughout that greater information leads to greater accuracy in adjudication).

one attempt to determine whether the trade off of greater administrative cost per case for greater accuracy (i.e., greater deterrence) is worth it.

We know that a more accurate regime tends to enhance deterrence (i.e., fewer non-victims and more victims bring suit). This is because non-victims think that their chance of being mischaracterized, and obtaining some benefits, decreases as accuracy increases.¹¹⁶ Fewer non-victims will then initiate suit. Similarly, victims also think their chance of being mischaracterized decreases as accuracy increases.¹¹⁷ More victims will then initiate suit. In addition, as fewer non-victims initiate suit there are fewer cases in which we must bear the individually high administrative costs and hence the total administrative costs associated with non-victims may not actually increase.¹¹⁸ Furthermore, as fewer non-victims bring suit we expect fewer wasteful races to the courthouse. Thus, the more accurate a porous penalty filter is the more likely that we will opt for it as its deterrent effect is increasing and its administrative costs are decreasing.

Thus, as the gap in accuracy between porous penalty and standing filters increases our desire should increase for a porous penalty filter. Similarly, as the accuracy gap narrows we might tend to prefer a porous standing filter.

C. *Institutional Concerns.*

One assumption, albeit an implicit one, was that we have essentially unfettered discretion in designing litigation filters. This is obviously untrue. In reality, it is not likely that we can implement a penalty filter that imposes penalties near the total wealth of the litigant.¹¹⁹ Further, sometimes Congress may not foresee (or choose not to foresee) certain kinds of undesirable litigants and thereby not provide for penalties, fee-shifting or other methods of controlling undesirable litigation.¹²⁰ If this is the case then the courts' tools to

¹¹⁶ See *id.*, at 356 (discussing how increasing accuracy reduces the rate of mistaken acquittals and convictions); Calfee & Craswell, *supra* note 16, at 965 (1984) (discussing the effects of uncertainty on compliance, and concluding that although legal uncertainty affects people's incentives to comply with the law, adjusting legal rules to account for uncertainty is difficult) and at 999 – 1000 (discussing reducing uncertainty as a means of addressing the distortions caused by uncertainty and noting that this could be achieved by improving the fact-finding process, replacing standards with bright line rules, and promulgating enforcement guidelines).

¹¹⁷ See Kaplow, *supra* note 115, at 348 (noting that increasing accuracy increases the likelihood that the guilty are sanctioned); Calfee & Craswell, *supra* note 16, at 999-1000 (noting that reducing uncertainty may produce fewer distortions).

¹¹⁸ See Kaplow, *supra* 115, at 350-52 (noting the benefits of increasing accuracy and reducing enforcement efforts); Calfee & Craswell, *supra* note 16, at 1000 (commenting how reducing uncertainty should reduce the extent of overcompliance).

¹¹⁹ See Shavell, *supra* note 17, at 262.

¹²⁰ Cf. Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of*

regulate undesirable litigation may be limited to the standing filter. One could argue that even faced with this position courts should not use a standing filter when a penalty filter would do better, but rather Courts should encourage Congress to authorize penalties in the initial statute.¹²¹ I will not comment on this except to note that it is possible that when there is a need for an additional litigation filter some courts may resort to standing because other filters do not seem readily at hand.

D. Other Ways in Which Undeterrable Litigants May Arise

There are many ways in which litigants may be difficult to deter with a penalty filter even if they are not misperceiving accuracy and even if their gains come from the official remedy only. For example, assume that the penalty filter only sanctioned non-victims 10% of the time. In addition, suppose that the highest penalty that can be imposed is \$50,000 (we can assume this is the litigant's wealth or a socially constructed maximum) and that the expected gain to most non-victims from bringing suit was \$10,000. Here the non-victims face an expected gain of \$10,000 and an expected cost of \$5,000 (i.e., \$50,000 times 10%) and these non-victims would not be deterred. Further, *ex hypothesi*, the penalty cannot be increased any further. Thus, we may have undeterrable undesirable litigants if the actual level of court accuracy is so low that the highest practicable expected penalty would not deter many litigants. In such a scenario restricting standing may be a desirable option to consider.¹²²

E. Court Access Fees and One Way Fee Shifting

For much of the analysis I have not discussed court access fees (CAF) and one way fee shifting (OWFS) filters. On the accuracy front neither of these filters are likely to improve on the denial of remedy regime because both filters come at either the same time or earlier than the denial of remedy regime. Further, neither filter involves a determination so improved accuracy is unlikely.

On the front of undeterrable undesirable litigants, OWFS and CAF face the same problems as the penalty filter – a potential cap on the penalty/fee that can be imposed may limit the power to deter. Thus, both of these filters face the kinds of trade offs discussed in Part IV. B through E.

Civil Procedure, 67 N.C. L. REV. 1023, 1037-60 (1989) (describing areas where interceptive measures are not used).

¹²¹ This connects to the perennial debate about how “active” courts should be.

¹²² *Cf. Shavell*, *supra* note 17, at 261 – 62.

The primary differences are simply that OWFS and CAF may have lower administrative costs (no additional determinations are required) than the other filters and that their primary effects are on the expected cost of bringing suit for litigants only (not on accuracy *per se*).¹²³ If the litigant population contains many likely to be deterred by the private costs of OWFS and CAF then it may be worth considering these filters as an option given that the administrative costs might be lower than other filters.¹²⁴

F. *Standing as Just One Aspect of Optimal Enforcement Design*

Throughout the analysis I have assumed that the standing rule for an area of law is set by reference to standing's strengths relative to its alternatives. However, one could (and should) expand the analysis to take into consideration that the preference for a standing regime (and the form of that standing regime) may also be influenced by the amount of damages, evidentiary standards, and liability standards.¹²⁵ That would mean that when looking at an area of law we would, for example, determine the optimal damages rules while at the same time determining the optimal standing rules.

For example, for an area of law where traditional victim enforcement is insufficient for deterrence,¹²⁶ because victims often do not detect the wrongdoing, we might consider punitive damages (PD). PD increases the expected sanction and hence may enhance deterrence when simple victim enforcement is insufficient because PD provides a greater incentive to ferret out wrongdoing and bring suit (i.e., the supra-compensatory damages). PD may, however, increase the number of potential litigants (because it increases the reward for bringing a successful suit) and that may lead to a greater scope for undesirable litigation.¹²⁷ We might then try to reign in undesirable litigation by making PD harder to obtain (e.g., requiring *mens rea* perhaps) which appears to be an instance of changing liability standards. We could also make it harder to prove the requirements for PD (i.e., require a clear-and-convincing evidence standard). This is a change in evidentiary standards. We could also restrict

¹²³ See Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee-Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 655-56 (1982) (discussing how fee-shifting can discourage litigation because it increases costs); Note, *Fee Simple: A Proposal to Adopt a Two-Way Fee Shift for Low Income Litigants*, 101 HARV. L. REV. 1231 (1988) (noting that the rule of fee-shifting creates barriers to access); Donohue, *supra* note 51, at 1096-98 (examining Shavell and Posner's theoretical model of fee-shifting).

¹²⁴ See Note, *supra* note 123, at 1234 (indicating situations where potential litigants would be precluded from bringing socially beneficial litigation).

¹²⁵ This is not meant to be an exhaustive list.

¹²⁶ Traditional victim enforcement is basically typified by standard tort law – the victim sues for compensatory damages and recovers if he can show, on the preponderance of the evidence, harm and that the defendant was liable (whether that is on a strict liability or negligence standard or some other standard). See Shavell, *supra* note 17, at 271 – 74.

¹²⁷ See POSNER, *supra* note 25, at 194.

who can seek PD (e.g., only certain kinds of victims or only those injured in a specific way). This would be an instance of restrictive standing rules.¹²⁸ In fact, we actually use all these methods in some form or the other. In torts we have liability, evidentiary and damages adjustments.¹²⁹ In antitrust we do not appear to have liability or evidentiary adjustments, but we only allow those who have suffered antitrust injury to bring suit (i.e., those injured by the anticompetitive aspects of a practice) which is a restrictive standing rule.¹³⁰

On the other hand, we might choose not to rely on PD to improve on insufficient victim enforcement. Perhaps, instead, we might consider broadening enforcement to allow some (or all) non-victims to sue, which would increase the likelihood of suit and hence enhance deterrence. However, broad enforcement, by increasing the number of potential litigants, increases the likelihood of undesirable litigation. We might then consider reducing the damages such parties would receive (to reduce the undesirable litigation problem) if they are successful (e.g., like a bounty regime where the bounty is less than the harm alleged). We could also permit more people to sue but make the evidentiary standards higher (e.g., if a government agency does not approve of the case the litigant must prove the case on clear and convincing standard, but if the agency does approve then on the preponderance of evidence standard). We could also allow only certain non-victims to sue (e.g., organizations ostensibly representing victims) and leave everything else the same.

These are just a couple of examples of how we might try to improve upon an insufficiency with traditional victim enforcement. There are many others too and perhaps by focusing on the interaction of standing, evidentiary standards, liability standards, and damages rules, amongst other factors, a great deal more can be learned about enforcement structures. The inter-

¹²⁸ We could also grant courts the power to trim back PD awards. See Developments, *The Paths of Civil Litigation*, 113 HARV. L. REV. 1783, 1805 (2000) (proposing punitive damages reforms); Polinsky & Shavell, *supra* note 56, at 869 (noting problems with the determination of punitive damages).

