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I. INTRODUCTION

In *City of Los Angeles v. Lyons*,[1] the United States Supreme Court declared that, in most cases, a plaintiff seeking injunctive relief under Title 42 of the United States Code, Section 1983 ("Section 1983") must allege that he or she will be subject again to the challenged conduct. Absent such allegations, the Court held that a plaintiff does not have standing to seek an injunction and thus, that aspect of the case is not justiciable.[2]

The decision has been often criticized and interpreted.[3] Additionally, courts frequently have cited the decision when denying plaintiffs standing for injunctive relief.[4] In other cases, however, courts have distinguished, limited, or otherwise bypassed *Lyons*.[5] Indeed, since *Lyons*, the Supreme Court has not required a virtual certainty of future harm before granting injunctive standing, as certain language in *Lyons* indicated.[6]

The Court's analysis in *Lyons* was incorrect, in terms of both the Court's rationale and its use of precedent.[7] For that reason, it is desirable to construe the case narrowly, to limit its application, and, when possible, to harmonize its broad reaching language with a more traditional approach to standing and equitable relief.[8] The

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1. 461 U.S. 95 (1983).

2. *Id.* at 105.

3. *See, generally* L. TRIBE, CONSTITUTIONAL CHOICES, 99-120 (1985); Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1 (1984); Note, *Standing and Injunctions: The Demise of Public Law Litigation and Other Effects of Lyons*, 25 B.C.L. REV. 765 (1984) [hereinafter cited as Note, *Public Law Litigation*]; Note, *The Supreme Court, 1982 Term—Standing to Seek Equitable Relief*, 97 HARV. L. REV. 215 (1983).

4. *See, e.g.*, Gonzales v. City of Peoria, 722 F.2d 468 (9th Cir. 1983); John Does 1-100 v. Boyd, 613 F. Supp. 1514 (D. Minn. 1985).

5. *See infra* notes 150-244 and accompanying text.

6. *See infra* notes 125-49 and accompanying text.

7. *See infra* notes 102-24 and accompanying text.

8. *See infra* notes 121-24 and accompanying text.

purpose of this article is to examine *Lyons*, related Supreme Court opinions, and lower court cases that have distinguished it. Cases from courts within the Seventh Circuit will be emphasized. This examination can determine not only whether those courts correctly analyzed and applied *Lyons*, but also whether its scope can be limited.

This article first will provide an overview of the law of standing and the closely related doctrine of mootness.[9] It will next examine and analyze *Lyons* and several subsequent Supreme Court decisions concerning standing to sue for injunctive relief.[10] Finally, the lower court opinions distinguishing *Lyons* will be examined.[11] This article will conclude that *Lyons* should be construed as requiring allegations of only a reasonable likelihood of recurrence of the challenged conduct. This approach is consistent with relevant caselaw from both the Supreme Court and lower courts. Moreover, most lower courts that have distinguished *Lyons* have in fact followed this approach.[12] The *Lyons* decision also should be narrowly construed to apply only to situations in which recurrence is unlikely, thus limiting the impact of the case.

II. STANDING—DOCTRINAL AND PRECEDENTIAL FOUNDATIONS

Article III of the Constitution mandates that only a "case or controversy" is justiciable.[13] To meet this constitutional requirement that prohibits rendering advisory opinions, a party must have standing.[14] Recently, the Supreme Court expressly declared that standing is considered part of the "case or controversy" requirement.[15] The standing doctrine, however, is quite amorphous. The Supreme Court itself has admitted: "We need not mince words when we say that the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided. . . ."[16]

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9. *See infra* notes 13-37 and accompanying text.

10. *See infra* notes 38-149 and accompanying text.

11. *See infra* notes 150-244 and accompanying text.

12. *See infra* notes 150-244 and accompanying text.

13. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 484 (1982).

14. *Id.* at 475-76.

15. Allen v. Wright, 468 U.S. 737, 740 (1984); *see generally* 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 3531, 3531.1 (2d ed. 1984) [hereinafter WRIGHT & MILLER] (describing standing doctrine and its historical evolution).

16. *Valley Forge*, 454 U.S. at 475. *See also* United States Parole Comm'n v. Ger-

The issue of standing is a threshold question. It "determines the power of the court to entertain the suit."[17] Because it is a jurisdictional question, the issue of standing can be raised at any stage of litigation, and a court may inquire *sua sponte* into the existence of standing.[18] To have standing to sue, a plaintiff must demonstrate a "personal stake" in a dispute sufficient to create the "concrete adverseness" necessary for an Article III controversy to exist.[19] To demonstrate the requisite personal stake, a party must first show that he or she has sustained or will sustain a direct injury, or injury in fact.[20] Either an "actual or threatened injury" is sufficient,[21] but the injury must be "real and immediate" rather than "conjectural" or "hypothetical."[22] Congress may define rights that create standing when invaded.[23]

Furthermore, a plaintiff must demonstrate a causal nexus between the injury and the conduct challenged, or demonstrate that the injury "fairly can be traced to the challenged action"[24] and that it "is likely to be redressed by a favorable decision."[25] Without this causal connection, a defendant's alleged actions are too far removed from the plaintiff's injury.

The final requirement, a likelihood of redressing the alleged injury, is a recent development in the law of standing.[26] Courts gen-

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aghty, 445 U.S. 388, 406 n.11 (1980) (The law of standing and the related doctrine of mootness "may be said to be somewhat confusing, and [some cases], perhaps, are irreconcilable with others."); Ass'n of Data Processing Service Org. v. Camp. 397 U.S. 150, 151 (1970) ("Generalizations about standing to sue are largely worthless as such.").

17. Warth v. Seldin, 422 U.S. 490, 498 (1975).

18. MT. HEALTHY CITY SCHOOL DIST. BD. OF EDUC. v. DOYLE, 429 U.S. 274, 278 (1977). Indeed, a court must decide the question of standing, because it may not proceed without jurisdiction over a dispute.

19. Diamond v. Charles, 106 S.Ct. 1697, 1703 (1986) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). Standing concerns the parties' personal interest and involvement in a dispute. It focuses on the party, not the issue, before the court. Northside Sanitary Landfill, Inc. v. Thomas, 804 F.2d 371, 381 (7th Cir. 1986) (citing *Valley Forge*, 454 U.S. at 471).

20. *Valley Forge*, 454 U.S. at 472; Fallon, *supra* note 3, at 16.

21. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979); Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973). *See also* McKinney v. United States Dept. of the Treasury, 799 F.2d 1544, 1550 (Fed. Cir. 1986)(describing further nature of the actual or threatened injury).

22. *Lyons*, 461 U.S. at 102; Golden v. Zwickler, 394 U.S. 103, 109-10 (1969).

23. Warth v. Seldin, 422 U.S. 490, 500 (1975); *Linda R.S.*, 410 U.S. at 617 n.3.

24. Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1976).

25. *Valley Forge*, 454 U.S. at 472; Duke Power Co. v. Carolina Environmental study Group, 438 U.S. 59, 75 n.20 (1978); *Simon*, 426 U.S. at 38.

26. Fallon, *supra* note 3, at 18. In addition to constitutional requirements, the Supreme Court has created certain nonconstitutional "prudential" limitations to standing, which are additional barriers to justiciability. *See* Note, *Public Law Litigation*, *supra* note 3, at 771. These limitations address the Court's concerns about limiting the proper

erally have used it "as a way of illustrating the lack of causal relationship between the injury asserted and the underlying illegal conduct."[27] In these cases, requiring redressability merely recasts the causation requirement. The requirement of redressability does not in itself require a court to scrutinize separately each form of requested remedy, such as damages and injunctive or declaratory relief.[28] Moreover, at least one commentator has argued persuasively that the remaining "case or controversy" requirements adequately protect the concerns contained in the redressability requirement. Therefore, redressability need not always be present as a separate standing hurdle.[29]

In addition to the requirement of standing, a case must be ripe, and must not have become moot, or extinguished, by the passage of time.[30] Ripeness concerns whether an issue is sufficiently developed for decision, while mootness focuses on whether an issue remains alive.[31] These doctrines are also part of the "case or controversy" requirement.[32] Both ripeness and mootness concern the time dimension of what was originally a question of standing. "Mootness [has been defined] as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence.' "[33] An action "becomes moot when interim relief or events have eradicated the effects of the defendant's acts or omission, and there is no reasonable expectation that the alleged violation will recur."[34] For instance, if a plaintiff seeks an injunc-

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role of the judiciary. *Id.* The limitations are based on an interest in not deciding "abstract questions of wide public significance [when] other governmental institutional may be more competent." *Warth*, 422 U.S. at 500. The prudential limitations include requirements that plaintiffs litigate their own rights, not those of third parties; that an injury be one peculiar to a plaintiff, not the citizenry as a whole, whose interests are best addressed by the legislature; and that the plaintiff's allegations "fall within the zone of interests protected" by the relevant law. Allen v. Wright, 468 U.S. 737, 751 (1984). Prudential limitations to standing, however, may be removed by Congress. Havens Realty Corp. v. Coleman, 455 U.S. 363, 372 (1982); McKinney v. United States Dept. of the Treasury, 799 F.2d 1544, 1550-51 (Fed. Cir. 1984).

27. Jorman v. Veterans Admin., 579 F. Supp. 1407, 1415 n.9 (N.D. Ill. 1986).

28. *Lyons*, 461 U.S. at 129 n.20.

29. *See* Fallon, *supra* note 3, at 23-47.

30. 13A WRIGHT & MILLER, *supra* note 15, at §§ 3532.1, 3533.1.

31. *Id.*

32. *Id.*

33. United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980) (quoting Monaghan, *Constitutional Adjudication: The Who and the When*, 82 YALE L.J. 1363, 1384 (1973)).

34. NAACP v. City of Richmond, 743 F.2d 1346, 1352-53 (9th Cir. 1984). Relying on its earlier decision in Taxpayers for Vincent v. City Council, 682 F.2d 847, 849 n.1 (9th Cir. 1982), *rev'd on other grounds*, 466 U.S. 789 (1984), the Ninth Circuit explained:

tion to gain certain employment, but then dies, finds another job, or the defendant voluntarily hires her, the case becomes moot. In contrast, if a plaintiff challenges an action that is too brief to permit disposition of the claim during its pendency, the "capable of repetition, yet evading review" exception can keep a controversy alive and justiciable under Article III.[35] Under this exception, if the defendant's conduct has ceased, but is reasonably likely to recur, a case will not be held moot.[36] The standard for mootness is thus somewhat lower than that for standing. It also is considered more flexible.[37]

III. CITY OF LOS ANGELES V. LYONS

A. Facts

On October 6, 1976, Los Angeles police stopped Adolph Lyons, a black Los Angeles resident, for a traffic violation.[38] After alighting from his car, Lyons was asked to clasp his hands and put them on top of his head while one of the officers frisked him.[39] Lyons then lowered his arms, and one of the officers grabbed his hands and slammed them onto his head.[40] Lyons complained of pain, at which time an officer applied a chokehold, causing Lyons to lose consciousness.[41] When Lyons regained consciousness, he was on

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> In *Vincent* . . . supporters of a political candidate and the candidate's sign supplier challenged the constitutionality of an ordinance prohibiting the posting of signs on public property. The court of appeals considered whether the case might be moot because there was no indication that Vincent himself would again seek public office. The court of appeals found that the sign company's interest in printing posters in future campaigns, combined with the City's presumed intent to continue enforcing the ordinance, brought the case within the "capable of repetition, yet evading review" exception to the mootness doctrine. Apparently the Supreme Court did not disagree, because it never discussed mootness.

