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I. INTRODUCTION

Imagine the following scenario: The government enacts a statute, regulation, or policy that is facially nondiscriminatory but motivated by intent to disfavor a constitutionally protected group—that is, the facial justification for the law is a pretext for discrimination. Take, for example, laws that harshly punish marijuana possession or disparately punish crack cocaine possession and that are enacted in part because they are expected to predominantly affect nonwhite defendants. Now suppose that those laws cause collateral damage to a non-targeted person—in our example, a white defendant prosecuted for possessing marijuana or crack cocaine.[1] Collateral damage is, after all, virtually inevitable when government discrimination is achieved through generally applicable policies themselves, rather than through discriminatory enforcement of them, and when those policies do not explicitly target the disfavored group but instead hide behind pretext. Such collateral-damage-of-discrimination situations raise an important and unsettled question of who has standing to sue.

In our example, the drug law is likely unconstitutional, and it also clearly harms the white defendant. But does the white defendant have standing to seek to invalidate his prosecution on the ground that the drug law is unconstitutionally discriminatory against racial minorities? While few would dispute that the white defendant meets the minimum standard for Article III standing under federal law,[2] the question becomes far more

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1. *Infra* Part III. I will distinguish this type of "collateral" damage of discrimination from the indirect or downstream effects of discrimination (such as the effects that a discriminatory prosecution has on the defendant's family), a related but distinct phenomenon.

2. Such a defendant surely has an "injury-in-fact"—namely, his conviction—that is *at least* as tangible as other indirect injuries from discrimination that courts have assumed would suffice to satisfy the minimum constitutional standard for standing. *See, e.g.*, Rachel Bayefsky, *Constitutional*

of a quandary once one turns to so-called "prudential" standing under federal law or to states' standing doctrines that do not so sharply distinguish between constitutional and prudential standing. The temptation is to conceive of this question as a debate over "third-party standing," i.e., a litigant's standing to assert that the violation of *someone else's* rights has harmed the litigant. But, as scholars have long understood, third-party standing is far too malleable a concept to explain reliably why the white defendant in our example either should or should not be able to pursue the claim.

Without retreading ground well covered by previous scholarship or offering a new grand theory of third-party standing, this article posits a narrow thesis: when addressing a claim that a generally applicable policy was motivated by unlawful discrimination, and when the claim is made by someone other than an intended target of the discrimination, courts should look beyond the first-party/third-party distinction and instead consider the special remedial implications that accompany such collateral-damage-of-discrimination claims. Namely, can the discriminatory policies' various effects be separately remedied among classes of litigants in a manner that is not itself discriminatory? If not, then refusing to hear the "third-party" claim (brought by the party who was not an intended target of the discrimination) is unduly formalistic, pointlessly evasive, and therefore imprudent.

This article illustrates its thesis with reference to the example of *State v. Bradley*,[3] a Connecticut Supreme Court case decided in October 2021 in which a white man challenged the constitutionality of the marijuana criminalization statute under which he was convicted and which he alleged was purposely enacted by the Connecticut legislature to discriminate against Black and Latino people—a challenge that the court rejected based on a debate over third-party standing. Part II describes the *Bradley* decision. Part III then situates the court's decision in the broader scholarly debate about the scope of third-party standing and explains why the *Bradley* court's analysis misses the point. And Part IV offers suggestions for addressing cases like *Bradley*, including but not limited to additional constitutional challenges that could conceivably be brought to marijuana and crack cocaine laws around the country.

Injury and Tangibility, 59 WM. & MARY L. REV. 2285, 2328 (2018) (observing that the Supreme Court had suggested that "a shareholder would have constitutional . . . standing 'to sue a company for firing a valuable employee for racially discriminatory reasons, so long as he could show that the value of his stock decreased as a consequence'") (quoting Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 177 (2011)).

3. 266 A.3d 823 (Conn. 2021).

II. THE *STATE V. BRADLEY* DECISION AS EXEMPLARY OF THE QUANDARY

The Connecticut Supreme Court's recent decision in *State v. Bradley*[4] is a useful illustration of the quandary described above.