¹²⁹ The liability adjustment is that PD are normally awarded on the showing of intentional wrongdoing. See *Nappe v. Anschelwitz*, 97 N.J. 37, 49 (1984) (stating that there must be an intentional wrong doing); *DiGiovanni v. Pessel*, 55 N.J. 188, 191 (1970) (affirming that the plaintiff was not entitled to punitive damages because he failed to show that the defendant acted with malice); *Universal Life Ins. Co. v. Veasley*, 610 So. 2d 290 (Miss. 1992) (reversing a punitive damages award due to the absence of any showing of intentional wrong doing). The evidentiary standard adjustment is that PD are sometimes required to be shown on the clear-and-convincing-evidence standard. See *Kansas City v. Keene Corp.*, 85 S.W. 2d 360, 377 (1963). The damages adjustments arise from the courts reigning jury awards of PD. See *BMW of N. America, Inc. v. Gore*, 701 So. 2d 507 (1997).

¹³⁰ See *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 114 (1969) (stating that the plaintiff must be injured to some extent to sustain an anti-trust claim).

relationships between these choices are interesting and challenging areas for further inquiry.

We are now in a position to apply the analysis in this paper to various standing rules in the next Part. The following paragraphs provide a summary of the analysis so far.

We should ask ourselves whether for a particular area of law we may anticipate many difficult to deter or undeterrable undesirable litigants. Litigants might be difficult to deter if (a) many litigants derive benefits independent of the official remedy (b) many litigants are not well informed about their own litigant type or court accuracy (and the litigants cannot be induced to become informed by a penalty regime) or (c) many litigants are undeterrable because of the inaccuracy of remedy determination and limits on penalties. If we are likely to have many such litigants then a penalty filter (given limits on penalty size) is unlikely to deter all undesirable litigants and our desire to prevent some litigants from bringing suit increases.¹³¹

We could do this through using a restrictive standing rule and then we must choose whether we want a porous standing filter or a tight one. We might opt for a porous standing filter if we thought for that area of law it was important to let all desirable litigants bring suit and only stop some undesirable litigants. On the other hand, if stopping the undesirable litigants is very important (e.g., they may cause great social harm) then a tighter standing filter might be desirable. The desire for a tighter filter also increases as the accuracy of standing filters increases.

However, if we do not anticipate many difficult to deter litigants then the argument for a standing filter is somewhat different. If a denial of remedy regime needs a supplement because of its inaccuracy then a penalty filter is generally better. A porous standing filter may be desirable if it has some net gain and we can layer our litigation filters (i.e., we can also have a porous penalty filter). However, if non-victims are likely to bring suits that generate large social losses then a porous standing filter is inappropriate. Finally, a standing filter may be preferred due to institutional constraints on other filters.

With this analytical matrix we should be able to examine various areas of law to ascertain if their standing rules match those that might be proscribed by the analysis developed in this paper. That is left for the next Part.

¹³¹ The analysis in this paper suggests that we should also compare the accuracy gap between standing and penalty filters to see how this affects the analysis. *See supra* Part IV.D. However, if we can layer litigant filters this may not be too important as long as a standing filter produces some net gain. Alternatively, for purposes of simplicity, we could assume that the accuracy gap is not too great.

VI. APPLICATION OF ANALYSIS TO THE VARIOUS AREAS OF LAW

In this Part I examine how the analytical matrix developed in this paper might be applied to various areas of law. I begin by noting the variety of standing rules in section A, which are considerably broader than “only victims can sue”. Sections B through F apply the analysis to these standing rules.

A. *Current Standing Rules.*

In this section I bring together a wide variety of doctrines that are not often categorized as standing rules and place them in the same category as standing. Thus, contract law privity requirements, standing rules for judicial review, and the antitrust injury doctrine are all treated as different kinds of “standing” rules. Although doctrinally these are quite distinct areas of law, from a functional perspective they are similar. They all serve, in some measure, to screen out undesirable litigation in their respective areas of law by asking early in the proceedings what category of litigant is bringing suit.¹³²

Standing rules, as defined above, vary greatly by context and depend in great measure on the actual common law, statutory, or constitutional provision relied upon for the underlying legal action.¹³³ They might be said to form a continuum from extremely broad rules, which allow almost everyone to sue,¹³⁴

¹³² See, e.g., Jensen, Meckling, & Holderness, *supra* note 8, at 1 (defining standing as what “determines who can bring suit.”); POSNER, *supra* note 25, at 570 (discussing standing as a method of controlling access to the courts); Scott, *supra* note 8, at 670 (noting that standing in judicial review settings can serve as an “access screen”.); Wooten, *supra* note 9, at 770 (suggesting that antitrust injury serves as a gatekeeper on litigation and also “minimizes the burden on the courts”). Note that for purposes of analysis the absence of any restriction on standing is treated as a standing rule that grants standing to all. Also note that I do not suggest that the traditional areas of law called “standing” may not serve other functions than that specified here, but those other purposes are outside the scope of my analysis.

¹³³ See generally Jaffe, *supra* note 1; Jaffe, *supra* note 3.

¹³⁴ See 31 USC §§ 3729 - 3731 (1994). See Kovacic, *supra* note 44, 1801 - 08; Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341 (1989). See also Sunstein, *Lujan*, *supra* note 1, at 165 n. 11 (discussing the environmental statutes that allow for citizen suits and noting that “Every major environmental statute except FIFRA authorizes a citizen suit”). Although the breadth of citizen suit provisions has been limited by *Lujan*, *supra* note 4, at 571 - 78, the legislative drafting of them is rather broad. See, e.g., 15 U.S.C. § 2060(a) (1994) (citizen suit provision of the Consumer Product Safety Act); 33 U.S.C. § 1365 (1994) (citizen suit provision of the Clean Water Act); 42 U.S.C. § 6972 (1994).

Besides the qui tam provisions of the False Claims Act there are other other citizen suit provisions and bounty type provisions. See, e.g., Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, § 21A(e), 102 Stat. 4677, 4679 (bounty provision); 26 C.F.R. § 301.7623-1 (1995) (allowing payment of bounty to individuals who provide information leading to recovery of underpaid taxes). See also Alex S. Navarro, Note, *Bona Fide Damages for Tester Plaintiffs: An Economic Approach to Private Enforcement of the Antidiscrimination Statutes*, 81 GEO.L.J. 2727 (1993).

to very narrow and restrictive rules, allowing very few people to sue,¹³⁵ to many points in between.¹³⁶

The *qui tam* provisions in the False Claims Act of 1986 essentially permit anyone to initiate suit and even recover a bounty if they are successful.¹³⁷ At the other extreme, we have areas of law where no one is permitted to sue.¹³⁸ For example, the courts have effectively denied standing to anyone trying to bring suit to remove a Supreme Court Justice who may have been appointed in violation of the ineligibility clause.¹³⁹

Moving away from the extremes of the continuum we have rules that allow the government to sue, but no one else. For example, only state governments have standing to initiate state criminal prosecutions meaning that victims cannot initiate criminal actions.¹⁴⁰

Moving yet further we have a series of injury based rules that permit many parties to sue. For example, we have standing rules that allow both the government and *certain kinds* of victims to sue. In the antitrust context both the government and certain private litigants can bring suit, but the private litigant must be injured by the *anticompetitive* aspects of the defendant's practice or

¹³⁵ See Fletcher, *supra* note 1, at 226.

¹³⁶ See *infra* text accompanying notes 140 – 164.

¹³⁷ See Kovacic, *supra* note 44, at 1801, 1806 – 07, 1813 (noting that “[as] interpreted by the courts, the *qui tam* mechanism grants standing to an incomparably broad range of individuals, including employees of government contractors and employees of government agencies alike.”) There are at least four limitations on this, see Kovacic, *supra*, at 1813. Although the Department of Justice maintains some level of control over the litigation, that control is generally perceived to be rather weak. See Kovacic, *supra* note 44, at 1818. *But see* Jill E. Fisch, *Class Action Reform, Qui Tam and the Role of the Plaintiff*, 60 LAW & CONTEMP. PROBS. 167, 193 (this said, “if case is weak or insignificant, the government will not proceed”) (Autumn 1997) (noting that there is evidence to suggest that if the DOJ does not take over the case that is viewed as a signal to the litigants that their case is not strong).

¹³⁸ Certain denials under the Veteran’s Benefits Act could not be challenged in court. See Fletcher, *supra* note 1, at 226.

¹³⁹ See *Ex parte Levitt*, 302 U.S. 633 (1937). Consider also *Schelsinger v. Reservists to Stop the War*, 418 U.S. 208, 216 - 27 (1974) (denying citizens standing to sue to enforce the incompatibility clause as the citizens only suffered a generalized grievance).

¹⁴⁰ See *U.S. v. Bryson*, 434 F. Supp. 986, 988 (W.D. Okla. 1977); *State ex. Rel. Wild v. Otis*, 257 N.W. 2d 361 (Minn. 1977); Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL’Y 357, 374 (1986).

See Kovacic, *supra* note 44, at 1812- 17 (discussing relator standing in *qui tam* cases); 26 C.F.R. §301.7623-1 (1995) (allowing payment of bounties to individuals who provide information leading to recovery of unpaid taxes).