NAACP, 743 F.2d at 1354 n.7 (citations omitted).

35. This exception may be applicable to allegedly unconstitutional voting procedures.
36. *See* 13A WRIGHT & MILLER, *supra* note 15, at § 3533.8.
37. *Id.* at § 3533.1.
38. *Lyons*, 461 U.S. at 97, 114.
39. *Id.* at 114.
40. *Id.* at 114-15.
41. *Id.* A chokehold is a police control procedure in which an officer, positioned behind a subject, places his arm against the subject's neck and applies pressure. *Id.* at 97-98. Chokeholds are capable of cutting off the subject's air supply, causing him to lose consciousness. *Id.* at 97 n.1. In the 'carotid" hold, an officer standing behind a subject with his arm around the subject's neck applies pressure with his bicep and lower forearm to the carotid arteries on the sides of the neck. *Id.* at 97-98, 117 n.7. The "bar arm" hold is more dangerous—a similarly-positioned officer applies pressure to the front of the subject's neck. *Id.* If the hold is not released, the subject can die as a result of its application. *Id.* at 117 n.7.

the ground spitting up blood and had urinated and defecated.[42] He had suffered damage to his larynx.[43] The officers gave him a ticket because one of his taillights was burned out and released him.[44]

Lyons brought suit in federal district court under Section 1983, seeking damages and injunctive and declaratory relief against the City of Los Angeles and four of its police officers.[45] He alleged the deprivation of rights protected by the first, fourth, eighth, and fourteenth amendments and sought to enjoin use of chokeholds except when the victim threatened or appeared to threaten "the immediate use of deadly force."[46] Lyons further alleged that the chokehold had been applied to him although he did not resist, threaten, or provoke the officers in any manner, and that no justification existed for the action.[47] In addition, he alleged that Los Angeles officers, "pursuant to the authorization, instruction and encouragement of Defendant City of Los Angeles, regularly and routinely apply these chokeholds in innumerable situations where they are not threatened by the use of any deadly force whatsoever."[48] Lyons requested injunctive relief, claiming that he and others similarly situated[49] were threatened with the irreparable injury of bodily harm and loss of life and that he feared a further encounter with the police would result in another application of a chokehold to him without justification. Finally, he sought a declaratory judgment that an officer's use of a chokehold without a threat of immediate use of deadly force by a suspect violated various constitutional rights.[50]

After an appeal of a district court order granting partial judgment on the pleadings to the defendants and a subsequent remand, Lyons moved for a preliminary injunction, supporting his application with affidavits, depositions, and government documents.[51] The evidence revealed that at the time of the incident, and until May, 1982, the Los Angeles Police Department ("LAPD"), by its own admission, authorized use of chokeholds at least "to gain control of a subject who is violently resisting the officer or trying to

42. *Id.* at 115.
43. *Id.* at 98.
44. *Id.* at 114-15.
45. *Id.* at 97.
46. *Id.* at 98.
47. *Id.* at 97, 120-21.
48. *Id.* at 98. Lyons, a black male, also had alleged an equal protection violation, but the majority did not address this allegation. *Id.* at 116 n.3.
49. The suit, however, was not brought as a class action.
50. *Lyons*, 461 U.S. at 98.
51. *Id.* at 99.

escape," and to "subdue any resistance by suspects."[52] Moreover, an officer, when "resisted, but not necessarily threatened with serious bodily harm or death" could "subdue a suspect who forcibly resists. . . ."[53] In addition, an LAPD training officer testified that chokeholds were authorized whenever an officer "feels that there's about to be a bodily attack made on him."[54] In fact, as noted in the dissent, Los Angeles police applied the chokehold more often than any other control procedure over a period of five years.[55] Furthermore, "[b]etween February 1975 and July 1980, LAPD officers applied chokeholds on at least 975 occasions, which represented more than three-quarters of the reported altercations" involving citizens and police.[56] At least sixteen people had died as a result of chokehold application since 1975.[57]

The district court found for the plaintiff and entered an injunction enjoining the use of chokeholds "under circumstances which do not threaten death or serious bodily injury."[58] The Ninth Circuit affirmed per curiam.[59] The Supreme Court then granted certiorari, after which the LAPD imposed a six-month moratorium on the use of chokeholds except in situations in which use of deadly force was authorized.[60] In a 5-4 decision, the Court reversed the order upholding injunctive relief and found that Lyons lacked standing to seek injunctive relief.[61]

B. The Majority Opinion regarding Injunctive Standing

The Supreme Court's decision, written by Justice White, analyzed standing in its constitutional dimension, specifically holding that Lyons's claim was not justiciable because he "failed to demonstrate a case or controversy [under Article III of the constitution] with the City that would justify the equitable relief sought."[62] The

52. *Id.* at 110, 118.
53. *Id.* at 118.
54. *Id.*
55. *Id.* at 116.
56. *Id.*
57. Seventy-five percent, or twelve, of those who died were black males, although only nine percent of the citywide population consisted of black males. *Id.* at 116 n.3.
58. *Id.* at 100. The injunction covered both bar arm and carotid artery holds. The court also required an improved police training program, regular reporting, and record keeping. *Id.*
59. *Id.*
60. This six-month moratorium applied to use of carotid artery holds. Use of the bar arm hold was prohibited under any circumstances. *Id. See supra* note 41.
61. *Lyons*, 461 U.S. at 100. The Court also refused to declare the case moot because the LAPD could reinstate the use of chokeholds. *Id.* at 101.
62. *Id.* at 105.

majority conceded Lyon's standing to seek damages, based on his past injury.[63] His damages claim, however, was not before the Court. Up to that point, only the denial of the injunction had been litigated and appealed. Thus, the Court decided the question of standing for injunctive relief only. In doing so, the opinion separated the standing inquiry into two components: standing to sue for injunctive relief and standing to sue for damages.[64]

The Court held that to state a case or controversy justifying equitable relief, Lyons would have had to allege that he would suffer injury in the future from police use of chokeholds, so that an injunction would be effective for him.[65] The Court set forth a two-step test to determine the sufficiency of such allegations. First, the plaintiff must demonstrate that he will have another encounter in the future with the defendant.[66] Second, he must demonstrate that the defendant again will treat him in the same allegedly unconstitutional manner.[67] This test requires almost a certainty of future injury to ensure remedial effectiveness.[68] To satisfy the test and adequately assert that he would be choked again, Lyons would have had

> not only to allege that he would have another encounter with the police but also to make the incredible assertion either (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter . . . or, (2) that the City ordered or authorized police officers to act in such manner.[69]

This formulation of the test was premised on the majority's view that Lyons failed either to allege or demonstrate that he was choked pursuant to a uniform City practice or policy.[70] The opinion characterized Los Angeles's chokehold policy as authorizing the holds only in the face of the suspect's resistance, provocation, or attempt to escape.[71] Although Lyons had alleged tht he did not resist or provoke the police in any manner, his complaint had not clearly alleged a policy authorizing chokeholds in that situation.

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63. *Id.*

64. This aspect of the decision has been criticized frequently. *See generally* L. TRIBE, *supra* note 3, at 101; Fallon, *supra* note 3, at 22-23.

65. *Lyons*, 461 U.S. at 105-06. One commentator has stated, "In *Lyons* the Supreme Court treated as an element of standign the question whether an injunction would alleviate the specific personal injury on which the plaintiff's standing was predicated." Fallon, *supra* note 3, at 7.

66. *Lyons*, 461 U.S. at 106.

67. *Id.*

68. *See infra* notes 107-09 and accompanying text.

69. *Lyons*, 461 U.S. at 105-06 (emphasis in original).

70. *Id.* at 106.

71. *Id.* at 106 n.7.

He had alleged a policy that merely authorized chokehold use in the absence of any threat or use of deadly force.[72] Such a policy, however, does not necessarily encompass a situation in which police encounter no resistance. It may only encompass situations in which suspects attempt to escape or resist. Therefore, because LAPD officers did not uniformly choke citizens and because Lyons was choked in a situation in which use of the hold was unauthorized, no likelihood of future injury was apparent from either the complaint's allegations or the evidence adduced in support of the motion for a preliminary injunction.[73] Had an authorized and uniform practice been pleaded or proven to the Court's satisfactio, however, under the certainty of recurrence standard, Lyons still would have had to allege that he would have another encounter with the police.[74]

The Court also gave an alternative basis for its result. It concluded that Lyons could not avail himself of the mootness doctrine because his situation was not "capable of repetition, yet evading review."[75] Entirely apart from the standing question, the Court maintained that the plaintiff had not met the standards for issuance of injunctive relief.[76] He failed to demonstrate irreparable injury because the threat of future injury was speculative.[77] Accordingly, even if the case had been justiciable, Lyons would have been denied an injunction on the merits. Finally, the majority concluded that principles of equitable restraint, comity, and federalism precluded

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72. *Id.*

73. *Id.*

74. *Id.* at 105-06, 106 n.7.

75. *Id.* at 109. Application of this mootness doctrine would mean that Lyons could litigate his injunctive claim with a reasonable likelihood, rather than a certainty, of recurrence, if he had standing at the time of filing suit. *See infra* note 116. Because the constitutionality of chokeholds would be litigated as a necessary issue of Lyon's damages claim, the Court asserted that the case did not "evade review." *Lyons*, 461 U.S. at 109. *See* United Food & Commercial Workers v. Kroger Co., 778 F.2d 1171 (6th Cir. 1985), *cert. denied*, 107 S.Ct. 69 (1986). In *United Food*, the court stated:

> It appears to this court that the Supreme Court's statement that [Lyon's] claim for an injunction against the City of Los Angeles did not evade review because his claim for damages remained to be litigated was at the most *dictum*. This is true because . . . the Court had held that the issue raised by the claim for an injunction was not moot and had held that it was not justiciable for a different reason, that is, lack of standing.

Id. at 1175.

The *Lyons* Court noted that the doctrine is only available in exceptional circumstances, and then only when the challenged conduct is reasonably likely to recur. *Lyons*, 461 U.S. at 109. Because the Court found Lyons's chokehold unauthorized, however, even this standard was not met.