While serving a term of probation on a conviction for possessing marijuana with intent to sell, William Hyde Bradley was again found with marijuana in 2017 and charged with violating his probation and violating Connecticut's controlled substances statute.[5] Bradley moved to dismiss the charges, arguing that the criminalization of marijuana in Connecticut was racially motivated to discriminate against Black and Latino people in violation of state and federal equal protection guarantees and that it would violate due process to convict him under an unconstitutionally discriminatory statute.[6] The trial court held that, despite being undisputedly white, Bradley had standing to assert his claims; ultimately, though, it rejected the claims on the merits after finding insufficient evidence of a racially discriminatory motive for the statute.[7] Bradley was then convicted and sentenced to a prison term of five and a half years.[8] Connecticut's intermediate appellate court later affirmed the conviction on the alternative ground that Bradley lacked standing to bring his claims regarding racial discrimination, even if they were true, because he was white.[9]

The Connecticut Supreme Court granted review as to whether Bradley had "standing to raise a due process challenge to his prosecution under a criminal statute . . . that he claims was enacted for the purpose of discriminating against minority groups to which he does not belong."[10] It ultimately affirmed the lower court's upholding of the conviction. Before rejecting Bradley's arguments, the court recited Connecticut's two-prong standard for standing that closely resembles the well-known federal standard. First, echoing the federal "zone of interests" test for prudential standing, "the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the

4. *Id.*
5. *Id.* at 826.
6. *Id.* at 826-27.
7. *Id.* at 827.
8. *Id.*
9. State v. Bradley, 223 A.3d 62, 62 (Conn. App. Ct. 2019).
10. *Bradley*, 266 A.3d at 827.

concern of all members of the community as a whole."[11] Second, akin to the federal constitutional standard for Article III standing, the party must establish "a possibility, as distinguished from a certainty," that "this specific personal and legal interest has been specially and injuriously affected by the [challenged action]."[12]

Bradley's claim of standing, the court held, failed on the first prong because there was no "correlation between the harm to be avoided and the person subjected to the harm."[13] The court saw Bradley's only interest as the same general interest in eradicating racial discrimination that any member of the community would have.[14] In effect, the court found that Bradley had not established what federal courts would call "prudential standing."

Next, the court swept aside any possibility that an exception to the first prong's requirement—namely, the doctrine of "third-party standing," or Bradley's standing to assert that violation of a nonparty's rights harmed him—could save Bradley's claim. First, the court cast doubt on the notion that the third-party standing doctrine even applies in Connecticut court, without directly ruling out the possibility.[15] Second, it deemed the issue abandoned, stressing that Bradley did not argue a theory of "third-party standing . . . in a representational capacity on behalf of others," and therefore that standing should be analyzed only as to his "individual capacity."[16] More specifically, the court noted that Bradley had not claimed to meet the two traditional requirements for third-party standing: that he had a "close relationship" with a rights-holder (by which the court presumably was referring to a Black or Latino defendant), and that something "hind[ered]" the rights-holder's ability to protect their own interests.[17] For those reasons, the court disregarded federal case law permitting parties to claim standing based on rights belonging to others, such as *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (allowing a defendant convicted of providing contraceptives to women to assert the rights of women to access contraceptives), *Craig v. Boren*, 429 U.S. 190 (1976) (allowing a beer seller to challenge a prohibition on sales to males under

11. *Id.* at 828.

12. *Id.* The court did not describe the two prongs in "prudential" and "constitutional" terms, instead treating the two prongs jointly as a jurisdictional issue. But in substance, the first prong is akin to federal prudential standing, and the second prong akin to federal Article III standing.

13. *Id.* at 832.

14. *Id.*

15. *Id.* at 834.

16. *Id.* at 829.

17. *Id.* at 834 n.8.

age 21 on the ground that it discriminated against male buyers), and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) (allowing physicians to challenge statutes criminalizing abortion).[18]

In his dissent, Justice Ecker observed that Bradley's personal, non-generalized stake was obvious: he was convicted under the statute, unlike most members of the community.[19] As for the "harm to be avoided," Justice Ecker endorsed the view that the law should avoid the harm of convicting *anyone* under an unconstitutional scheme,[20] a view finding support in cases such as *Bond v. United States*, 564 U.S. 211 (2011) (allowing an individual criminal defendant to challenge a conviction as a violation of the Tenth Amendment's reservation of powers to states) and *Campbell v. Louisiana*, 523 U.S. 392, 400 (1998) (allowing a white criminal defendant to challenge the discriminatory selection of grand jurors under a due process theory). Further, Justice Ecker pointed to scholarship explaining why Bradley's supposed failure to raise a "third-party" rights claim was merely a question of framing: a "first-party" right not to be convicted under a statute that violates anyone's constitutional rights can readily be reframed as a third-party assertion of others' constitutional rights.[21] And such third-party assertions have often been permitted, at least in some contexts.