Although victims may not be able to bring criminal suits they may bring civil (often tort suits) for the same underlying conduct. See Richard A. Epstein, *The Tort/Crime Distinction a Generation Later*, 76 B.U.L. REV. 29 (1996); David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U.L. REV. 59 (1996). There is at least one exception to this - the crime of treason. See generally *Cramer v. U.S.* 325 U.S. 1 (1944)

arrangement.¹⁴¹ Thus, if you are injured by the practice's procompetitive aspects you have not suffered antitrust injury and have no standing to sue.¹⁴²

Another area where the litigant must be injured in a specific way is in the context of seeking exclusion of evidence under the Fourth Amendment's prohibition of unreasonable search and seizures.¹⁴³ If the government wants to obtain evidence to use in prosecuting X it must not violate X's Fourth Amendment rights or else X may be able to exclude that evidence under certain circumstances.¹⁴⁴ However, the government may violate Y's Fourth Amendment rights in order to obtain evidence against X without fear of X being able to exclude that evidence.¹⁴⁵ This is because X cannot challenge the violation of Y's rights.¹⁴⁶ X's injury must be a result of the violation of X's Fourth Amendment rights not simply the result of the violation of someone else's Fourth Amendment rights.

Moving yet further we have rules that allow a much more broadly defined class of victims to sue. For example, private parties trying to obtain judicial review of government action:

must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'

¹⁴¹ See *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990); *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977); Joseph Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1, 5 (1995) (noting that "[t]he defect in [*Cargill*] was that the plaintiff had not suffered 'antitrust injury', a judicial limitation on antitrust suits that requires a plaintiff to prove not only that it has been injured by an antitrust violation but also that its injury is an anticompetitive effect of the violation").

¹⁴² See *Atlantic Richfield*, *supra* note 141, at 335 (discussing *Cargill* and stating that "we reaffirmed that injury ... will not qualify as 'antitrust injury' unless it is attributable to an anti-competitive aspect of the practice under scrutiny, 'since it is inimical to [the antitrust] laws to award damages for losses stemming from continued competition.'"); Brodley, *supra* note 141, at 16 - 21. For discussion of some further intricacies in the antitrust context, see *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). In fact, in the antitrust context standing is even more restricted because only direct purchasers not indirect purchasers are generally permitted to initiate proceedings. See *id.*, at 747 - 48 (noting that by "elevating direct purchasers to a preferred position as private attorneys general, the *Hanover Shoe* rule denies recovery to those indirect purchasers who may have been actually injured by antitrust violations"). See also William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws?: An Economic Analysis of the Rule of Illinois Brick*, 46 U. CHI. L. REV. 602 (1979) (discussing the efficiency justifications for such a rule).

¹⁴³ See WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT*, VOLUME ONE 117 (3rd ed. 1996).

¹⁴⁴ See LAFAVE, *supra* note 143, at 122 - 206 (analyzing judicial decisions on standing in a variety of contexts).

¹⁴⁵ See *US v. Payner*, 447 U.S. 727 (1980).

¹⁴⁶ See *id.*, at 732; 736 - 37.

“Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be “fairly ... trace[able] to the challenged action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”¹⁴⁷

The injury-in-fact requirement along with causation and redressability¹⁴⁸ are constitutional minimums and apply to all areas of federal law with some apparent exceptions when the litigant has a proprietary interest or might receive a bounty for succeeding at trial.¹⁴⁹ In certain instances other concerns, labeled prudential considerations, may also play a role in determining who has standing to sue.¹⁵⁰ Nonetheless, it would appear that the primary hurdle in most of these cases is the injury-in-fact requirement.¹⁵¹ Injury-in-fact in this context is defined broadly and can include loss of employment,¹⁵² loss of business resulting from unauthorized competition,¹⁵³ governmental or agency

¹⁴⁷ Lujan, *supra* note 4, at 560 – 61 (internal quotes omitted).

¹⁴⁸ See Lujan, *supra* note 4, at 562; Bennett, *supra* note 4, at 1164 – 65 (analyzing and rejecting the Government’s argument that “any injury suffered by petitioners is neither ‘fairly traceable’ to the Services Biological Opinion, nor ‘redressable’ by a favorable judicial ruling...”); Sunstein, Lujan, *supra* note 1, at 193 – 97, 206 – 09 (Analyzing the constitutional minimums established in Lujan and criticizing the injury in fact and redressability requirements).

¹⁴⁹ See Lujan, *supra* note 4, at 560 (discussing constitutional minimums); Sunstein, Lujan, *supra* note 1, at 232 – 35 (noting “Redefined Property Rights”). Cf. Kovacic, *supra* note 44, at 1813 (noting that “courts have rejected the argument that the 1986 qui tam reforms improperly purported to give standing to relators who do not satisfy constitutional standing requirements of injury in fact and causation”).

¹⁵⁰ See Lujan, *supra* note 4, at 561 and also see for further discussion TRIBE, *supra* note 1, at 134 - 45 and Stearns, *Historical Evidence*, *supra* note 2, at 404 - 62.

¹⁵¹ See TRIBE, *supra* note 1, at 111 – 29 (discussing injury in fact), 134 – 45 (discussing prudential considerations). Indeed, the cases under the other restrictions are often considered to be reflective of concerns other than those underlying standing. See Fletcher, *supra* note 1, at 243 – 50 (discussing causation, redressability, third party standing, and advisory opinions); Sunstein, Lujan, *supra* note 1, at 193 – 97 (discussing causation redressability, and the separation of powers). Cf. TRIBE, *supra* note 1, at 129 – 34; Fallon, *supra* note 1, at 17 & n.91 (discussing causation); Nichol, *supra* note 114, at 68 n.3 (noting that the law of standing lacks consistency).

¹⁵² See TRIBE, *supra* note 1, at 115 (discussing *Truax v. Raich*, 239 U.S. 33 (1915) where an Arizona state law prohibited employers from hiring more than a certain number (percentage) of aliens. An employee who was about to be fired because of this law challenged it under the 14th Amendment and was granted standing).

¹⁵³ See, e.g., *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970). In this case “[the litigants] were granted standing to challenge a rule promulgated by the Comptroller of the Currency permitting national banks to provide data processing services to other banks.” Fletcher, *supra* note 1, at 229. See also *Hardin v. Kentucky Utilities Co.* 390 U.S. 1 (1968) (wherein a utility company that had a monopoly was granted standing to bring suit questioning the validity of the Tennessee Valley Authority’s plan to itself offer cheaper service). See also Fletcher, *supra* note 1, at 263 (noting that in *Clarke* the litigants “challenged the Comptroller of Currency’s approval of two banks’ applications to offer discount brokerage

interference with current or future advantageous business activities,¹⁵⁴ environmental injuries of many varieties,¹⁵⁵ racial discrimination and loss of association,¹⁵⁶ and infringement of voting rights¹⁵⁷ along with many others.¹⁵⁸

services to the public. The Court held that [the litigants] had standing under section 10(a) of the APA and §§ 36 and 81 of the National Bank Act to challenge the decision by the Comptroller.”)

¹⁵⁴ See *Bachus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (standing granted to business challenging laws interfering with current or future business activities). See also *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1978).

¹⁵⁵ The courts have been quite willing to countenance a variety of environmental injuries. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727 (1972) (noting that injury to environmental well-being could count for standing purposes if alleged by the litigant or if alleged to affect a member of the litigant group). Thus, as Tribe notes, if the members of the Sierra Club used part of the Forest at issue they could claim injury from the “change in aesthetics and ecology of the area.” TRIBE, *supra* note 1, at 117. See also *United States v. SCRAP*, 412 U.S. 669 (1973) (discussing rather attenuated injuries from the Interstate Commerce Commission’s decision to allow a railroad hike).

The more recent case is *Lujan*, *supra* note 4, at 562 where a “desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for the purpose of standing.” *Lujan*, *supra* note 4, at 563 (discussing *Sierra Club*, *supra*, at 734 – 35, 92). However, the Court was not willing to allow for broader versions of injury such as the ecosystem nexus theory which proposes “that any person who uses any part of a ‘contiguous ecosystem’ adversely affected by a funded activity has standing even if the activity is located a great distance away.” *Lujan*, *supra* note 4, at 565. The Court rejected this because the plaintiff “must use the area affected by the challenged activity and not an area roughly ‘in the vicinity’ of it” *Lujan*, *supra* note 4, at 565.

¹⁵⁶ See *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 - 11 (1972) (noting that “exclusion of minority persons from the apartment complex [results in] the loss of important benefits from interracial associations [with excluded tenants]” which is a sufficient injury). Also see *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982) (noting that “[a] tester who has been the object of a misrepresentation made unlawful under s. 804(d) has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a claim for damages under the Act’s provisions. That the tester [had no] intention of buying or renting a home, does not negate the simple fact of injury within the meaning of s. 804(d).”).

¹⁵⁷ See *Baker v. Carr*, 369 U.S. 186 (1962).