76. *Id.* at 109, 111.

77. *Id. See* O'Shea v. Littleton, 414 U.S. 488 (1974).

a finding of standing.[78]

C. *Precedent Relied On By the Court*

To arrive at its holding, the Court majority relied heavily on *O'Shea v. Littleton*[79] and *Rizzo v. Goode*.[80] The *Lyons* majority claimed that its result represented no extension of the holdings of these cases.[81] In *O'Shea*, the Supreme Court held that citizens of Cairo, Illinois, who had sued a local judge, magistrate, and other local officials for racially discriminatory activity in the operation of the criminal court system, had no "case or controversy."[82] Although some of the plaintiffs allegedly had suffered past injury at the hands of the State's Attorney, he was no longer a party when the case reached the Supreme Court.[83] Thus, none of the named plaintiffs had suffered any injury from acts of the defendants who remained parties in the case, and the plaintiffs asserted no damages claims against these defendants.

The Court in *O'Shea* held that the facts presented an insufficient personal stake and that the plaintiffs needed to show a "likelihood" of future injury at the hands of these defendants.[84] The level of certainty, however, was not specified. The case was held to be non-justiciable, because the plaintiffs could not demonstrate that they would again be arrested, charged with an offense, and subjected to the alleged discriminatory practices.[85] Moreover, the Court held that the plaintiffs made no showing of the irreparable injury neces-

78. *Lyons*, 461 U.S. at 111-12. Claiming that the district court's injunction constituted excessive interference with the operations of local law enforcement, the Court adverted to prior decisions forbidding federal involvement in state court systems or major restructuring of police departments. *Id.* at 112.

79. 414 U.S. 488 (1974).

80. 423 U.S. 362 (1976).

81. *Lyons*, 461 U.S. at 105.

82. *O'Shea*, 414 U.S. at 493. The plaintiffs, who sought to represent a class of similarly situated persons, brought no damages claim against the judge and magistrate, the only two defendants who later petitioned the Supreme Court. *Id.* at 492.

83. *Id.* at 491.

84. *Id.* at 496.

85. *Id.* at 497. The opinion stated: "We assume that respondents will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct said to be followed by petitioners." *Id.* The Court did not state whether it was analyzing the case under standing or mootness doctrine. Rather, no "case or controversy" existed. In addition, the Court referred to principles of equitable restraint and held the injunctive claim non-justiciable because its enforcement would require ongoing supervision of a state's criminal justice system and the operation of its courts. *Id.* at 500. This supervision was held to be an intrusion of a magnitude forbidden by prior cases. *Id.* at 499. *See* Younger v. Harris, 401 U.S. 37 (1971), *quoted in Lyons*, 461 U.S. at 112. *Younger* denied a federal injunction against an ongoing state criminal prosecution.

sary to obtain an injunction because the threat of future injury was speculative.[86] Finally, the *O'Shea* opinion implied that the plaintiffs would not have to demonstrate a likelihood of future injury if they could show "continuing, present adverse effects" from a previous injury at the hands of these defendants.[87]

The *Lyons* majority also relied on *Rizzo v. Goode*,[88] another case involving police practices that the Supreme Court held not justiciable. In *Rizzo*, the plaintiffs, individually and as class representatives, sued the mayor, police commissioner, and other officials of Philadelphia, alleging that various police practices violated their constitutional rights.[89] The plaintiffs asserted no claim for damages, but sought to enjoin the allegedly unconstitutional practices.[90] The district court granted an injunction that revised the system for handling civilian complaints and rules governing police/civilian contact.[91] The Third Circuit reversed and the Supreme Court affirmed the appellate court.[92]

The Court in *Rizzo* held no case or controversy existed. It concluded that no causal nexus existed because the plaintiffs adduced no proof that the defendants had caused or were in any other way responsible for the alleged racially discriminatory police practices.[93] In essence, the plaintiffs asked the Court to infer the defendants' responsibility from a statistical pattern of brutality incidents. The Court was unwilling to make this inference without evidence of an "affirmative link" between the defendants' behavior and that of the unnamed individual officers who had allegedly abused citizens.[94]

D. The Dissent in Lyons

Justice Marshall, writing in dissent, interpreted the facts differ-

86. *O'Shea*, 414 U.S. at 497.

87. *Id.* at 496. The *Lyons* Court cited *O'Shea* on this point, thereby implying an exception to the *Lyons* doctrine of certainty of future injury, but held that the plaintiff suffered from no such effects. *Lyons*, 461 U.S. at 102.

88. 423 U.S. 362 (1976).

89. *Id.* at 366.

90. *Id.*

91. *Id.* at 365 n.2.

92. *Id.* at 366.

93. *Id.* at 371. Similar to *O'Shea*, the *Rizzo* Court did not specify whether it decided the case as a mootness or standing question.

94. *Id.* In an alternative holding, the Court also refused to find a case or controversy on federalism grounds. Similar to *O'Shea*, the requested equitable relief necessitated ongoing intervention into and supervision of a local governmental function. *Rizzo*, 423 U.S. at 378-80. In fact, the intervention requested in *Rizzo* was even greater because it involved a massive restructuring of police department procedures. *Id.* at 365 n.2.

ently than the majority and concluded that the adduced evidence sufficed to prove a chokehold policy covering Lyons's nonresistance.[95] That officers were trained to use the holds when they "felt" they were about to be resisted was a sufficiently broad authorization to encompass the *Lyons* defendants.[96] Accordingly, Justice Marshall determined that Lyons should have had injunctive standing based on the threat of future harm because he had proven authorization of the use of chokeholds by the LAPD.[97] The dissent disputed the certainty of harm standard, noting that even an authorized practice of shooting one in ten suspects would fail to meet the standard, because its occurrence would not be certain.[98]

In addition, the dissent criticized the Court for severing the damages and injunctive claims in its standing analysis absent any precedent. In fact, the dissent claimed, no prior decision supported such an approach.[99] The dissent further asserted that Lyons's injunctive claim would have been justiciable because his damages claim gave him a sufficient and continuing personal interest in the controversy to confer standing.[100] Finally, the dissent disputed the Court's equitable restraint argument.[101]

IV. The Decision Analyzed

The dissent was correct when it argued that the decision in *Lyons* represented an unwarranted extension of prior case law.[102] Traditionally, a completed injury giving rise to a justiciable damages claim sufficed to confer standing to seek an injunction.[103] Lyons himself had suffered a serious injury. As Justice Marshall

95. *Lyons*, 461 U.S. at 113-14, 118 (Marshall, J., dissenting).

96. *Id.* at 118-19.

97. *Id.*

98. *Id.* at 137.

99. *Id.* at 127. "[B]y fragmenting a single claim into multiple claims for particular types of relief and requiring a separate showing of standing for each form of relief, the decision today departs from the Court's traditional conception of standing and of the remedial powers of the federal courts." *Id.*

100. *Id.* at 122-31.

101. *Id.* at 131-33. Justice Marshall disagreed with the majority's conclusion that the negative injunction, prohibiting chokehold use, constituted intervention into local governmental or law enforcement operations sufficient to counsel restraint. *Id.* at 131-37. As Professor Tribe noted, however, *Lyons* arrived in the Supreme Court as a "procedural mess." L. Tribe, *supra* note 3, at 354 n.238. The district court had not only forbidden chokehold use, but had instituted a revised training program and monitoring requirements. This injunction thus contained certain features resembling those in *O'Shea*. *See Lyons*, 461 U.S. at 100, 120 n.10.

102. *Lyons*, 461 U.S. at 122-31 (Marshall J., dissenting).

103. *See supra* note 99 and accompanying text.

noted, Lyons had a direct interest in litigating the constitutionality of the chokehold.[104] Lyons's direct injury should have been enough to confer standing to seek an injunction.

Instead, necessity of future injury displaced the adequacy of past injury as a basis for justiciability. The Court required that the requested remedy, the injunction on chokehold use, be capable of remedying the particular injury on which standing was predicated.[105] In the Court's view, not only would an injunction fail to remedy Lyons's past injury, but it could not remedy a speculative threat of future injury.[106] Enjoining the defendant officers and City would not stop any future chokeholds, because the chokehold used on Lyons was an unauthorized random act. Even if the chokehold had been authorized, however, it is not clear that Lyons would have had standing because future injury still would have been uncertain.

Under the Court's two-pronged test, to have standing, Lyons would have had to allege that he would have another police encounter and that he would be choked again.[107] This test requires a virtual certainty of future injury to ensure remedial effectiveness. Such injury definitely would occur only if officers used chokeholds uniformly. Alternatively, it would be highly likely to occur if officers were ordered or authorized to use chokeholds during every encounter with a citizen. The Court considered either of these alternatives sufficient to meet the test.[108]

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104. *Lyons*, 461 U.S. at 126. Lyons's past injury gave rise to a damages claim, which gave him a personal stake in his case beyond his interest in obtaining an injunction. This factor should not have been disregarded when addressing the justiciability of his claims.

105. The most novel feature of the *Lyons* decision is the Court's separation of the standing analysis of a case into components according to the relief requested. The plaintiffs in *O'Shea* and *Rizzo* had no damages claims. This distinction is significent because the absence of a damage claim indicates that the plaintiffs in the previous cases did not have an ongoing interest in their controversy apart from their injunctive claim. The *Lyons* majority also had cited Ashcroft v. Mattis, 431 U.S. 171 (1977), and Golden v. Zwickler, 394 U.S. 103 (1969), in support of its conclusion. Neither of these cases involved damages claims. The plaintiff in *Mattis* originally sought damages, but later dismissed his damages claim. *Mattis*, 431 U.S. at 172. Accordingly, the Supreme Court considered only his claim for equitable relief.

106. *See supra* notes 70-73 and accompanying text.

107. *Lyons*, 461 U.S. at 106.

108. *Id.* Further references to virtual certainty of recurrence appear elsewhere in the opinion. The opinion refers to the necessity of Lyons demonstrating that he "will be" stopped by police and choked, *id.* at 107 n.7, and that "strangleholds are applied by the Los Angeles police to every citizen who is stopped or arrested. . . ." *Id.* at 108. Neither Lyons, nor any other plaintiff, could prove that the police would confront him again. Nor could he demonstrate a practice of uniform chokehold application. He could attempt to prove authorization, but even that would have to be a blanket authorization allowing police always to chokehold citizens who did not resist or provoke them at all.