III. DIGGING BENEATH *BRADLEY*'S SURFACE

The disagreement between the court majority and Justice Ecker mirrors a longstanding debate among judges and scholars about the parameters of third-party standing—a debate that reveals why the *Bradley* majority's reasoning is doubly unsatisfying: (a) it is unduly formalistic, and (b) it pointlessly evades the underlying constitutional question.

A.

First, the lynchpin of the *Bradley* majority's opinion—that Bradley abandoned the right to assert a third-party standing theory—is unduly formalistic, in that it faults Bradley for not invoking a doctrinal framework that itself fails to capture how courts have approached cases akin to his. As Justice Ecker rightly noted, scholars have identified multiple explanations for precedents that appear to allow "third-party" standing,

18. *Id.* at 833-34.
19. *Id.* at 835 (Ecker, J., dissenting).
20. *Id.* at 836 (Ecker, J., dissenting).
21. *Id.* at 836 n.2 (Ecker, J., dissenting).

none of which is perfectly explanatory and many of which often blur together. The traditional theory, which the *Bradley* court faulted Bradley for not raising, is that courts allow a party to assert a nonparty's rights only when some obstacle impairs the nonparty's ability to assert their own rights.[22] But that explanation is underinclusive and impossible to square with the actual *results* of many precedents; departures from it are numerous, such as permitting suits by vendors of goods and services who assert violations of their customers', employees', or tenants' rights.[23]

A more expansive explanation—and the one that Bradley invoked—is the "valid rule requirement," i.e., that courts can permit seeming third-party standing to vindicate the "first-party" right that all people have to not be subject to sanction under an unlawful policy.[24] That explanation, though, is overinclusive in its reach; in many areas of law, the courts have refused to recognize such a broad, universally held right.[25] Still more explanations have been offered: that third-party standing is simply a question of legislative intent, i.e., whether the enacting legislature intended the particular right at issue to be enforceable by *any* party harmed by its infringement or instead only a smaller set of direct rights-holders;[26] or that third-party standing is usually denied when it would result in "spillover" effects and transform litigation into a "forum for far-reaching

22. Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1359–60 (2000); Curtis A. Bradley & Ernest A. Young, *Unpacking Third-Party Standing*, 131 YALE L.J. 1, 58–60 (2021).

23. *See, e.g.*, Oti Kaga, Inc. v. S.D. Hous. Dev. Auth., 342 F.3d 871, 881–82 (8th Cir. 2003) (holding that a housing developer had standing to bring Fair Housing Act discrimination claim on behalf of prospective tenants against state funding program); Hang On, Inc. v. City of Arlington, 65 F.3d 1248, 1252 (5th Cir. 1995) ("Ordinarily, a business like Hang On may properly assert its employees' or customers' First Amendment rights where the violation of those rights adversely affects the financial interests or patronage of the business."); Hudson Valley Freedom Theater, Inc. v. Heimbach, 671 F.2d 702, 706 (2d Cir. 1982) (holding that a theater production organization had standing to sue on the theory that its funding was denied due to racial discrimination against the audiences it aimed to reach); Gajon Bar & Grill, Inc. v. Kelly, 508 F.2d 1317, 1322 & n.9 (2d Cir. 1974) ("Gajon did have standing to defend the First Amendment rights of its employees and patrons because of the adverse economic effect which it suffers as a result of the ban on topless dancing."); Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208, 1212–14 (8th Cir. 1972) ("We believe that [project developers] have standing to question whether the purpose and effect of the ordinance is to exclude low and moderate income individuals from the [city] in violation of the Thirteenth and Fourteenth Amendments to the United States Constitution."); *see also* Bradley & Young, *supra* note 22, at 3; Brian Charles Lea, *The Merits of Third-Party Standing*, 24 WM. & MARY BILL RTS. J. 277, 278–79 (2015).