¹⁵⁸ See TRIBE, *supra* note 1, at 114 - 24 and more recently Stearns, *Historical Evidence*, *supra* note 2, at 348 – 462 (discussing “Standing in Historical Context” and ‘Standing in the Burger and Rehnquist Courts’.) Some areas within this broad heading appear to be unresolved, in particular taxpayer standing cases where the establishment clause is implicated and cases relating to future harm. The general rule is that taxpayers do not have standing to raise “generalized grievances about the conduct of government or the allocation of power in the Federal System.” *Valley Forge*, *supra* note 4, at 480 (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1986)). However, when the establishment clause is implicated the Court seems to have vacillated between granting standing (see *Flast*, *supra* note 4, at 106 -07) and denying it to taxpayers (see *Valley Forge*, *supra* note 4, at 477 - 83). For greater discussion of this issue see TRIBE, *supra* note 1, at 124 - 29; Fletcher, *supra* note 1, at 267 - 72; Scott, *supra* note 8, at 660 - 662; Stearns, *Historical Evidence*, *supra* note 2, at 402 – 03, 406 – 07, 432 - 36. On cases concerning future harm commentators often find some inconsistency in the Courts’ decisions in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978) where standing was granted to the litigant to seek an injunction to prevent a School from denying him admission, on allegedly unconstitutional grounds (there was a set aside for certain minority candidates as part of affirmative action), the next time he applied to medical school. See *Bakke*, *supra*, at 281 n. 14. The court thus appeared to protect against future harm. However, the decision in *City of Los Angeles v. Lyons*, 461 US 95 (1983) has been criticized on the grounds that denying

Finally, we have rules that permit any injured party to bring suit where injury is defined at its widest. For example, for most standard torts we have the injury test – only someone who has been injured may bring a tort suit.¹⁵⁹ The injury may be pecuniary or non-pecuniary including physical, economic, or severe emotional distress.¹⁶⁰ Thus, if you learn of a car accident, but the victim is not suing, you normally cannot go to court and bring a tort action on behalf of the victim.¹⁶¹ Class actions are not an exception to this rule because a class representative must be injured before she brings suit on behalf of herself and others who were injured.¹⁶²

A similar standing-like rule is the privity requirement in contract which permits only the parties to the contract to sue for breach or to seek damages.¹⁶³ If there are many parties to the contract then presumably all of them can sue.

standing there hindered the ability to prevent future harm (here the infliction of a police chokehold). See Winter, *supra* note 1, 1375 (noting that six people died as the result of LAPD chokeholds while the Lyons appeal was pending). For further discussion of these cases Sunstein, Lujan, *supra* note 1, at 202 – 05 (discussing Bakke’s characterization of “injury”); TRIBE, *supra* note 1, at 120 – 22 (criticizing Lyons).

Outside the context of taxpayer suits other parts of injury in fact are debatable, for example, cases where standing is denied to challenge governmental underenforcement of the law. See Frank Easterbrook, *The Supreme Court, 1983 Term – Forward: The Court and the Economic System*, 98 HARV. L. REV. 4, 40 (1984) (noting, while discussing the denial of standing in the *Linda R.S.* case, that “it is hard to take seriously the claim that enforcement of legal rules does not affect bystanders. The rule against murder is designed to prevent other people from slaying me, as well as others, and I suffer an injury if the police announce that they will no longer enforce that rule in my neighborhood . . . Only a judge who secretly believes that the law does not influence behavior would find no injury in fact.”).

¹⁵⁹ See Landes & Posner, *supra* note 11, at 31-32 (discussing tort and contract); Shavell, *supra* note 17, at 271 - 274 (discussing tort).

¹⁶⁰ See PROSSER & KEETON, TORTS 7 (5th ed., 1984).

¹⁶¹ See *id.* (noting that “[t]he civil action for a tort . . . is commenced and maintained by the injured person”); Jensen, et al., *supra* note 8, at 209 (noting that “[a]t common law, with few exceptions, individuals lacked standing to assert the rights of others...”).

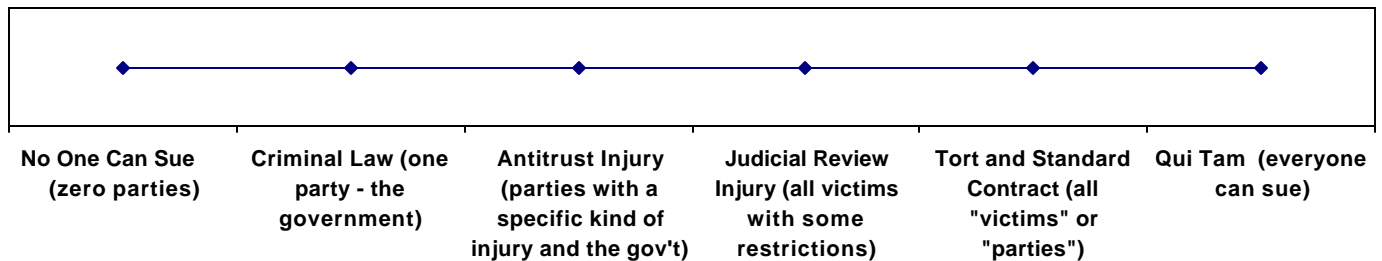
¹⁶² See *Fallick v. Nationwide Mutual Insurance Co.*, 162 F.3d 410, 423 (6th Cir. 1998) (holding that a class representative must demonstrate individual standing); *Uttila v. City of Memphis*, 1999 U.S. Dist. Lexis 4753, W.D. Tenn. (ruled that the named representative in a class action must allege an injury-in-fact.) *Cf.* Coffee *infra* note 164, at 679-81 (discussing that in reality it’s the class’s lawyer who controls the suit even though nominally it is the injured class representative).

¹⁶³ See Landes & Posner, *supra* note 11, at 31 - 32. *Cf.* JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS 691 – 702 (3rd ed. 1987) (discussing intended third party beneficiaries). Thus, if X and Y agree that X will sell Y widgets for \$10 each in 2 months and they later renegotiate to sell at \$11 instead, a third party - Z - cannot normally try to enforce the original contract using contract law. If Z is injured by the new contract Z could possibly have some sort of tort action under certain circumstances. See PROSSER & KEETON, *supra* note 160, at 667 - 76.

In a similar vein note that only parties to a marriage can initiate divorce proceedings with respect to that marriage.¹⁶⁴

With these few examples of standing rules we can construct a simple continuum based on how many parties are likely to have standing to sue.

Who Can Sue?



¹⁶⁴ See 24 AM. JUR. 2D, DIVORCE AND SEPARATION §§ 269 – 73 (1983 & Supp. 1991). Exceptions may be made if one spouse is legally incompetent. See, e.g., *Nelson v. Nelson*, 878 P.2d 335 (1994) (noting that “[l]egally incompetent spouse may initiate divorce proceedings in New Mexico through legal guardian).

Related to the contract cases consider who can bring a derivative suit in the corporate law context. In almost all such cases only current shareholders may bring a derivative action. See ROBERT C. CLARK, *CORPORATE LAW* 652 (1986) (noting “the rather basic point that the plaintiff must hold shares at the time he brings suit (and throughout the suit).

The shareholders are, technically, third parties to the contract between management and the corporation and hence derivative suits constitute an exception of sorts to the standard contract scenario. However, given the special context of corporate law (i.e., the corporation cannot act on its own) it might be desirable to allow some kind of intervention by a party whose interests are often congruent with the fictional corporation’s. See CLARK, *supra*, at 652.

We see something like this in allowing shareholders to bring derivative suits because, as the residual claimants to the corporation’s assets, they may have the best incentives of any litigant group. See generally, Eugene F. Fama & Michael C. Jensen, *Agency Problems and Residual Claims*, 26 J.L. & ECON. 327, 328-332 (1983) (noting that shareholders are residual claimants and bear the residual risk, but have little input into the decision making process); Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 J.CORP.L. 657, 729 (1996) (noting that “Shareholders are the only corporate constituent with a residual, unfixed ex post claim on corporate assets and earnings.”); Comment, *The Demand and Standing Requirements in Stockholder Derivative Actions*, 44 U. CHI. L. REV. 168, generally (1976) (discussing the prerequisites of initiating a stockholder derivative suit.). This assumes that the shareholders can survive the other screens the court, and perhaps management, put in front of them (e.g., demand required or demand excused and so on). See CLARK, *supra*, at 640 - 49; Reinier Kraakman, Hyun Park, & Steven Shavell, *When are Shareholder Suits in Shareholder Interests?*, 82 GEO. L.J. 1733, 1752 – 58 (1994).

See, for discussion of agency concerns, John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 679-81 (1986) (noting that lawyers in shareholder derivative suits may pursue their own interests at the expense of their clients).

With this continuum of standing rules we can ask how the analysis developed in earlier parts may explain or critique some of the current standing rules. At the outset it is worth recalling that examining standing is really a two-fold inquiry. The first inquiry is who is a desirable enforcer for a particular area of law – victims, or government, or other private parties. This is often discussed in the literature under the rubric of private versus public enforcement.¹⁶⁵ The second inquiry is, assuming we have decided who should enforce the law, what rules should we use to ensure that only those parties bring suit. This paper focuses on the latter inquiry.¹⁶⁶

However, for the first three areas of law (i.e., tort, judicial review, and standing rules at the extremes of the continuum) I comment briefly on the first inquiry to highlight how it is different to the second inquiry and also to illustrate how the first inquiry might be undertaken. For the remaining areas of law the discussion focuses only on the second inquiry.