A standard requiring virtual certainty is anomalous relative to the body of caselaw regarding standing. Neither *O'Shea* nor *Rizzo*, nor any other previous decisions had posited such a standard.[109] It was unnecessary for the *O'Shea* Court to specify the level of certainty required, because it was extremely unlikely that the plaintiffs would again be arrested, charged, and brought before the same judge and magistrate. The chain of contingencies required to occur was too remote.[110] The *O'Shea* Court also held that "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury,"[111] a proposition the *Lyons* Court cited with approval[112] but disregarded. The *Lyons* opinion rendered past injury irrelevant by maintaining that the plaintiff, though a victim of past wrongs, was no more entitled to an injunction than any other citizen of Los Angeles.[113]

Despite the majority's assertion that it was merely following *Rizzo*, the *Rizzo* opinion did not directly address the question of future injury. Rather, it focused on the plaintiffs' inability to demonstrate a causal nexus between the defendants' actions and the allegedly unconstitutional pattern of police misconduct.[114] Arguably, *Rizzo* addressed future injury implicitly. Such injury would have been considerably more likely had the plaintiffs proven

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Moreover, the opinion implies that even this level of authorization must result in uniform application of chokeholds. Otherwise, Lyons could not prove that he would again be a chokehold victim. In other words, "ordered" and "authorized" appear to be virtually synonymous in *Lyons*.

One author has interpreted the reference to authorization as allowing standing whenever any sort of authorization exists. Under this view, even random authorization, such as to shoot one in ten suspects, would suffice. Cole, *Obtaining Standing to Seek Equitable Relief: Taming Lyons*, in CIVIL RIGHTS LITIGATION AND ATTORNEYS FEES ANNUAL HANDBOOK 109-10 (1986). This interpretation is erroneous. As noted in the dissent, a plaintiff would not have standing in such a situation, because he could not demonstrate a likelihood of recurrence. *Lyons*, 461 U.S. at 113. Cole is incorrect to argue that allegations of authorization can in themselves circumvent the standard posited by the Court. He has taken the Court's reference to "authorization" out of context. Thus, *Lyons* cannot be tamed; it can only be caged.

109. *See supra* notes 79-94 and accompanying text. *See also* L. TRIBE, *supra* note 3, at 109-10 (review of several Supreme Court cases utilizing standards considerably lower than certainty of future injury).

110. The likelihood of Lyons again being stopped by police and choked would have been greater had he been able to prove authorization.

111. *O'Shea*, 414 U.S. at 496.

112. *Lyons*, 461 U.S. at 102-03.

113. *Id.* at 111.

114. *See supra* notes 88-94 and accompanying text. Proving a policy might have supplied the requisite nexus. But the *Rizzo* plaintiffs were not able to prove a city policy authorizing unconstitutional police behavior and the case accordingly was not justiciable. *See supra* notes 93-94 and accompanying text.

a policy of unconstitutional police behavior. Because no policy was proven, however, the plaintiffs in *Rizzo* would not have been able to demonstrate that future injury to them was anything but speculative. Similarly, Lyons did not prove a policy authorizing chokehold use. Assuming Lyons had demonstrated a chokehold policy, *Rizzo* would provide no assistance in determining the level of certitude of future injury required.[115] Therefore, despite the *Lyons* majority's claim that its holding represented no extension of prior law, *Lyons* does extend the law of justiciability, rendering standing more difficult to obtain.[116]

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115. Nor do *O'Shea* and *Rizzo* support the *Lyons* Court's result on federalism grounds. In both cases, the district courts had granted injunctions that interfered with local government operations in widespread and significant ways. The *O'Shea* injunction involved ongoing supervision of an entire criminal justice system. *O'Shea*, 414 U.S. at 500. The *Rizzo* injunction called for a complete restructuring of a police department's system for handling civilian complaints, as well as rules governing police/civilian contact. *Rizzo*, 423 U.S. at 365. In *Lyons*, however, the plaintiff requested only an injunction prohibiting chokehold use.

116. *See* Fallon, *supra* note 3, at 6. *Lyons* has created numerous questions for those litigating similar injunctive claims, including, in certain instances, whether the *Lyons* standing analysis has superseded a mootness analysis of the viability of a claim. This question is significant in part because the standard for testing mootness is the reasonable likelihood of recurrence, rather than virtual certainty.

To some extent, the doctrines of standing and mootness overlap; both concern the adequacy of a party's interest in a controversy. Standing, however, is generally considered a threshold inquiry, while mootness concerns whether a once viable claim has abated. *See supra* notes 17-37 and accompanying text. Courts have not always made the degree of overlap and distinction clear, however, as illustrated by both the *O'Shea* and *Rizzo* opinions, which speak only of justiciability in general, rather than distinguishing between the concepts of standing and mootness. The *Lyons* opinion, on the othe rhand, addressed both standing and mootness. The Court spoke primarily of Article III standing, but also indicated the relevance of the concept of mootness when it explained that Lyons could not avail himself of the "capable of repetition, yet evading review" component of mootness doctrine in order to meet the requirements of Article III. *Lyons*, 461 U.S. at 109.

The *Lyons* standing test has intruded upon the mootness inquiry because standing now concerns not only the plaintiff's current situation, but her future condition as well. That is, the injunctive relief sought must be effective to remedy a threat of future injury. Analysis of the question whether Lyons was likely to suffer a recurrence of a previous injury is quite similar to that of determining whether, under the mootness doctrine, the chokehold was "capable of repetition, yet evading review." Although both standing and mootness concepts were applicable, however, the standing analysis was dispositive. When literally construed, the result is that the apparently higher standard of virtual certainty of recurrence has displaced the "reasonable likelihood" standard of mootness. Fallon, *supra* note 3, at 26. The mootness doctrine's applicability to the *Lyons* situation, however, also supports the argument that the "reasonable likelihood" standard ought to control whether a court analyzes justiciability under mootness or standing doctrine.

Wright and Miller contend, furthermore, that the question of justiciability should not be tied to a rigid doctrine but should involve a number of inquiries. 13 WRIGHT & MILLER, *supra* note 15, at § 3531.12. A multifaceted inquiry should replace application of a single doctrine, such as standing or mootness doctrine, to determine the existence of

The result in *Lyons* is not warranted by the purpose underlying the standing doctrine, which is to assure that the parties have a sufficient interest in the litigation to pursue it effectively.[117] Nor is it warranted by the purpose underlying Section 1983. Congress enacted Section 1983 explicitly to provide equitable remedies for those deprived of their constitutional rights.[118] *Lyons* ignored this statutory purpose in declaring that the plaintiff could not seek an injunction to remedy an alleged deprivation of constitutional rights. Legislation can define injuries that meet standing requirements.[119] The majority, therefore, should have considered the alleged deprivation of Lyons's constitutional rights in its analysis of whether Lyons had suffered an injury sufficient to give him a direct stake in the controversy.[120]

To reconcile *Lyons* with related decisions, it must be narrowly construed to require only a reasonable likelihood of recurrence, instead of a virtual certainty of recurrence. Even that standard extends prior law.[121] *Lyons* cannot be ignored, however, and this construction represents a reconciliation of applicable caselaw.

Moreover, a reasonable likelihood standard is supported by the *Lyons* opinion itself. First, the language of the *Lyons* opinion setting forth the certainty standard ranged beyond that necessary to the holding, which rested upon Lyons's failure to demonstrate adequately any likelihood of being a future chokehold victim. Second, much of the additional language requiring certainty[122] should be considered dicta or rhetorical hyperbole. The ambiguity of the opinion itself provides support for this hypothesis because adjacent portions of the opinion refer to an apparently lower standard: "Lyons would have to credibly allege that he faced a *realistic threat* . . ."[123] and "Lyons'[s] standing . . . depended on whether he was *likely* to suffer future injury. . . ."[124]

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a case or controversy. *Id.* This allows for a flexible approach to often difficult questions arising in a multiplicity of factual situations. *Id.* The *Lyons* opinion ignores Wright and Miller's approach by emphasizing standing doctrine alone as dispositive. It ignores the relevance of aspects of mootness. Under Wright and Miller's suggested approach, the court would have considered both.

117. *See supra* notes 17-29 and accompanying text.

118. The purpose of Section 1983 was to enforce the fourteenth amendment and to provide an effective federal remedy for litigants deprived of their constitutional rights by defendants acting under color of state law. Monroe v. Pape, 365 U.S. 167 (1961).

119. *See supra* note 23 and accompanying text.

120. *See supra* notes 20-23 and accompanying text.

121. *See* Fallon, *supra* note 3, at 35-39.

122. *Lyons*, 461 U.S. at 106, 107 n.7, 108.

123. *Id.* at 107 n.7, 109 (emphasis added).

124. *Id.* at 105 (emphasis added). Although this language supports a narrow reading

V. THE SUPREME COURT'S TREATMENT OF STANDING ISSUES IN SUBSEQUENT CASES

Subsequent Supreme Court cases provide at least indirect support for the hypothesis that the *Lyons* standard for injunctive relief should be construed narrowly to require only a reasonable likelihood of recurrence of the challenged conduct. These cases also suggest that *Lyons* should not be applied when other factors warrant standing. Since *Lyons*, the Supreme Court has not decided any directly analogous case. Nor has it cited *Lyons* in support of any argument regarding injunctive standing. The Court also has not required a virtual certainty of recurrence to find justiciability in any subsequent case.[125]

In a case decided the same term as *Lyons*, *Kolender v. Lawson*,[126] the Supreme Court held that allegations of a "credible threat" of recurrence sufficed to confer standing.[127] The plaintiff in *Lawson* had been detained or arrested fifteen times within a two-year period for allegedly violating a California statute.[128] Lawson challenged the constitutional validity of the statute, which required a suspect stopped and questioned by an officer to identify himself with "credible and reliable" identification and to account for his presence.[129] The Court held the statute void for vagueness[130] after establishing that Lawson's situation met the "credible threat" test for standing purposes.[131] The past pattern of arrests rendered it

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of the decision, when all of the applicable language is construed together, the resulting standard is amorphous and composed of seemingly contradictory elements. Therefore, it remains possible, though in the author's view, not likely, that the Court was defining a "reasonable" threat as one that is in effect certain to occur. Professor Tribe gives examples of results that would follow from a literal or strict interpretation of the *Lyons* rule. L. TRIBE, *supra* note 3, at 114-17. For example, he states that Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) would not have been justiciable under a certainty standard. In *Bakke*, the plaintiff, a Caucasian, had been denied admission to medical school because of a school policy requiring that a set number of minority applicants be admitted. *Id.* at 276. The plaintiff sought equitable relief and an order that he be admitted to a future class. *Id.* at 277. He would not have been able to demonstrate to a certainty, however, that he would be admitted to a future class but for the minority admission policy. Other factors, such as yearly fluctuations in the quality of the applicant pool, could disqualify him. L. TRIBE, *supra* note 3, at 115-17. Similarly, the plaintiff seeking an abortion in Roe v. Wade, 410 U.S. 113 (1973), could not demonstrate that she would be pregnant and seek an abortion again. *See id.* at 125.

125. *See infra* notes 126-49 and accompanying text.

126. 461 U.S. 352 (1983).