24. Fallon, *supra* note 22, at 1359–60; Lea, *supra* note 23, at 336.

25. *See, e.g.*, Leonhard v. United States, 633 F.2d 599, 618 (2d Cir. 1980) ("Even assuming that Leonhard had a constitutionally protected interest in visiting his children, a question we have not reached because Leonhard's claims are time-barred, the children do not have standing to complain of abridgement of Leonhard's rights."); *see also* Bradley & Young, *supra* note 22, at 5–6.

26. Lea, *supra* note 23, at 281–82.

and complex policy change";[27] or that third-party standing is usually denied when the party at bar has a substantially lesser stake in the outcome than nonparties do.[28]

The multiplicity of plausible doctrinal explanations for courts' decisions, together with the courts' own failure to consistently apply the standard that they purport to have adopted, have led to a "muddle"[29] and made it "increasingly bootless to seek general rules governing standing."[30] In that context, it is unduly formalistic to fault a litigant, as the *Bradley* court did, for failing to couch a claim in the traditional terminology. Arguing that "I have the right not to be punished under a statute that discriminates against others" is not meaningfully different from arguing that "I should not be punished under a statute because it discriminates against others and I can assert their rights," especially when courts have not clearly and consistently required one framing over the other.

B.

Second, and more fundamentally, the court's debate over third-party standing is unsatisfying because it pointlessly evades the underlying constitutional question. I say "pointlessly" because, unlike some third-party standing scenarios, a collateral-damage-of-discrimination situation like Bradley's does not actually permit the compromise position that standing doctrine purports to provide and that the Connecticut Supreme Court likely found appealing—at least, it does not permit the compromise position in the long term.

Rejecting a claim on standing grounds is often an attractive middle path: the court need not reject the underlying claim; it is instead holding merely that *this claimant* is not entitled to benefit from the underlying claim, whether or not the claim has merit. In many instances, the middle path is real because the possibility remains that, in a future case with a proper claimant, the court can offer remedies tailored to *that claimant*. In that way, as scholars have long recognized, debates over standing are closely linked to debates over the appropriateness of "facial" (as opposed to "as-applied") challenges[31] and whether lawful applications of a law can

27. Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1468 (2013).
28. Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1195–97 (2014).
29. Lea, *supra* note 23, at 278, 291–92.
30. Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1063 (2015).
31. Fallon, *supra* note 22, at 1326–27.

be "severed" from unlawful ones.[32] That is, when the underlying substantive law permits courts to sever a lawful application of the law to the present litigant from the potential unlawful applications of the law to different litigants, the court can take an as-applied approach and prevent the present litigant from challenging the unlawful applications, instead leaving such a challenge for a different, proper litigant to bring.

But in a collateral-damage-of-discrimination situation, the middle path can be illusory. Ultimately, a court will have to grant Bradley the remedy he sought unless his constitutional claim either (a) is tested on the merits and fails or (b) is so weak that no Black or Latino defendant ever attempts to test it. To see why, imagine that, as the *Bradley* court would seem to prefer, the constitutional challenge to Connecticut's marijuana statute came instead from a Black defendant convicted under it. In that event, either the claim will fail on the merits (meaning that no defendant is entitled to remedy) or succeed on the merits. And if the claim succeeds, the court could not provide as-applied remedies tailored only to Black defendants or only to minority defendants, because to do so would create a more flagrant form of unconstitutional discrimination: a marijuana criminalization statute that applies only to white or only to non-Black citizens. The only option would be to invalidate the statute entirely, at which point Black and non-Black defendants alike could move to dismiss ongoing prosecutions under the statute or vacate their convictions—the very same outcome that Bradley sought in his standalone suit.[33] That is, the nature of the legal question presented permits *only* a facial analysis. Thus, barring Bradley from asserting the constitutional challenge was both an arbitrary result of the happenstance that no Black or Latino defendant had yet challenged the statute and, moreover, a mere delay of the near-inevitable need to confront the challenge on its merits.

That is not to say, however, that all victims of the *indirect or downstream* effects of discrimination should have standing to sue. In many instances, the recipient of the indirect or downstream effects of discrimination is differently situated from the intended target of the discrimination without regard to the protected characteristic, making it possible for a court to non-discriminatorily grant relief to only the intended target. Depending on the values at stake and *how* indirect the harm seems,

32. Marc Rohr, *Fighting for the Rights of Others: The Troubled Law of Third-Party Standing and Mootness in the Federal Courts*, 35 U. MIA.L. REV. 393, 403–04 (1981).