B. *Injury Requirements in Tort Law.*

Most torts (e.g., the punch in the nose) encapsulate a form of enforcement which relies on victims to initiate and pursue suit.¹⁶⁷ Thus, on the first question (who should enforce the law) we might say that tort law reflects an area where victims are the people who should bring suit.¹⁶⁸ We might then ask why should victim enforcement be the norm for tort law, why not government enforcement or allow anyone to sue, but only the first to the courthouse to recover?

Prior analyses suggest that victims are the desirable enforcers when they have cheap access to information relevant for enforcement (i.e., the harm, when it occurred, who was the injurer, and so on) and sufficient incentive to

¹⁶⁵ See Polinsky, *supra* note 11; Landes & Posner, *supra* note 11; Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (1974); *Merrell Dow v. Thompson*, 478 US 804, 832 (1986) (stating that “Congress’ decision to withhold a private right of action and to rely instead on public enforcement reflects congressional concern with obtaining more accurate implementation and more coordinated enforcement of a regulatory scheme.”)

¹⁶⁶ However, by focusing on the second inquiry I do not want to suggest that the inquiries are unrelated. Quite the contrary, they are closely related because if we decide that victim enforcement is desirable that would mean that standing should be granted, *at least*, to those who qualify as victims. However, opting for victim enforcement does not mean, by itself, that we should deny standing to all non-victims.

¹⁶⁷ See PROSSER & KEETON, *supra* note 160, at 7; Shavell, *supra* note 17, at 273; Ashutosh Bhagwat, *Modes of regulatory Enforcement and the Problem of Administrative Discretion*, 50 HASTINGS L.J. 1275, 1285 (1999) (noting that “The entire common law tort system is one of private ex post enforcement...”); Richard C. Ausness, *The Case for a “Strong” Regulatory Compliance Defense*, 55 MD. L. REV. 1210, 1221 (1996) (stating that “[T]he tort system relies entirely upon private enforcement.”).

¹⁶⁸ See Landes & Posner, *supra* note 11, at 20 - 24, 31 - 32; Shavell, *supra* note 17, at 271 - 74.

sue (i.e., the injury victims suffer is not so small that it makes bearing the costs of pursuing suit prohibitive).¹⁶⁹ If either scenario is unlikely then we need to consider supplemental enforcement by the government or perhaps even broad based enforcement (e.g., anyone can sue).¹⁷⁰ However, in the context of a standard tort victims will often have access to enforcement information cheaply and also have sufficient incentive to bring suit.¹⁷¹ Further, if we required the government to enforce tort law it would have to expend resources and hire people to search out the information that victims already possess.¹⁷² Similarly, allowing anyone to bring suit might lead to races to the courthouse with many parties expending resources, duplicatively, to gather information that victims already have.¹⁷³ Thus, victim enforcement is desirable for standard torts.

This leads to our next question -- how to ensure or encourage only victims to bring suit.¹⁷⁴ The answer to this, as Parts III through V tell us, turns on a number of issues. For example, are there many litigants who would be difficult to deter with a penalty given the limits on penalties (e.g., because gains are independent of remedy or litigant misperception along some front).

In the standard tort context we would expect that most litigants bring suit to recover a remedy for some harm allegedly caused by the defendant. This suggests that the litigant population tends to derive most of their gains

¹⁶⁹ See Landes & Posner, *supra* note 11, at 31 - 32 (discussing tort and contract); Shavell, *supra* note 17, at 271 - 74 (discussing tort).

¹⁷⁰ When considering a supplemental enforcer we should ask whether the added deterrence gains from relying on a supplemental enforcer outweighs the added enforcement costs of relying on her. Further, these net gains should be compared to the net gains from relying on other groups of supplemental enforcers to determine which group we should rely on first. *Cf.* Shavell, *supra* note 17, at 273 - 274.

¹⁷¹ See Landes & Posner, *supra* note 11, at 31 - 32 (discussing tort and contract); Shavell, *supra* note 17, at 271 - 74 (discussing tort).

¹⁷² See Shavell, *supra* note 17, at 273 - 74.

¹⁷³ See Landes & Posner, *supra* note 11, at 31 - 32; Polinsky, *supra* note 11, at 115 - 20. See generally Landes & Posner, *supra* note 11, at 10 -15.

¹⁷⁴ It is worth noting that there may be areas of tort law where simple victim enforcement may not be particularly cheap or effective (e.g., certain kinds of mass torts or class actions suits), but for the standard tort case (the punch in the nose) victim enforcement would be desirable. For discussions on class actions generally see John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986) (discussing the private enforcement incentives of plaintiffs and their attorneys); Bruce Hay, *Contingent Fees and Agency Costs*, 25 J. LEGAL STUD. 503 (1996) (*not sure if relevant the only mention of class actions is in a parenthetical*). For discussion of class action in the non-tort context see Julie Davis, *Federal Civil Rights Practice in the 1990s: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 238, 270 (1997) (discussing civil rights class actions). *Cf.* H.R. CONF. REP. NO. 104-369 at 37 (calling discovery in securities class actions "fishing expeditions," and noting that some testimony estimated that discovery costs accounted for 80% of total litigation costs in securities class actions).

from the official remedy. Further, there appears little reason to believe that litigants are generally uninformed about their litigant type or that there are other reasons for anticipating many difficult to deter undesirable litigants.

In such a scenario (when accuracy is our primary concern) the analysis indicates that a standing filter would be desirable only when it was essentially porous, produced a net gain (given its administrative costs), non-victim suits tended not to generate large social losses, and we could layer litigation filters (e.g., use a porous penalty filter). On inspection it does appear that tort law possesses exactly such porous standing and penalty filters.

All litigants are required to state an injury to themselves to survive a motion for summary judgment (which can be treated here as the equivalent of a standing rule as the timing is the same as a standing rule and you need to be an alleged victim in both). However, the requirements for meeting this standard are very porous. Almost any kind of injury will suffice and it only needs to be alleged, not necessarily proven, to survive summary judgment.¹⁷⁵ Thus, it should be fairly easy to survive this sort of litigation filter, but it might catch the most egregious non-victims. Further, tort litigants are subject to penalties under Rule 11 and the torts concerning abuses of the legal process, which also tend to be fairly porous.¹⁷⁶

C. *Standing Rules Where a Private Litigant Challenges a Government or Agency Decision.*

The more controversial areas of standing involve a private litigant seeking judicial review of government action.¹⁷⁷ The general rule in this area is that the litigant must be injured in fact to bring suit.¹⁷⁸ There may be further requirements, but the primary obstacle appears to be injury in fact.¹⁷⁹ The questions to ask are: is victim enforcement desirable here and should a standing filter be used to supplement a simple denial of remedy regime.

¹⁷⁵ See Jacqueline M. Mega, *Negligent Infliction of Emotional Distress: Confusion in New York and a Proposed Standard: Lynch v. Bay Ridge Obstetrical and Gynecological Associates, P.C.*, 56 BROOKLYN L. REV. 379, n.69 (1990) (discussing the types of "physical injuries" which courts have found to be sufficient to meet the physical injury requirement of NIED suits).

¹⁷⁶ See Thomas A. Waldman, *SLAPP Suits: Weaknesses in First Amendment Law and in the Courts' Responses to Frivolous Litigation*, 39 UCLA L. REV. 979, 1036 (1992) (noting that plaintiffs with colorable claims can be sanctioned); Polinsky & Rubinfeld, *supra* note 46, *passim*.

¹⁷⁷ See Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 NYU L. REV. 1234, 1277 (1989) (noting the Supreme Court's reluctance to grant standing in suits for the judicial review of government actions).

¹⁷⁸ See *Lujan*, *supra* note 4, at 560; *Bennett*, *supra* note 4, at 1161.

¹⁷⁹ These other constitutional requirements are causation and redressability and also there are the prudential standing doctrines, which are not constitutionally mandated. See *Lujan*, *supra* note 4, at 560; TRIBE, *supra* note 1, at 111 - 45; Sunstein, *Lujan*, *supra* note 1, at 183 - 97.

The standard reasons for moving away from victim enforcement, as identified in section B, are when victims are unaware of their injuries or when the injury victims suffer is so small that it would not be worth it for victims to pursue suit.¹⁸⁰ In many cases administrative action will affect “victims” who know they are being influenced in some way. The standard denial of a license to someone seeking one is the scenario I envision. In such cases those who are harmed will know it and will have information relevant for enforcement purposes.¹⁸¹ These are cases for victim enforcement. Situations where victims may not have information or the incentive to sue are discussed a little later (e.g., broad based environmental harms).

1. *Victims have relevant enforcement information and incentive to sue.*

If victim enforcement is desirable then the issue is whether a simple denial of remedy regime needs to be supplemented – this again depends on a number of factors. We begin with whether some (or many) litigants derive gains independent of the official remedy. There may be other reasons to believe that litigants may be difficult to deter, but we focus on this one for expositional ease.

In this area one might expect that some non-victim litigants may derive gains independent of the official remedy. For example, a competitor (Q) to someone granted a license (Y) may decide to challenge the grant of the license even if he thinks he is unlikely to succeed. The advantage to Q might be in delaying Y from starting operations and hence competing with Q. If the benefits of delay to Q exceed the costs in bringing suit to Q (including potential penalties) then Q will bring suit. Q is then difficult to deter and if there are likely to be many Qs then we would want to consider a standing filter. The issue is then whether we need a porous filter or not.¹⁸²

We may have some reason for believing that the non-victims in this area may impose larger losses than the non-victims in the tort field. The reason is that the non-victims here may affect people besides themselves.¹⁸³ For example, if Y would be a better producer than Q then the social losses associated with delaying Y’s entry to the market can be significant. Here the

¹⁸⁰ See POSNER, *supra* note 25, at 655 - 62; Shavell, *supra* note 17, at 258 - 59, 273 - 74, 278 - 79, 282 - 85; John T. Byam, Comment, *The Economic Inefficiency of Corporate Criminal Liability*, 73 J. CRIM. L. & CRIMINOLOGY 582, 594 -98 (1982).