127. *Id.* at 355 n.3 (citing Ellis v. Dyson, 421 U.S. 426 (1975)).

128. *Id.* at 354.

129. *Id.* at 353-54.

130. *Id.* at 353.

131. *Id.* at 355 n.3.

likely that he would be detained again.[132] For that reason, the *Lawson* holding is distinguishable from *Lyons*, in which recurrence was not likely. Nonetheless, the Court's verbal formulation of the standing test, "credible threat of recurrence," is closer to a reasonable likelihood than a virtual certainty.[133] *Lawson* can be reconciled with the *Lyons* approach if the *Lyons* holding is limited to situations in which recurrence is uncertain. It was likely, but not certain, that the *Lawson* plaintiff would be detained or arrested again.

The following year, the Supreme Court held that standing existed in another case in which recurrence of the defendants' allegedly unconstitutional behavior was uncertain.[134] The plaintiffs in *Immigration and Naturalization Service v. Delgado*[135] were employees of factories that Immigration and Naturalization Service ("INS") agents had entered to question workers and to search for illegal aliens.[136] The plaintiffs had each been questioned once regarding their legal status,[137] and illegal aliens at their workplaces had been detained.[138] The plaintiffs' complaint "allege[d] the existence of an ongoing policy which violated the Fourth Amendment and which [woulld] be applied to their workplace in the future."[139] They had no other evidence supporting recurrence, but the Court

132. *Id.*

133. It is difficult to derive a more fully-developed rule from this holding because the Court's standing discussion was contained within a short footnote. *Id.* at 355 n.3. In United States v. Grace, 461 U.S. 171 (1983), decided the same day as *Lyons*, the Court considered the merits of a statutory challenge without addressing the issue of standing. To reach the merits, however, the Court must have agreed that standing existed, because absent justiciability, the merits cannot be considered. Warth v. Seldin, 422 U.S. 490, 498 (1975). The petitioners in *Grace* brought a first amendment challenge to a statute prohibiting distribution of leaflets on the grounds of the United States Supreme Court. *Id.* at 172-73. They alleged that they had distributed leaflets at the Court and would continue to do so. They had never been arrested under the statute, yet one plaintiff had been warned to stop twice. Another had been warned three times. *Id.* at 173-74. Though future injury was not certain to occur, its likelihood was reasonable. The *Grace* decision is not inconsistent with *Lyons*. The *Grace* plaintiffs would not have standing under a certainty of future harm standard unless the chilling effect of the warnings was itself considered an ongoing injury sufficient to create justiciability. *See supra* note 87 and accompanying text. Nor are these results inconsistent with the *Lyons* Court's reliance on principles of federalism and equitable restraint. A simple negative injunction prohibiting enforcement of an unconstitutional statute or ordinance does not unduly interfere with the daily operation of local law enforcement.

134. INS v. Delgado, 466 U.S. 210 (1984).

135. *Id.*

136. *Id.* at 211-12.

137. *Id.* at 213.

138. *Id.* at 217 n.4.

139. *Id.*

proceeded to decide the case on the merits,[140] thus implicitly holding that standing existed. The Court treated the standing issue in *Delgado* only summarily, in a footnote,[141] apparently because the INS had not specifically contested the plaintiffs' standing.[142]

The case remains significant because standing existed, despite the uncertainty of the policy's future application to the plaintiffs. Under the two-pronged *Lyons* inquiry, requiring that the parties meet again and that the defendant again act in an unconstitutional manner, it was not at all certain that the plaintiffs would have another encounter with the defendants. Nevertheless, it was likely that if they did meet, the defendants would follow their policy of allegedly unconstitutional searches. Overall, the result was that only a reasonable likelihood of recurrence existed.

Recently, the Supreme Court held that standing existed in a first amendment case in which injury was less than certain to occur. The plaintiff in *Meese v. Keane*,[143] a California state representative, wished to exhibit three Canadian films that had been classified as "political propaganda" under the Foreign Agents Registration Act.[144] He alleged that the identification of the films threatened to cause him cognizable injury and he supported his allegations with affidavits. Specifically, the plaintiff stated that his reputation would suffer, thereby diminishing his chances of obtaining re-election and practicing his profession.[145] His affidavits included the results of an opinion poll and the opinion of an experienced political analyst supporting the plaintiff's claim that his reputation and re-election prospects would be harmed by designation of the films as "political propaganda."[146] The Court held that this evidence demonstrated the requisite injury. Accordingly, the plaintiff had standing.

Keane is distinguishable from *Lyons* because occurrence of injury was likely in *Keane* and the case raised first amendment issues. Courts are especially diligent to protect free speech, particularly when the chilling effect of unconstitutional conduct can injure this

140. *Id.*

141. *Id.* at 217 n.4.

142. *Id.* The Court held the evidence insufficient to prove a fourth amendment violation or a policy of engaging in fourth amendment violations. *Id.* at 218-19. Although the INS clearly and admittedly had a policy of conducting these workplace "surveys," the Court held that such surveys did not constitute a seizure. *Id.*

143. 107 S. Ct. 1862 (1987).

144. *Id.* at 1864.

145. *Id.* at 1867.

146. *Id.* at 1867-68.

right.[147] For this reason, a standard of even less than a reasonable likelihood of injury may be appropriate in a first amendment case.[148] The Court in *Keane* did not cite *Lyons* in its opinion, nor did it apply a certainty standard in its analysis, which indicates that the Supreme Court is not applying the *Lyons* rule broadly.[149]

VI. DISTRICT AND APPELLATE CASES

A number of lower courts have interpreted the *Lyons* test as requiring only a reasonable likelihood of recurrence.[150] Most federal district and appellate court opinions that have distinguished *Lyons* have found that a reasonable likelihood of future injury existed. In most of these cases, the plaintiffs would not have had standing if a certainty of recurrence test had been applied.

Federal district and appellate court cases distinguishing *Lyons* can be categorized into several groups. The first category of decisions focus on the first prong of the *Lyons* test, the likelihood of the plaintiff again being in a position to have an encounter with the defendants.[151] Second are those decisions that emphasize the second prong of the test, the likelihood of the plaintiff again being subjected to the complained of practice.[152] Most decisions in this category concern statutes or official policies governing the defendants' behavior, or uniform patterns of governmental conduct that were condoned by the defendants. Several decisions in both the

147. *See* Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 956-58 (1984); Cole, *supra*, note 108, at 111-14.

148. The Court has not directly confronted that question, except in the context of facial challenges to overbroad statutes. *Munson*, 467 U.S. at 956-57. The Court also has held, however, in a challenge to political spying practices, that allegations of a "subjective chill" are insufficient to confer standing. Laird v. Tatum, 408 U.S. 1 (1972).

149. *See also* City of Houston v. Hill, 55 U.S.L.W. 4823 (June 15, 1987). In *Hill*, the Supreme Court struck down, on first amendment grounds, a Houston ordinance prohibiting citizens from "in any manner oppos[ing], molest[ing], abus[ing] or interrupt[ing] any policeman in the execution of his duty. . . ." *Id.* at 4824. The plaintiff, a self-described "gay rights activist," *id.* at 4826 n.7, previously had been arrested four times for alleged violations of the ordinance. He had never been convicted. *Id.* at 4825. The Court held that the plailntiff had standing to challenge the ordinance because he showed " 'a genuine threat of enforcement' of the statute against his future activities." *Id.* at 4826 n.7 (quoting Steffel v. Thompson, 415 U.S. 452, 475 (1974)). The Court agreed with the appellate court that the plaintiff's record of arrests and his "adopted role as citizen provocateur" created the requisite genuine threat of enforcement. *Id.* (quoting Hill v. City of Houston, 789 F.2d 1103, 1107 (5th Cir. 1986)).

150. In certain cases in which the plaintiff had not been injured previously, only a reasonable likelihood of occurrence, rather than recurrence, was required. *See infra* notes 157-229 and accompanying text.

151. *See infra* notes 155-80 and accompanying text.

152. *See infra* notes 181-229 and accompanying text.

first and second categories raised first amendment issues, which influenced the courts' analyses and contributed to decisions that justiciability existed.[153] The final category comprises cases brought as class actions in which the courts used the existence of the class as a factor increasing the reasonable likelihood of recurrence.[154]

A. The First Prong: The Plaintiff Will Be in the Same Position Again

A number of courts distinguishing *Lyons* and finding justiciability under a reasonable likelihood standard focused their analysis on the likelihood that the plaintiff again would be in a position that could subject him to the defendants' illegal actions. In *Lyons*, this would have occurred only if Lyons was stopped by the police again. Future recurrence of a chokehold was unlikely, particularly when multiplied by the unlikelihood that the police, having stopped Lyons, would use a chokehold

In contrast are situations in which the plaintiff is reasonably likely to be in a position that could subject him to the challenged conduct again without breaking the law. For example, the plaintiffs in *INS v. Delgado*[155] could be subject to the challenged practice again without deviating from their ordinary, lawful activities. Closely related are cases in which the plaintiffs claim a right to act as they did prior to arrest, even if their conduct was illegal. The plaintiffs challenged the constitutionality of proscribing the conduct leading to their arrest.[156] The plaintiffs' intent to disobey the law would place them in an identical position again. Finally, several courts held cases justiciablel although the plaintiff had to break a law or engage in acts of malfeasance, the legality of which he did *not* challenge, in order to be in the same position again.

In *Hardwick v. Bowers*,[157] the Eleventh Circuit held that a practicing homosexual had standing, under *Lyons*, to challenge on privacy grounds a Georgia anti-sodomy statute. This case was later appealed to the Supreme Court and decided on other grounds.[158] The court could have raised the issue of standing, but did not, thereby signalling an implicit acknowledgement that the plaintiff

153. *See infra* notes 157-68, 182-91, 215-29 and accompanying text.

154. *See infra* notes 230-44 and accompanying text.

155. *See supra* notes 134-42. *See also* Stanton v. Bd. of Educ., 581 F. Supp. 190, 193 (N.D.N.Y. 1983)(the situation of handicapped minor plaintiffs who suffered from serious neurological impairment was unlikely to change).

156. *See infra* notes 176-80 and accompanying text.

157. 760 F.2d 1202 (11th Cir. 1985), *rev'd on other grounds*, 106 S.Ct. 2841 (1986).