33. The same is not true when a policy *explicitly* discriminates on the basis of an unlawful classification; the remedy in that situation can be simply to remove the classification and thereby transform the policy into one of general applicability.

the court might or might not extend standing to the recipient of the indirect or downstream effects. For example, a taxpayer lacks standing to sue on the theory that taxes in their city will increase as a result of the discriminatory zoning practices of a neighboring city.[34] In contrast, litigants can challenge racial discrimination in jury selection, even though the discrimination is directed at the jury pool and affects the litigant only indirectly in the form of potentially changed outcomes.[35] No doubt, part of what makes courts leery of claims like the taxpayers' is the intuitive sense that antidiscrimination law is not meant to bestow windfalls on people who were not themselves targets of discrimination; that sentiment is certainly understandable both generally and in the specific context of criminal defendants like Bradley.

What renders cases like *Bradley* unusual and creates the quandary, however, is that the protected classification *itself* (here, Bradley's race) is the supposed rationale to deem the litigant too remote from the discrimination to have standing. The damage is "collateral" in that narrow sense, as distinguished from the broader range of indirect and downstream effects of discrimination. In such scenarios, as-applied remedies are themselves problematic, and thus demanding a showing of prudential standing is a pointless effort to avoid the necessary decision whether to invalidate the law in its entirety, as to all persons.

IV. THE QUANDARY'S POTENTIAL MANIFESTATIONS ELSEWHERE

The prudential standing quandary facing the *Bradley* court is not unique. Connecticut is not, of course, the only state with drug laws that are at least arguably tainted by racialized, gender-based, or otherwise unlawful motives for their enactment. Nor are drug laws the only form of generally applicable, facially neutral laws that might well have been intended to target marginalized groups but nonetheless inflict collateral damage on non-targeted groups: voting restrictions,[36] housing policies, transportation policies, and safety net programs, to name a few. In addition, private actors, such as employers, might likewise adopt generally applicable policies that are motivated by discrimination against a particular group but

34. Warth v. Seldin, 422 U.S. 490, 508–10 (1975).

35. Powers v. Ohio, 499 U.S. 400, 410–16 (1991).

36. *See, e.g.*, Richard Luedeman, *Voting as a Genuinely Religious Act in a World of Free Exercise Maximalism*, 55 U.C. DAVIS L. REV. ONLINE 1, 16 (2021) ("[O]ne could imagine, for example, a claim that practices such as Souls to the Polls have been impermissibly 'targeted' by state legislators who have at some point criticized the role that Black churches play in elections.").

that still inflict collateral damage outside that group.[37] Courts nationwide would therefore do well to keep in mind the special considerations that attend arguments over litigants' standing to challenge such laws and policies.

First, courts should not take the easy way out—finely parsing whether issues have been properly raised, thereby elevating form over substance—given the tangled doctrinal mess that we call "third-party standing." Terminology in this area is debated, fluid, and inconsistent, so the question should be simply whether a litigant has fairly raised the issue of the constitutionality of a policy being enforced against them.

Second and more particular to this corner of the law, courts should keep in mind the longer-term remedial implications of deeming the litigants before them to be too remote from the harm. Is there a scenario in which someone *closer* to the harm would ultimately be entitled to remedy but the present litigant would not be? If not, it is pointlessly evasive, and an imprudent invocation of standing doctrine, to deny consideration of the merits of the present litigant's claim.

37. For a discussion of the possibility of such scenarios and the standing-based obstacles they face, see Kerri Lynn Stone, Ricci *Glitch? The Unexpected Appearance of Transferred Intent in Title VII*, 55 LOY. L. REV. 751, 783 (2009), and Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 176–77 (2011) ("If any person injured in the Article III sense by a Title VII violation could sue, absurd consequences would follow. For example, a shareholder would be able to sue a company for firing a valuable employee for racially discriminatory reasons, so long as he could show that the value of his stock decreased as a consequence. At oral argument Thompson acknowledged that such a suit would not lie. We agree . . . ." (citation omitted)).