¹⁸¹ Cf. Landes & Posner, *supra* note 11, at 31-32; Shavell, *supra* note 17, at 258 - 59. If we were to consider broadening enforcement a point to note is that given that victim enforcement is probably desirable little is gained, in deterrence terms, by broad enforcement and much may be lost (e.g., wasted resources in races to the courthouse) by broadening the group of potential enforcers.

¹⁸² See Cass & Hylton, *supra* note 92.

¹⁸³ See *id.*

desire to prevent Q's suits would be quite great. Thus, we would expect to see somewhat more stringent requirements than for tort law. The law appears to match this because the standing rule in judicial review cases has more requirements than in tort cases (e.g., causation, redressability, no generalized grievances).¹⁸⁴

2. *Areas where standard victim enforcement is questionable.*

Although simple victim enforcement might be a good general rule there may be areas where it is not desirable, by itself, and this may require us to rethink the standing rule. Consider whether an exception should be made in the area of environmental regulation. If we believe there is a serious threat of underenforcement (because victims may not know they have been injured or because victims are harmed in such a small way that they would not want to bear the costs of bringing suit) and that the harm from underenforcement is very large (e.g., long term degradation of the environment) then we may want to countenance broader enforcement regimes.¹⁸⁵

One possible regime might be allowing certain organizations to pursue suit on behalf of their members who have allegedly been injured by a practice. The presence of organizations, like Sierra Club and National Defenders of Wildlife, could, in theory, overcome some of the problems with relying solely on victim enforcement. First, if victims do not bring suit - because it is too costly relative to the harm they have suffered - then these organizations may make bringing suit less onerous. The large organizations may be willing to spend more than the harm to be recovered in one case because of the longer range benefits of a favorable decision as they may often be repeat players in

¹⁸⁴ Plausible injury can be quite broad in this area. See *Lujan*, *supra* note 4, at 562. One further point worth noting is that if we relied on private competitive enforcement (i.e., anyone can bring suit but only the first to the courthouse can proceed) we might also use a bounty to control the level of overenforcement (as Polinsky suggests, *supra* note 11, at 120 - 24). However, this might only exacerbate the problem in the arena of citizen suits seeking injunctions as often the benefits litigants receive may flow from events occurring after a favorable decision (e.g., denial of license to competitor) so that they already have sufficient (or too much) incentive to bring suit and the bounty might only increase the incentives of enforcers and thereby increase overenforcement. See Polinsky, *supra* note 11, at 120 - 24. Cf. Kovacic, *supra* note 44, at 1825. See also *Lujan*, *supra* note 4, at 572 - 73 (Justice Scalia discussing possibility of bounty regimes being acceptable).

¹⁸⁵ Cf. Shavell, *supra* note 17, at 278 - 82, 284 - 85; William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After Bennett v. Spear*, 49 ADMIN. L. REV. 763, 787 - 88, 801, 804 (1997).

The greater the social harm from underenforcement the more we should be concerned about it and the more willing we should be to consider bearing the costs of overenforcement. See Polinsky, *supra* note 11, at 113-15. Thus, enforcement regimes with more potential enforcers, who can provide useful information, may be worth examining.

litigation.¹⁸⁶ Second, if victims do not bring suit because they are not aware of their injury such organizations might develop their own investigative divisions for the purpose of discovering harm and informing the victim and the community more generally of that harm. Once informed the victim could be further assisted in bringing suit. Thus, these large organizations may overcome some problems of victim enforcement in the environmental arena.¹⁸⁷

The broad interpretation given to injury in fact in the environmental context (and other similar contexts) and allowing such organizations to initiate suit when a member is injured¹⁸⁸ may thus help to shore up the viability of victim enforcement for environmental law. If victim enforcement *in this sense* (i.e., organizational representation of victims) is the desirable enforcement structure then we need to inquire about whether non-victims should be penalized or denied standing.

As before we begin with whether we think there may be some litigants who are motivated by gains independent of the official remedy (i.e., are there many difficult to deter litigants). This seems as likely, if not more so, than with the case of the standard denial of a license. We would still have competitors who would want to delay and cause confusion, but we may also have certain litigant groups pushing a particular agenda who may benefit from the publicity of such a suit – regardless of the actual result. Consequently, we might expect some difficult to deter litigants. In such a scenario a standing rule should be increasingly preferable.

The next issue is whether the standing filter should be tight or porous. Once again one expects that the difficult to deter litigants in this area are more likely than in the tort context to impose large social losses so that a tighter standing screen might be warranted than in the standard tort context.

In fact, we do have a tighter standing filter than in the regular tort context as witnessed by the extra causation and redressability requirements.¹⁸⁹ The results here are treated as somewhat tentative given that this area also involves questions that may stretch into other justiciability doctrines.

¹⁸⁶ I assume that a group whose object is preservation of the environment has a greater chance of factoring in long term advantages to the environment from a successful suit compared to an individual who may be only interested in receiving compensation for the specific instance of harm. Cf. Shavell, *supra* note 14, at 578.

¹⁸⁷ Of course, something like a class action mechanism might work too, but I do not consider that option here for reasons of brevity.

¹⁸⁸ See *Sierra Club*, *supra* note 155, at 734, 739 - 40; *Lujan*, *supra* note 4, at 562 - 63.

¹⁸⁹ See *supra* discussion in Part VI.A.

Consequently, these arguments are speculative at present, but provide an avenue for further research.¹⁹⁰

D. *Standing Rules At The Extremes Of The Continuum.*

Standing rules appear to exist outside of simply allowing victims to sue – we have areas of law where no one is permitted to sue and others where everyone can sue. This section considers both extreme points.

1. *Everyone can sue.*

Consider the qui tam provisions under the False Claims Act (FCA).¹⁹¹ Here we have a melding of public enforcement and victim enforcement -- the government is the victim in government contractor fraud cases. Given that the government, as victim, may not know it is being lied to, may not respond quickly, or may be blocked by corruption, it is hardly surprising that we see some kind of supplemental enforcement.¹⁹² There might be many people who could have information useful for enforcement purposes such as the defendant contractor's employees, associates, and competitors and the government's employees and associates. It is not clear whether any of these groups are generally desirable or undesirable. For example, defendant's employees might have rather perverse incentives to bring suit (for revenge in which case fabrication of wrongdoing seems plausible) or not to bring suit (intimidation by their superiors or colleagues and fear of job security).¹⁹³

Thus, we face a problem that we do not have categories of litigants who would appear to be desirable or undesirable at the standing stage. Thus, even if there are many undeterrable undesirable litigants we cannot easily deny them standing because we do not, at the standing determination stage, know which categories of litigants are undesirable. In such a situation a standing filter is unlikely to work well – we do not know who to deny standing to.

¹⁹⁰ Other avenues for research might include the “tax payer suits”. See, e.g., *Flast*, *supra* note 4, at 103 - 06; *Valley Forge*, *supra* note 4, at 478 - 79.

¹⁹¹ See 31 USC §§ 3729 - 3731 (1994).

¹⁹² See Kovacic, *supra* note 44, at 182 n. 112 (noting that “[t]he Senate report on the 1986 qui tam reforms said enhanced qui tam monitoring was ‘necessary to halt the so-called ‘conspiracy of silence’ that has allowed fraud against the Government to flourish.’”), 1823 (noting that “[w]hen it detects supplier fraud, a government purchasing body might forego prosecution for fear that any scandal will engender funding for favored programs, or because the firm has captured its regulator.”), 1823 (noting also that “by deputizing contractor employees and government employees to sue on the government’s behalf, the qui tam mechanism decreases the likelihood that meritorious cases will languish because the purchasing agency or DoJ, owing to sloth ... [or] negligence ... declines to investigate and attack apparent episodes of fraud.”).

¹⁹³ Cf. Kovacic, *supra* note 44, at 1825 – 26 (discussing the “Disadvantages of Qui Tam Actions.”), 1826 – 27 (discussing agency problems with qui tam actions in the False Claims Act area).

A penalty filter, on the other hand, may work well here because after trial we would expect that we could tell in many cases who were undesirable litigants. In this manner we might be able to induce the desirable litigants to bring suit and deter some undesirable litigants by use of the much more accurate penalty filter. In a sense the bounty provisions of the False Claims Act work like a penalty or a reduced damage award.¹⁹⁴ The difference between actual damages and the bounty received by the qui tam relator can be seen as a varying penalty determined at the end of the trial.¹⁹⁵

Further, although courts might not be able to identify undesirable litigant groups early in trial perhaps an agency with sufficient expertise might be able to screen some individual litigants before trial.¹⁹⁶ Given that the Department of Justice (DoJ) normally brings prosecutions under the False Claims Act,¹⁹⁷ we might expect that it would have greater expertise than a court about what is desirable and undesirable litigation in this area. Thus, we might expect to see the DoJ perform some sort of screening function. In fact, that is precisely what we witness. All qui tam relators are supposed to submit their information to the DoJ which can then either take over the case, ignore it, or attempt to bar the suit from getting started.¹⁹⁸ However, the DoJ's screening function is rarely used to bar cases and thus may not deter many undesirable litigants.¹⁹⁹ Nonetheless, the DoJ's imprimatur is frequently seen as a signal of the suit's underlying value.²⁰⁰

2. *No one can sue.*

¹⁹⁴ See 31 USC §§ 3729 - 3731 (1994).