158. *Id.*

had standing.[159] The plaintiff alleged in his complaint that he regularly engaged in private homosexual acts and would continue to do so.[160] He had been arrested and charged under the statute after police entered the plaintiff's bedroom while he was engaged in a homosexual act.[161] The charges, however, were not pursued.[162]

The *Hardwick* court considered the dispositive question to be whether the threat of prosecution was real and immediate.[163] To answer this question, the court analyzed the identity and interests of the parties. The State's interest in enforcing the statute and its past enforcement patterns were one indication of the reality of the threat of prosecution, while the plaintiff's interest in engaging in the proscribed conduct was another.[164] The State's past enforcement of the statute evidenced its intent to continue to prosecute alleged violators. The court added that

> Hardwick's status as a homosexual lends special credence to his claim (citation omitted). While a plaintiff hoping only to challenge a statute might overestimate his or her willingness to risk actual prosecution, a plaintiff who genuinely desires to engage in conduct regardless of its legal status presents a court with a more plausible threat of future prosecution.[165]

Finally, the court declared that a plaintiff like Hardwick, who was "best suited to challenge a law," has a strong claim for standing.[166]

Under the reasonable likelihood standard,[167] this result was correct. Hardwick would be in a position to be arrested again, and a reasonable likelihood of prosecution existed.[168] As a homosexual, he was a potential target of the statute, unlike Lyons, whose status, according to the Court, did not predispose him to another police encounter. A virtual certainty of recurrence, however, did not exist. Because Hardwick alleged that his sexual activity was private, only under the most unusual circumstances would the state have

159. *See supra* note 18 and accompanying text.
160. *Hardwick*, 760 F.2d at 1204.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 1206. This is one of the prudential limitations on standing discussed *supra* at note 26. Therefore, Hardwick had a case or controversy, although two additional plaintiffs did not. *Id.* The other plaintiffs were a married couple who alleged they knew Hardwick and "desired to engage in sexual activities proscribed by the statute, but had been chilled by the existence of the statute and the recent arrest of Hardwick." *Id.* at 1204. These facts did not present a serious risk of prosecution. *Id.* at 1206.
167. *See supra* notes 121-24 and accompanying text.
168. *See supra* notes 121-24 and accompanying text.

sufficient evidence to prosecute. Moreover, the previous charges against him had been dropped.

A district court in the Northern District of Illinois also held a case justiciable when a plaintiff had a reasonable chance of again encountering the defendant. In *Faheem-El v. Klincar*,[169] the court held that a prisoner had standing to seek to enjoin allegedly defective parole revocation hearing practices. The plaintiff prisoner had been found guilty, at a preliminary parole revocation hearing, of violating his parole.[170] He was also a defendant in a criminal action for the same offense.[171] The court determined that

> a strong possibility [exists] that plaintiff again will be subject to the procedures complained of in this action. If plaintiff wins his criminal trial, or his final parole revocation hearing, he will again be on parole. Any alleged violation, real or imaginary, will again subject him to potentially unconstitutional procedures. . . . Thus there appears to be a good chance that plaintiff will, in the future, be subject to the Illinois procedures complained of.[172]

According to the court, a "strong possibility" or "good chance" of recurrence met the *Lyons* test.[173] The *Faheem-El* court decided that the chance existed. It relied on the Supreme Court's prior acceptance of an estimate that thirty-five to forty-five per cent of parolees were recidivists. It added to that the number of parolees who come into contact with revocation procedures without having parole ultimately revoked.[174] The first prong of *Lyons* thus having been met, the court held that the second prong, likelihood of future injury, was certain to be met because the allegedly defective procedures were uniform.[175]

Faheem-El represents a reasonable interpretation of *Lyons*. The likelihood of recurrence was far from certain, but it was considerably more likely than under the facts of *Lyons*. The court's "good chance" or "strong possibility" standard is also consistent with the "reasonable likelihood" standard urged in this article. Under a higher standard, justiciability would not have existed. To be sub-

169. 600 F. Supp. 1029 (N.D. Ill. 1984), *aff'd as modified*, 814 F.2d 461 (7th Cir. 1987).

170. *Id.* at 1031-32.

171. *Id.*

172. *Id.* at 1036.

173. *Id.*

174. *Id.*

175. *Cf.* Gallman v. Pierce, 639 F. Supp. 472, 479-80 (N.D. Cal. 1986) (evicted tenants who continued to receive federal housing assistance at new locations had justiciable action against eviction procedures because they probably would "receive termination notices of their month to month tenancies at some future date.").

ject again to parole revocation procedures, the plaintiff would either have to engage in an illegal act, or the defendants would have to perceive that he did and then invoke revocation procedures. Thus, an element of uncertainty enters the analysis.

Another district court in the Northern District of Illinois held a case justiciable although, to be in the same position again, the plaintiffs had to continue engaging in conduct raising suspicions of child abuse.[176] In *E.Z. v. Coler*,[177] several plaintiffs who had been subject to Illinois child abuse investigation practices challenged them on fourth amendment grounds. The court held that the plaintiffs probably would be investigated again, because "the testimony . . . regarding their family problems and disciplinary methods indicates that the likelihood of future [Department of Children and Family Services] investigation is not merely speculative."[178] Under such conditions, the likelihood of the plaintiffs having another encounter with the defendants was not speculative. Given the continuous nature of the plaintiffs' conduct and the lack of change in their circumstances, it was more likely that they would encounter the challenged practices again than that Lyons would be arrested again.[179] The court's result was correct. It is entirely reasonable to interpret the *Lyons* test to cover such conduct that is reasonably likely to occur.[180]

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176. E.Z. v. Coler, 603 F. Supp. 1546 (N.D. Ill. 1985), *aff'd on other grounds sub nom.* Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986).

177. 603 F.Supp. 1546.

178. *Id.* at 1551 n.6.

179. Similarly, standing was found in Reigh v. Schleigh, 595 F. Supp. 1535, 1537, 1541-42 (D. Md. 1984), *vacated on other grounds*, 784 F.2d 1191 (4th Cir. 1986). The plaintiffs were judgment debtors attacking post-judgment attachment procedures, although their attachment orders had been quashed. They were impoverished and remained indebted on their underlying debt, however, and therefore could be subjected to the challenged procedures again. *See also* Lake v. Speziale, 580 F. Supp. 1318 (D. Conn. 1984). The named plaintiff was impoverished and unemployed. He was in arrears on his child support obligations and had been held in contempt repeatedly for nonpayment. *Id.* at 1327. He challenged the court's failure to appoint counsel for him in the contempt proceedings. *Id.* at 1320. The court distinguished *Lyons*, maintaining that a likelihood of future contempt proceedings existed, which "does not depend on Michael Lake willfully breaking the law. Michael Lake's present financial condition creates the likelihood of this occuring in th future without any deliberate act of malfeasance on his part." *Id.* at 1328 (citation omitted). While it is somewhat astonishing that the court did not consider failure to pay child support a willful act of malfeasance, the results in *E.Z.*, *Reigh*, and *Lake* are reasonable. A reasonable probability existed in each case.

180. *But cf.* Strandell v. Jackson County, 634 F. Supp. 824 (S.D. Ill. 1986) (named plaintiffs, parents of a deceased pretrial detainee, probably would not be arrested for criminal offense, and thus had no standing to challenge jail practices); Williams v. City of Chicago, 609 F. Supp. 1017 (N.D. Ill. 1985) (plaintiff class representative unlikely to be arrested for criminal offense in future).

B. The Second Prong: The Plaintiff Will Be Subjected Again to the Unconstitutional Practice—Statutes, Policies and Patterns

Cases distinguishing *Lyons* have found a reasonable likelihood of recurrence when plaintiffs were in a position to be subjected to the challenged governmental practice again and that practice was officially authorized. The authorization itself made recurrence reasonably likely, although not certain. The opinions discussed in this section focus on the second prong of the *Lyons* test.

1. Statutes

Appellate courts have distinguished *Lyons* and have held that justiciability existed under a reasonable likelihood standard in cases in which plaintiffs challenged statutes as unconstitutional.[181] In *KVUE, Inc. v. Moore*,[182] the United States Court of Appeals for the Fifth Circuit held that a plaintiff had standing to challenge on first amendment grounds a statute under which it had never been prosecuted. This case was later appealed to the Supreme Court, where it was summarily affirmed, indicating that the Supreme Court agreed that the case was justiciable.[183] In *KVUE*, a television station sought a declaratory judgment regarding the constitutionality of a Texas statute that prescribed the rates that stations could charge for political advertising and required identification of sponsors.[184] KVUE had violated the statute, claiming it had lost revenues by previous compliance.[185] Meanwhile, the County Attorney professed a disinclination to prosecute, but would not definitely rule it out.[186] In its complaint, the station alleged its intention to continue violating the statute.[187] The *KVUE* court held that the station had standing, citing *Kolender v. Lawson*[188] for the proposition that a "credible threat" of future injury existed.[189] The court also distinguished *Lyons*, holding that the television sta-

181. Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985), *rev'd on other grounds*, 106 S.Ct. 2941 (1986), provides one example. *See supra* notes 157-67 and accompanying text.

182. 709 F.2d 922 (5th Cir. 1983), *aff'd on other grounds sub nom.* Texas v. KVUE-TV, 465 U.S. 1092 (1984). The Supreme Court held, prior to *Lyons*, that threats of prosecution under a statute may suffice to confer standing. Steffel v. Thompson, 415 U.S. 452, 459 (1974).

183. *KVUE*, 465 U.S. 1092.

184. 709 F.2d 922.

185. *Id.* at 929-30.

186. *Id.* at 929.

187. *Id.* at 930.

188. 461 U.S. 352 (1983).

189. *KVUE*, 709 F.2d at 930.

tion was more likely to fact future injury than was Lyons.[190]

This result is correct for a first amendment case. The first prong of the *Lyons* test, whether the plaintiff will again be in a position to be subject to the challenged conduct, was met. The second prong, whether the plaintiff would be prosecuted under the statute was, however, uncertain, because the station had not even been threatened with prosecution. Nevertheless, as long as the state remained equivocal about its intentions, any likelihood of prosecution could create a chilling effect that could deter protected expression. Accordingly, in the first amendment context, a lower standard should apply, because the free speech issue distinguishes the case from *Lyons*.[191]

2. Official Policies

Courts have distinguished *Lyons* by employing a reasonable likelihood test, and have found justiciability when written policies resulted in uniform application of the challenged practice.[192] Unwritten official policies also can lead to the existence of standing, as in *Jorman v. Veterans Administration*.[193] In *Jorman*, six

190. *Id.*

191. The chilling effect of the statute's continued existence could be regarded as an "ongoing adverse effect," bringing the case under the *O'Shea* exception to the future injury requirement. *See supra* note 87 and accompanying text. The special protection accorded first amendment rights, and the consequent protection against chilling effects of unconstitutional conduct have led courts to find standing in these cases. *O'Shea*, 414 U.S. at 496; Cole, *supra* note 108, at 103, 111-14. *See also* Meese v. Keane, 107 S. Ct. 1862 (1987); United States v. Grace, 461 U.S. 171 (1983).

192. *See, e.g.*, Gallman v. Pierce, 639 F. Supp. 472 (N.D. Cal. 1986). The court found justiciability under both standing and mootness doctrines when plaintiffs receiving federal housing assistance contested the legality of eviction procedures. Although past evictions were completed, recurrence was foreseeable. In *Gallman*, the court posited alternative requirements for justiciability: the plaintiffs had to demonstrate either the "threat of a real or immediate injury," or that their action was "capable of repetition, yet evading review." *Id.* at 479. It is not entirely clear what the court meant by this requirement. If it meant that a reasonable likelihood of recurrence standard controls, it was correct. If, on the other hand, it meant that plaintiffs may meet one of two differing standards in order to have a case or controversy, it was not correct. Instead, a plaintiff not suffering from ongoing adverse effects must demonstrate both that she is reasonably likely to be in a position subjecting her to the challenged conduct again, and that that conduct is reasonably likely to be applied to her. *See also* Stanton v. Bd. of Educ., 581 F. Supp. 190 (N.D.N.Y. 1983) (mootness no bar when handicapped children challenged New York's refusal to provide summer educational services although the plaintiffs had found alternative summer placement for the current year; they would be in the same position the next year); *but cf.* John Does 1-100 v. Boyd, 613 F. Supp. 1514 (D. Minn. 1985) (no standing when county jail inmates challenged strip search practice; while searches were always conducted, plaintiffs were unlikely to be arrested and put in jail again).

193. 579 F. Supp. 1407 (N.D. Ill. 1984. *See also* Lake v. Speziale, 580 F. Supp. 1318

named plaintiffs charged that the Veterans Administration's mortgage lending practices caused "white flight" and resegregation on the Southwest Side of Chicago.[194] The defendant admitted its practices, but denied that such practices caused the alleged effects.[195]

A number of the plaintiffs, who lived in an all-white neighborhood, had suffered no past injury as a result of the white flight allegedly promoted by Veterans Administration mortgage lending practices.[196] They alleged, however, that they were threatened with future injury caused by white flight.[197] According to the plaintiffs' expert witnesses, the plaintiffs lived in an area of Chicago "in much greater danger of injury from white flight than most other areas."[198] Though this danger was not expected to occur for some time, it was expected eventually if the defendant continued its challenged mortgage lending practices.[199] The court held that this fact situation presented a threat of sufficient reality and immediacy to warrant justiciability.

> *[T]emporal* immediacy is not the hallmark of what is "immediate" in the legal sense. Cases such as *Lyons* and *O'Shea*, which were dismissed on standing grounds because the threat of injury was not "immediate," did not suffer such dismissal because the injury was too far in the future or too slow in its operation. Rather the lack of "immediacy" simply meant plaintiffs were no more in danger of harm than any of a large class of persons—the populace generally.[200]

In contrast to *Lyons*, the *Jorman* plaintiffs' injury, according to expert opinion, was likely and foreseeable, although not certain, given the defendant's continuing practices. The decision is correct, because it was reasonably likely that the problem of white flight would ultimately reach the plaintiffs' neighborhood. The plaintiffs could have been denied standing under the virtual certainty interpretation of *Lyons*.

(D. Conn. 1984) (indigent plaintiff contesting failure to appoint counsel and facing repeated threat of contempt finding for failure to pay child support had standing); Faheem-El v. Klincar, 600 F. Supp. 1029 (N.D. Ill. 1984) (*Lyons* distinguished and live controversy found when prisoner challenged parole revocation hearing practices).

194. *Jorman*, 579 F. Supp. at 1410-11.

195. *Id.* at 1410.

196. *Id.* at 1414.

197. *Id.* at 1411.

198. *Id.* at 1415.

199. *Id.* at 1415-16.

200. *Id.* at 1415 (emphasis in the original).

3. Unofficial Patterns of Conduct

Related to the actions challenging official policies are those involving unofficial uniform patterns of challenged activity. In certain circumstances, they are the functional equivalent of officially-endorsed policies because the uniform pattern, if proven, can evidence a tacit custom, practice, or policy of the defendant.[201] These situations are particularly compelling when the pattern of activity has been directed against a discrete group because the likelihood of recurrence is increased.[202]

The Ninth Circuit distinguished *Lyons* under a reasonable likelihood standard when plaintiffs proved a pattern of illegal activity.[203] In the case of *La Duke v. Nelson*[204] the court held that migrant worker residents of farm dwellings had standing to sue Immigration and Naturalization Service ("INS") officials. The plaintiffs alleged that INS agents had unconstitutionally searched their dwellings in violation of the fourth amendment.[205] The district court agreed, finding a "standard pattern" of such searches which the INS had authorized.[206] The appellate court affirmed, construing *Lyons* and *Lawson* to create a " 'credible threat' of recurrent injury" standard.[207] The court then articulated several facts distinguishing the case from *Lyons*, including the district court's finding of likely recurrence,[208] and the existence of a recurrent and uniform pattern of searches.[209] Accordingly, *La Duke* presented a

201. *See* Monell v. New York City Dept. of Social Services, 436 U.S. 658, 694 (1978); Lenard v. Argento, 699 F.2d 874 (7th Cir. 1983), *cert. denied*, 464 U.S. 815 (1983). It is well-established in Section 1983 jurisprudence that patterns of alleged unconstitutional activity with failure to invoke remedial measures are tantamount to official policies when the responsible officials have been deliberately indifferent to or tacitly authorized continuation of the illegal activity. *Lenard*, 699 F.2d at 885-86.

202. *See* Cole, *supra* note 108, at 115.

203. *Cf.* E.Z. v. Coler, 603 F. Supp. 1546, 1551 (N.D. Ill. 1985), *aff'd on other grounds sub nom.* Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986) (plaintiffs alleged that Department of Children and Family Services employees investigating child abuse reports had engaged and continued to engage in pattern of unconstitutional searches; interim Department rule change mandating stricter search procedures not relevant because plaintiffs alleged that illegal searches continued notwithstanding change).

204. 762 F.2d 1318 (9th Cir. 1985), *modified on other grounds*, 796 F.2d 309 (9th Cir. 1986).

205. *Id.* at 1321.

206. *Id.*

207. *Id.* at 1323.

208. *Id.* at 1324.

209. *Id.* Third, this case raised no concerns about federal court intervention into local matters because the defendants were federal employees. *Id.* at 1324-25. Finally, the plaintiffs constituted a certified class and thus, injury to the class could be anticipated. *Id.* at 1325; *see also infra* note 239.

stronger case for justiciability than *Lyons*.

Decided later the same year, *Nicacio v. United States Immigration and Naturalization Service*[210] followed the reasoning set forth in *La Duke*. The Mexican plaintiffs in *Nicacio* alleged that agents of the defendant engaged in a pattern of stopping Hispanics without warrants and without a reasonable suspicion of criminal activity.[211] The Ninth Circuit affirmed, citing *La Duke*, and stating that this case was even stronger.[212] The district court specifically had found that several plaintiffs "actually experienced repeated stops . . . . The possibility of recurring injury ceases to be speculative when actual repeated incidents are documented."[213] On that basis, the court distinguished *Lyons*.[214] The distinction was appropriate, because the pattern rendered recurrence reasonably likely.

A rather unusual sort of authorization was at issue in *Olagues v. Russoniello*.[215] In *Olagues*, the Ninth Circuit en banc held that organizations furthering Hispanic and Chinese-American voting rights and Mr. Olagues, as an individual plaintiff, had standing to sue a United States Attorney on first amendment grounds for equitable relief after he had investigated them for possible voter registration irregularities.[216] He had terminated a preliminary investigation, but would not disavow future investigations.[217] An earlier panel decision in the same case had found the organizations had standing, but not the individual plaintiff.[218] Any future investigations probably would encompass the organizational plaintiffs

210. 768 F.2d 1133 (9th Cir. 1985), *modified on other grounds*, 797 F.2d 700 (9th Cir. 1986). *But cf.* Gonzales v. City of Peoria, 722 F.2d 468 (9th Cir. 1983) (citizen and resident alien plaintiffs who alleged policy of illegal stops of Hispanics and who had experienced such stops sufficiently alleged threat of injury, but injunctive claim dismissed on federalism grounds).

211. *Nicacio*, 797 F.2d at 702.

212. *Id.*

213. *Id.* This case also was brought as a class action, which was a factor the court considered in its analysis. *Id.* at 701. *See infra* notes 230-44 and accompanying text.

214. *Id.*

215. 797 F.2d 1511 (9th Cir. 1986)(en banc)("Olagues II"), *rev'g in part* Olagues v. Russoniello ("Olagues I"), 770 F.2d 791 (9th Cir. 1985), *cert. granted*, 107 S. Ct. 1885 (1987). The questions presented on certiorari are: (1) May a federal court, consistent with Article III of the Constitution, consider a preindictment challenge to the manner and scope of noncoercive investigatory activities by a U.S. Attorney?; (2) Assuming that such judicial review is permitted in these circumstances, may a federal court enjoin or declare unconstitutional such activities when they are not taken in bad faith or for purposes of harassment, do not violate any clearly established rights, and have not been shown to be devoid of legitimate investigatory purpose? (3) Is this case moot?

216. *Olagues II*, 797 F.2d at 1518-19.

217. *Id.* at 1516-17. One of the questions presented on certiorari to the Supreme Court is whether the case is moot because the earlier investigation was terminated.

218. *Olagues I*, 770 F.2d at 797-99.

who had alleged injury to recruitment as a result of the investigation's chilling effect.[219] Moreover, they were composed of members of discrete groups specifically targeted by the defendants.[220]

In contrast, Olagues, the individual plaintiff, was considerably less likely to be a future target. Unlike the organizational plaintiffs, he had been chosen at random to be investigated as part of the United States Attorney's policy of random investigation of recently registered bilingual voters requesting bilingual ballots.[221] The investigation revealed that Olagues was a citizen and legally registered to vote.[222] Therefore, the investigation was not continued.[223] In addition, the chilling effects on Olagues were not as severe as those of the organizations.[224] Nonetheless, the Ninth Circuit held that Olagues had standing, distinguishing *Lyons*.[225]

Four judges dissented on the issue of the individual plaintiff's standing.[226] While the United States Attorney's practice made future investigation of the organizations possible, the random nature of his investigative practice of individuals made any future investigation of Olagues unlikely.[227] Under *Lyons*, the dissent was analytically correct, even if one applies a lower than "reasonable likelihood" standard for first amendment cases. The random nature of the investigation, as well as Olagues's status as a citizen and legal voater, probably would disqualify him from future injury.[228] The majority could circumvent the future injury component of *Lyons* only by ignoring it. *Olagues*, however, also illustrates some of the analytical difficulties of the *Lyons* rule and the confusion created by it. A plaintiff who has experienced a direct injury, such as Olagues, should have standing. The question of likelihood of recurrence more appropriately belongs to an inquiry regarding the plaintiff's entitlement to an injunction. If no likelihood of recurrence or other continuing threat exists, injunctive relief can be de-

219. *Id.* at 798-99.