¹⁹⁵ It can also be viewed as a varying court access fee. Note that a bounty is not a perfect solution because it may raise problems associated with bribery see Polinsky, *supra* note 11, at 123 - 24; Landes & Posner, *supra* note 11, at 24 - 25.

¹⁹⁶ We might prefer an agency if it had greater expertise (i.e., more information about desirable and undesirable litigants) in an area than the courts or were cheaper screeners than courts. Cf. Landes & Posner, *supra* note 2, at 713 - 15.

¹⁹⁷ See Anthony L. Dewitt, *Badges? We Don't Need No Stinking Badges! Citizen Attorney Generals and the False Claims Act*, 65 UMKC L. REV. 30, 40 (1996) (noting that the DoJ handles the majority of prosecutions under the False Claims Act).

¹⁹⁸ Barring of suits appears to have been rarely, if ever, used so perhaps the screening role is not particularly effective. See Kovacic, *supra* note 44, at 1817 - 18. *But see* Fisch, *supra* note 71, at 193 (noting that there is evidence to suggest that if the DoJ does not take the case that is viewed as a signal to the litigants that their case is not strong and that the average recovery in these cases tends to be very low relative to those cases where the DoJ does take over the case.)

¹⁹⁹ See Kovacic, *supra* note 44, at 1818 (discussing the infrequency of DoJ intervention in a relator action).

²⁰⁰ See Fisch, *supra* note 71, at 193 (noting that there is evidence to suggest that if the DoJ does not take the case that is viewed as a signal to the litigants that their case is not strong and that the average recovery in these cases tends to be very low relative to those cases where the DoJ does take over the case.)

Let us then consider cases where the courts have denied standing to essentially everyone. In *Levitt*²⁰¹ the Court denied standing to the plaintiff, a practicing lawyer (who was a member of the Supreme Court bar), who argued that Justice Black was "improperly appointed" (i.e., in violation of the ineligibility clause) to the Supreme Court because he had voted as a Senator to increase benefits for the Supreme Court Justices.²⁰² The Court required that the plaintiff be directly injured to bring suit.²⁰³

The problem in this case appears to be identifying who could be "directly injured". If the plaintiff had been a potential Supreme Court nominee who the President had ranked as the second choice after Justice Black then could that potential nominee bring suit? What about someone who suffered an adverse judgment in a 5 to 4 verdict in the Court where one of the 5 was Justice Black? I suspect that neither potential litigant would be permitted to bring suit so that it is difficult to imagine who would be permitted to bring suit. Thus, such a ruling would make it nearly impossible for private parties to enforce this law (i.e., the ineligibility clause) in the courts.

This may seem odd, but it might be justifiable if we believe that such an issue should not be debated or adjudicated in a court at all, but rather in Congress during confirmation hearings. One way of doing that is to deny judicial enforcement. We could do this by imposing draconian penalties, but that might not be politically palatable.²⁰⁴ Indeed, one suspects that given institutional constraints (i.e., we cannot impose draconian penalties and the Constitution contains no provision for penalties, fee-shifting or other "apparent" restrictions on suits to enforce violations of the ineligibility clause), standing doctrine may be one of the only ways to ensure that no one brings suit.²⁰⁵ Further, such a standing rule is rather easy to implement and is likely to be very accurate (i.e., "no one can sue" leaves little room for error in application).

E. Variations on Tort Law Injury Requirements.

²⁰¹ See 302 U.S. 633 (1937).

²⁰² See *id.*, at 633.

²⁰³ See *id.*, at 634. "The litigant's interest needs to be somehow different to that of the general populace and of all other citizens." *Id.* I suspect that political question might have been used in this case in any event. See Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031 (1984) (discussing the political question doctrine).

²⁰⁴ I suspect it might look odd to impose high sanctions on people for trying to enforce Constitutional provisions.

²⁰⁵ See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION*, 44-167 (3rd ed. 1999) (discussing justiciability doctrines including: prohibition against advisory opinions, standing, ripeness, mootness, and the political question doctrine). Similar arguments could be made for certain provisions in the Veteran's Benefits Act. See Fletcher, *supra* note 1, at 226.

In the antitrust arena government enforcement and in some instances private enforcement is permitted - when the plaintiff has suffered antitrust injury.²⁰⁶ This form of governmental enforcement plus private victim enforcement may be desirable for many reasons, but instead of delving into them here I will assume current law is desirable policy.²⁰⁷

If so, then the next question is - why should our litigation supplement be denying standing to everyone besides the government and parties allegedly injured in a particular way by the defendants. Once again we can begin by asking whether litigants may be motivated by gains independent of the official remedy (one reason for having difficult to deter undesirable litigants).

One suspects there may be many litigants who receive benefits independent of the official remedy - a competitor's delay in setting up a practice may provide many gains to certain litigants. Further, relative to tort law one would expect that the non-victim litigants may impose large social

²⁰⁶ See *Atlantic Richfield Petroleum Co.*, *supra* note 141, at 345; PHILLIP E. AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES* 86 - 87, 96 - 98 (4th ed., 1988) (discussing the antitrust injury doctrine).

Cf. In re: Teledyne Defense Contracting Derivative Litigation, 849 F. Supp. 1369, 1374 - 75 (C.D.Cal. Aug. 16, 1993) (noting that "[t]he courts have recognized that directly injured parties make for the best private attorney generals [sic] because they have the most access to the information necessary to uncover violations, information that may be hidden from or inaccessible to others further removed Therefore, the 'existence of identifiable persons more obviously suffering . . . injury whose self-interest would motivate them to vindicate the public interest in antitrust' or RICO enforcement generally weighs against conferring statutory standing on those who suffer less directly and obviously." (internal cites omitted)); Michael S. Grave, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339 (1990) (Discussing environmental law); Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1, 21 (1995) (noting that incentive concerns have prompted federal courts to limit standing to direct purchasers in price-fixing conspiracy actions).

²⁰⁷ See Landes & Posner, *supra* note 142; Brodley, *supra* note 206, at 10 - 15 (discussing the goals served by private enforcement). See Brodley, *supra* note 206, at 36 (noting that "[c]onsumers are the least capable litigants in merger injunction cases. No Individual consumer is likely to have a large enough stake to justify investment in the litigation . . . [and] neither consumers nor their lawyers are likely to have detailed knowledge of the industry held by business litigants . . ."). See also POSNER, *supra* note 25, at 659 (arguing that "[t]he cost of enforcement may be so high relative to the value of the claim that the legal claims "market" would not work if the principle that the victim had the exclusive right to the claim were adhered to strictly. A good example is price-fixing conspiracy that imposes a small cost on each of a large number of buyers.").

However, we restrict the kind of victim who can bring suit to those injured in an *antitrust* manner because those injured by the procompetitive aspects of the defendant's activities are highly likely to be undesirable litigants -- they might unseat a socially desirable business practice to obtain their own gains. See 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* 362a (rev. ed. 1995); Brodley, *supra* note 206, at 16 - 21, 28 - 30, 48 - 51, 80 - 91; Roger D. Blair & William H. Page, *"Speculative" Antitrust Damages*, 70 WASH. L. REV. 423 (1995); William H. Page & John E. Lopertko, *Antitrust Injury, Merger Policy, and the Competitive Plaintiff*, 82 IOWA L. REV. 127 (1996).

losses through their suits (e.g., delays in establishing desirable practices).²⁰⁸ Consequently, one might expect a standing filter that was a bit tighter than that seen in standard tort law. That is exactly what we witness.

Another variation on the tort law injury requirement is when criminal defendants try to exclude evidence obtained in violation of the Fourth Amendment.²⁰⁹ If the violation occurred with respect to the defendant's (X's) rights then the defendant will have standing to seek exclusion.²¹⁰ However, if the rights violated were those of the defendant's associates (Y's) then neither the defendant nor her associate will have standing to raise the exclusion issue even if the government violated the associate's rights in order to obtain evidence on the defendant.²¹¹

The implication is that we want a species of victim enforcement in this area (i.e., where the victim of the violation is facing criminal conviction). Whether this particular victim enforcement technique is desirable policy is debatable,²¹² but we can ask -- assuming current law is good policy -- whether denying standing to X, along with a denial of remedy, is the best method of enforcing this policy.

Once again we begin with litigant populations to ascertain whether there is any need for a supplemental or standing filter (i.e., are there likely to be many difficult to deter undesirable litigants). One might expect that X's gains are related to the official remedy, which is exclusion of evidence. If X could not obtain exclusion it is a little hard to imagine what else X could gain by bringing this claim.²¹³ On this front (i.e., presence of significant non-remedy related gains) we would not need a standing filter.