220. *Id. See also* Cole, *supra* note 108, at 115 (the author explains that membership in a targeted group makes a finding of standing more likely).

221. *Olagues II*, 797 F.2d at 1514, 1518.

222. *Id.*

223. *Id.*

224. 770 F.2d at 798-99.

225. 797 F.2d at 1517 n.6. The court maintained that *Lyons* was distinguishable because the plaintiffs in *Olaques* did not have to violate a law in order to be investigated. *Id.* They could be investigated even if they conducted themselves lawfully and did not deviate from normal activities. *Id.* The court did not address the likelihood of a future investigation of the individual plaintiff.

226. *Id.* at 1524.

227. *Id.* at 1526.

228. *Id.*

nied for lack of irreparable injury.[229]

C. *Class Actions*

Certain courts, including federal district courts within the Seventh Circuit, have distinguished *Lyons* when considering standing in cases brought as class actions. They have analyzed the standing of the class as a whole, rather than that of the named plaintiff class representative. Some courts also have analyzed the class action cases as presenting mootness issues in addition to, or instead of, standing issues.[230] It is clear, however, that in class actions the named plaintiff must have standing at the outset of the litigation.[231] If he does not, the action is not justiciable. It is thus not appropriate in such situations to distinguish *Lyons* and consider only whether the class has standing.

Since *Lyons*, however, justiciability has become more difficult to obtain. Currently, a class of persons injured by brief and fleeting practices will have no equitable remedy unless at least one victim can file suit while the practice is continuing, or a credible threat of recurrence exists to at least one individual. Absent this, a right exists without an equitable remedy. Such a result can be unjust, particularly because the presence of the plaintiff class normally

229. The *Lyons* standing analysis means that actions can be dismissed at an earlier stage of litigation than formerly. Lack of irreparable injury generally can be determined only after a hearing. Standing, on the other hand, often can be determined on the pleadings. One commentator suggests, however, that plaintiffs facing probable dismissal for lack of standing request discovery first. The plaintiff then would have an opportunity to find out if the facts support a likelihood of recurrence. Cole, *supra* note 108, at 115-16. *See also* Hardwick v. Bowers, 760 F.2d 1202, 1206-07 (11th Cir. 1985), *rev'd on other grounds*, 106 S.Ct. 2941 (1986)(court indicated in dicta its willingness to grant a discovery request to determine likelihood of prosecution of plaintiffs).

230. *Lyons* has modified the contours of the standing doctrine, and its current relationship to mootness is unclear. The cases reflect this ambiguity in the disparity of their approaches. Some decisions have used the doctrines interchangeably because, after *Lyons*, the likelihood of recurrence has become central to determining both injunctive standing and whether a potentially moot claim is capable of repetition. *See, e.g.*, Faheem-El v. Klincar, 600 F. Supp. 1029, 1035 (N.D. Ill. 1984). The Supreme Court's assertion that Lyons's claim did not evade review because he retained his damages claim should be regarded as dictum; mootness doctrine remains relevant. Other cases cited in this article also discuss mootness: Olagues v. Russoniello, 797 F.2d 1511,d 1517 (9th Cir. 1986)(en banc), *cert. granted*, 107 S.Ct. 1885 (1987), *supra* noes 215-29; La Duke v. Nelson, 762 F.2d 1318, 1326 (9th Cir. 1985), *modified on other grounds*, 796 F.2d 309 (9th Cir. 1986), *supra* notes 203-09; Reigh v. Schleigh, 595 F. Supp. 1535, 1538-42 (D. Md. 1984), *vacated on other grounds*, 784 F.2d 1191 (4th Cir. 1986), *supra* note 179; Stanton v. Bd. of Educ., 581 F. Supp. 190, 192-93 (N.D.N.Y. 1983), *supra* notes 155,192.

231. "There must . . . be a named plaintiff who has . . . a case or controversy at the time the complaint is filed. . . ." Sosna v. Iowa, 419 U.S. 393, 402 (1975), *quoted in* Williams v. City of Chicago, 609 F. Supp. 1017, 1019 (N.D. Ill. 1985).

would increase the likelihood of recurrence to at least some class members.

The court was confronted with such a dilemma in *Lewis v. Tully*.[232] A former Cook County Jail prisoner, on behalf of a class of prisoners, challenged the jail's practice of refusing to release prisoners discharged at suburban courts until they had been returned to the central, inner city facility.[233] The plaintiffs alleged that the practice was uniform, but the named plaintiff did not face a credible threat of recurrence and he had filed suit after his release.[234] Thus, he had no standing as an individual plaintiff under *Lyons*.[235] Nonetheless, the court proceeded to consider the issue "whether a named plaintiff's failure to have a live claim at the time he or she files a complaint defeats standing even where the class as a whole has a live claim."[236] Reasoning that the named plaintiff's past injury, as well as his interest in class certification, sufficed to create a personal stake under either the standing or mootness doctrine, the court ruled that the case was justiciable.[237] It held that the named plaintiff's standing was merged into that of the class.[238] Absent such a holding, no one could litigate the constitutionality of such inherently brief practices as those pertaining to detainees who are released after their first court appearance. Realistically, none of these persons could file suit while detained because their periods

232. 99 F.R.D. 632 (N.D. Ill. 1983), *modifying* 96 F.R.D. 370 (N.D. Ill. 1982).

233. *Lewis*, 96 F.R.D. at 372.

234. *See Lewis*, 99 F.R.D. at 634, 639.

235. *Id.* at 639.

236. *Id.*

237. *Id.* at 640. The court relied on the mootness doctrine to reach its conclusion. The named plaintiff's claim had become moot, because it was unlikely to recur, but under established mootness principles, the class claims had not thereby become moot. The Supreme Court has held that a class action does not become moot even if the named plaintiff's individual claim became moot after certification of the class. Sosna v. Iowa, 419 U.S. 393, 401-02 (1975). The rule was later extended to actions in which the plaintiff's case was mooted before class certification, Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975), and in which the plaintiff challenged a refusal to certify the class. United States Parole Commission v. Geraghty, 445 U.S. 388, 404 (1980). The rationale for these decisions is that the plaintiff retains a "personal stake" in at least the class certification issue, if not the underlying claim, and that the class as a whole has a personal stake in the outcome. *See Lewis*, 99 F.R.D. at 638. Class members are by definition those who are being subjected to the challenged practice; this guarantees the constant existence of persons with live controversies. *Id.*

238. *Id.* The holding was confined to cases in which the duration of the challenged action is too short for disposition before it ceases, *id.*, and too short to permit the filing of a suit before it ceases. If the suit had been filed before cessation of the challenged practice, no standing problem would have existed. The problem, instead, would have fallen under the mootness rubric.

of detention are quite short and they have limited access to attorneys while incarcerated.

Nevertheless, the court's result was incorrect under *Lyons*. The court attempted to avoid *Lyons* by holding thaht only the justiciability of the class claims need be considered, but in doing so, it ignored the requirement that named plaintiffs in class actions must have standing at the outset.[239] For that reason, the court refused to find justiciability in a similar case, *Williams v. City of Chicago*.[240] In *Williams*, the named plaintiff alleged that "she was detained [at a Chicago police station] pursuant to a city-wide policy which unconstitutionally authorizes police officers to detain arrestees indefinitely without appointment of counsel, judicial determination of probable cause, or a bond hearing while the officers complete their investigation of the arrestees."[241] She filed suit after her release, however, and no likelihood of rearrest existed.[242] Therefore, despite the existence of a class of detainees constantly subject to the alleged policy, the case was held not justiciable.[243] Criticizing *Lewis*, the *Williams* court explained that a named plaintiff must have a case or controversy at the time of filing, although the result was harsh.[244]

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239. *Compare* La Duke v. Nelson, 762 F.2d 1318, 1325-26 (9th Cir. 1985), *modified on other grounds*, 796 F.2d 309 (9th Cir. 1986) (The Ninth Circuit noted that named plaintiffs must have standing at the outset, but proceeded to consider only the standing of the plaintiff class as a whole. The opinion is ambiguous on the standing of the named plaintiffs; it does not state whether they had any individual past injury or whether they could expect future injury.).

240. 609 F. Supp. 1017 (N.D. Ill. 1985).

241. *Id.* at 1018.

242. *Id.*

243. *Id.* at 1019. The court distinguished the unpublished decision in Thomas v. City of Chicago, No. 83-5601 (N.D. Ill. Aug. 30, 1984), "in which the plaintiff remained the primary suspect in an unsolved murder investigation and accordingly satisfied the *Lyons* standing test." *Id.* at 1018 n.2.

244. *Id.* at 1019.

> We sympathize with Justice Marshall's dissent [in *Lyons*]—and with the *Lewis* court's attempt to circumvent the standing requirements. Because of the length of the detention periods involved in the present case, it is quite unlikely that an arrestee could retain an attorney and have the attorney prepare and file a complaint before the arrestee is released from the police station. Moreover, most arrestees (like Williams) will be unable to show a real threat of future injury from the City's detention policy. As a result, the federal courts are rendered impotent to order the cessation of a policy which may indeed be unconstitutional and may harm many persons.

Id. at 1020 n.7. *See also* Strandell v. Jackson County, 634 F. Supp. 824, 836 (S.D. Ill. 1986)("[T]he Court is not convinced that *Lyons* is inapplicable to class action suits . . . ." (citing *Williams*)).

Nonetheless, a recent decision followed *Lewis*, holding that a former pretrial detainee representing a class of such detainees had a sufficient personal stake to meet Article III

VII. CONCLUSION

City of Los Angeles v. Lyons was analyzed incorrectly. The opinion's language that plaintiffs' standing for injunctive relief requires a certainty of recurrence represents an unwarranted extension of prior caselaw. Indeed, no subsequent Supreme Court decision has set forth such an unattainable standard. Thus, *Lyons* must be narrowly construed in order to reconcile it with the body of law on standing. Even when narrowly construed, however, the *Lyons* requirement of only a reasonable likelihood of recurrence extends prior law. For the first time, the Court held that a plaintiff seeking both damages and an injunction did not have standing to seek injunctive relief unless his injury would recur. Thus, *Lyons* unnecessarily limits the remedies available to those subjected to unconstitutional conduct. Concerns about recurrence are more suitably raised during consideration of the merits of an injunctive claim.

A number of courts have distinguished *Lyons*, ruling that other fact situations created justiciable controversies. This article has surveyed those decisions, and analyzed their reasoning. Many of those decisions have applied correctly the narrow, reasonable likelihood of recurrence, construction of *Lyons*. This article concludes that *Lyons* cannot be ignored or avoided, but it can be caged.

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requirements. In Robinson v. City of Chicago, 1638 F. Supp. 186 (N.D. Ill. 1986), the court held that the plaintiff's past injury, combined with the interest of the class, sufficed to create standing. *Id.* at 190-91.