Another way in which a standing filter might be desirable is if X misperceived the level of court accuracy or if X did not know whether his or Y's rights had been violated when gathering evidence. The latter possibility may arise at times and if this is so then even a perfectly accurate denial of remedy regime might result in some Xs bringing suit. To prevent this a simple standing rule might be effective. This is especially likely if the standing rule is very accurate - as it might be here because courts know who has been charged

²⁰⁸ See Cass & Hylton, *supra* note 92.

²⁰⁹ See JEROLD H. ISRAEL, YALE KAMISAR, & WAYNE R. LAFAVE, *CRIMINAL PROCEDURE AND THE CONSTITUTION: LEADING CRIMINAL CASES AND INTRODUCTORY TEXT* 55 – 73 (1997) (discussing the exclusionary rule).

²¹⁰ See *id.*

²¹¹ See Payner, *supra* note 145, at 731 - 32; LAFAVE, *supra* note 143, at 118.

²¹² See LAFAVE, *supra* note 143, at 117.

²¹³ X imposing delay on the prosecutor, without hope for exclusion of evidence, seems a perilous route for X to take as there is little that may be gained from annoying a prosecutor, by itself. Especially if the prosecutor has some discretion in making sentencing recommendations.

with criminal wrongdoing (i.e., X as opposed to Y). Thus, a restrictive standing rule may be desirable.²¹⁴ However, I think there is still room for further discussion and debate on this particular rule.

F. Standing Rules In Contract.

Finally, consider the standard contract case wherein the enforcement structure is that only parties to a contract are allowed to bring suit.²¹⁵ Assuming this enforcement structure is desirable we need to ask whether non-parties should be denied standing or penalized for bringing suit or should we rely on another method of controlling undesirable litigation.

We begin by inquiring about whether litigants are likely to obtain gains independent of the official remedy. This may depend on the area of contract law, but let us begin with an area where litigants may derive gains independent of the official remedy. Let us consider a fairly extreme point – X and Y are married and Z (an irate in-law) tries to divorce X and Y (even though X and Y do not want to initiate divorce proceedings). This represents an area where the Zs may derive gains independent of the official remedy (e.g., Z may obtain benefits by simply causing disruption in X and Y's life). However, how difficult to deter might Z be? It is hard to imagine that a penalty equal to Z's wealth would not deter him from filing such a suit. On the other hand, it is difficult to imagine the law imposing such a high penalty for bringing such a suit. Thus, given that we may have some difficulty to deter non-parties (like Z) we may prefer a standing rule. Further, a standing rule is likely to be very accurate because it is normally straightforward to ascertain

²¹⁴ However, the scenario just pitched seems like only one instance where the issue may be raised. Another context may be as follows. Assume Z wants to bring suit to enforce Y's rights (neither Z nor Y are being charged with anything at this point). Here one might suspect that Z's motivations are not driven by the official remedy because the official remedy (i.e., exclusion of evidence) is irrelevant to Z or Y. Thus, Z must be motivated by gains independent of the official remedy. Here there is some prospect for undeterrable non-victims and maybe some undeterrable non-victims whose suits have large social losses. Thus, a restrictive standing rule may be desirable.

The query would then be if we can determine when the litigant is Z and when X why not have two different standing rules for those scenarios. If X could be identified (which seems likely as X is the only one who has criminal charges pending against him) it seems that a prima facie case could be made to grant X standing and deny it to Z. It might be that Z and X cannot be that easily differentiated or that X is for some other reason an undesirable litigant (i.e., police might then not be able to even inadvertently search Y because courts may have difficulty delineating between inadvertent searches of Y and deliberate searches of Y to get X). Such an approach may drastically hamper law enforcement in general and may be undesirable simply for that reason.

²¹⁵ See Landes & Posner, *supra* note 11, at 31-32. This may be a desirable enforcement structure if we assume that the parties would not have agreed to the deviation unless it benefited both of them and that no one else is affected by their behavior (i.e., no externalities). Further, if the agreement hurt third parties they might be able to sue under tort law in any event, but not under the contract. See PROSSER & KEETON, *supra* note 160, at 667 - 68.

early in the proceedings whether the person seeking a divorce is married to X or Y. Thus, a straightforward rule of spousal-standing would be warranted given a standing filter's high accuracy and the likely presence of some difficult to deter non-parties. Similar reasoning might apply to other areas where non-parties obtain gains independent of the official remedy.

Overall it appears that there is some broad congruence between the analysis in this paper and current law. Generally, if we can come up with groups of litigants that might be considered undesirable (unlike the *qui tam* context) then we frequently witness a restrictive standing rule. When the reason for a supplement is the inaccuracy of the denial of remedy regime we tend to witness porous standing filters (e.g., tort law). When the reason for a supplement is the presence of many difficult to deter undesirable litigants we witness a standing rule that tends to be tighter when the likely social losses from non-victim suits is potentially large (e.g., judicial review, antitrust injury). Finally, when standing rules tend to be very accurate we see tight versions of them (e.g., spousal standing rules, "no one can sue" rules). This seems broadly consistent with the analysis developed here that focuses on likely litigant populations, relative accuracy of filters, likely losses associated with undesirable litigant suits, and the presence of porous standing filters.

VII. CONCLUSION

Standing is one of the most contentious and heavily debated areas of legal scholarship.²¹⁶ However, there have been few functionally oriented writings on the subject and this paper aims to fill that gap.²¹⁷

I begin by focusing on a function for standing rules – to reduce or control undesirable litigation. This approach to standing leads us to the following three questions. First, what is undesirable litigation? Second, what are the methods of regulating or controlling such litigation? Third, when is restricting standing the most preferred method of controlling undesirable litigation?

Undesirable litigation refers to litigation where the net private benefits of bringing suit are positive and the net social benefits of bringing suit are negative.²¹⁸ As this arises in many litigation contexts we would expect to see a variety of responses. The responses can vary from restricting standing to only

²¹⁶ See NOWAK & ROTUNDA, *supra* note 1; TRIBE, *supra* note 1; Davis, *supra* note 1; Fallon, *supra* note 1; Fletcher, *supra* note 1; Jaffe, *supra* note 1; Scalia, *supra* note 1; Sunstein, *Standing*, *supra* note 1; Sunstein, *Lujan*, *supra* note 1; Winter, *supra* note 1.

²¹⁷ See Scott, *supra* note 8; Jensen, et al., *supra* note 8; Landes & Posner, *supra* note 2, at 715 – 18; Stearns, *Forest*, *supra* note 2; Stearns, *Historical Evidence*, *supra* note 2.

²¹⁸ See Shavell, *supra* note 14, at 575.

some litigants to granting standing to all litigants and then regulating that group by ex post penalties for undesirable suits, or fee-shifting, or charging court access fees, and yet others. The primary issue is when is restricting standing preferable to its alternatives.

When examining the various methods of controlling undesirable litigation I note that all regimes have one feature in common – they all share a denial of remedy regime. Consequently, it is the denial of remedy regime that is the primary means of controlling undesirable litigation. Standing rules, penalties, and others are simply supplements to the basic denial of remedy regime. In light of this it becomes important to identify when might a denial of remedy regime fail so that a supplement may be worth considering. Building on prior work in the optimal law enforcement literature, Part III finds that a denial of remedy regime may fail when courts are not perfectly accurate in categorizing litigants at the remedy determination stage, when litigants obtain non-remedy related gains, when litigants misperceive court accuracy and when litigants misperceive their own litigant type.

Part IV then compares standing and penalty filters under each of the instances when denial of remedy regimes may fail. Our preference for a standing rule depends on essentially two factors – the relative accuracy of each filter and the likely litigant population for a particular area of law. This is consistent with and relies on prior work in the optimal law enforcement literature. Accuracy is important because it is vital in influencing litigants when they decide whether to bring suit or not. As accuracy increases more desirable litigants want to bring suit and fewer non-victims want to bring suit. More accurate regimes thus have better deterrence of undesirable litigation, lower administrative costs associated with undesirable litigation and fewer wasteful races to the courthouse. Thus, as the accuracy of one filter improves relative to the others that filter becomes increasingly preferable.

The likely litigant population is important because some litigants will be more influenced by one kind of filter whereas others may only be influenced by another. Thus, a penalty filter is unlikely to work very well when the undesirable litigants cannot be easily deterred. Similarly, when litigants can be more easily deterred then a penalty regime may work better than a standing regime.

From this series of analyses I conclude that as the number of difficult to deter litigants in an area of law increases so does the preference for a standing filter. Further, as the accuracy gap between standing and penalty filters decreases the preference for a standing filter increases. Also, porous standing filters might be desirable if they provide a net gain, if non-victim suits do not generate large social losses and if litigation filters can be layered. This provides

some room for porous standing filters. Finally, standing filters are often used because institutional constraints may make reliance on other techniques quite difficult.

Part VI then sets out, in thumbnail form, the variety of standing-like rules we currently have and begins to examine them seriatim to inquire whether they match with the analysis in this paper. It appears that the broad contours of current standing-like rules do match with the analysis developed here.

Although the analysis developed here does appear to reflect some of our current standing-like rules I hasten to add that these conclusions are tentative and rely on assumptions about litigant populations that require empirical verification. However, the object of this paper was not to justify all of current practice, but rather to develop a functional framework from which to analyze standing rules as a method of controlling undesirable litigation. Whether the entire corpus of standing jurisprudence is justifiable is left for future discussion and debate.