This issue of the *Journal of Law & Policy* introduces a new feature: articles that deal with scientific issues that confront judges when they handle litigation in the twenty-first century. These articles are a felicitous outgrowth of a grant from the Common Benefit Trust established in the Silicone Breast Implant Products Liability Litigation to hold a series of conferences at Brooklyn Law School for federal and state judges to discuss complex questions that arise at the intersection of science and the law. The programs, under the auspices of Brooklyn Law School’s Center for Health Law and Policy, are being presented in collaboration with the Federal Judicial Center, the National Center of State Courts, and the Panel on Science, Law and Technology of the National Academy of Sciences. The pieces that follow are expanded and edited versions of papers that were originally presented by Drs. Eaton and Weed at the first Science for Judges program in March 2003.

The explosive growth of science and technology in our society has been mirrored by the increasing number of scientific and technological issues that arise in litigation. Particularly troublesome for the courts have been the difficult determinations about causation that arise in toxic tort cases when plaintiffs claim that exposure to a defendant’s product caused their injuries or disease. These are cases in which a great deal is at stake beyond compensation for the claimants and others adversely affected, even though the amounts claimed as damages may be enormous. An erroneous decision for the defendant may leave a dangerous product on the market and may persuade other corporations that

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they risk little by not taking more stringent precautionary measures to protect the public. On the other hand, litigation may result in a valuable product being taken off the market, serious, perhaps fatal, financial harm to a defendant, congestion in the courts, and immense transaction costs.

The crucial issue in these cases is almost always causation, proof of which must be provided by expert witnesses. Given the huge stakes in toxic tort cases, as well as escalating complaints about courts admitting “junk science,” it is probably not surprising that the use of expert testimony to prove causation captured the Supreme Court’s attention. In the past decade, the Supreme Court has issued a trilogy of opinions dealing with the admissibility of expert proof. The first two cases, *Daubert v. Merrill Dow Pharmaceuticals, Inc.* (1993) and *General Electric v. Joiner* (1997), were toxic tort cases. In *Daubert*, the plaintiffs claimed that Benedectin, a drug used to control morning sickness in pregnant women, caused birth defects in their children. In *Joiner*, the plaintiff alleged that exposure to PCBs promoted his lung cancer. The third case, *Kumho Tire Co. v. Carmichael* (1999), although not a toxic tort case, was a product liability action in which proof of causation was central; the plaintiff’s expert claimed that the rollover of a minivan, resulting in serious injuries and death, was caused by a defective tire.

The trilogy imposed new obligations on the federal trial judge with regard to expert testimony. It anointed the judge as the “gatekeeper” who must screen all proffered expert testimony for relevancy and reliability before allowing it to be heard by a jury. Consequently, in a case that turns on science, if the court finds that a party’s scientific proof is not reliable—that is, not scientifically valid—the expert seeking to offer an opinion based on such

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1 This phrase, which was given currency by Peter Huber’s book, *Galileo’s Revenge: Junk Science in the Courtroom* (1991), was hardly the first attack on expert witnesses. Learned Hand was fulminating about venal experts at the turn of the last century. See Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. L. Rev. 40 (1901).


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evidence will not be allowed to testify. Because causation is a necessary element of a plaintiff’s toxic tort case, exclusion of the plaintiff’s expert on causation will result in summary judgment for the defendant. The trilogy also established that when an appellate court reviews a trial judge’s ruling on admitting expert proof, it must use an abuse of discretion standard, deferring to the ruling of the lower court unless it is manifestly erroneous.

Obviously, the Supreme Court trilogy has given enormous power and responsibility to the federal district courts in making them the gatekeepers who often have the final say on the admissibility of all expert testimony. And the trilogy has had an impact on state trial judges as well. By now, a majority of the states have opted to adopt some version of the federal approach, and even in states that have not formally adopted the trilogy, judges appear to be subjecting expert testimony to greater scrutiny. It is the difficulties that judges now face in having to identify sound science that led to the establishment of the Science for Judges Program.

In toxic tort cases, the judicial screening burden is particularly onerous. Few judges come from educational backgrounds which provide them with the scientific and statistical training needed to understand and evaluate the validity of the epidemiological, toxicological, and clinical proof they are likely to encounter. Furthermore, the etiology of many diseases is as yet unknown. We are only on the threshold of unraveling genetic information and understanding how interactions between genetic and environmental factors can lead to adverse health effects. As a result, the judge ruling on the admissibility of expert proof may be hampered not only by his or her lack of scientific expertise, but also by the scientific uncertainty surrounding the question on which an expert seeks to testify and consequent disagreements among scientists and scientific disciplines.

Because toxic tort cases have played such an important role in focusing judicial attention on scientific proof in the courtroom, and because these cases raise issues of grave societal concern, it seemed only fitting to devote the first Science for Judges program to an overview of issues that bear on proving causation in toxic tort cases. Dr. Eaton’s paper examines what can be known through the
application of basic toxicological principles. Dr. Weed surveys and critiques epidemiologists’ methodology in drawing causal inferences.

Subsequent issues of the *Journal of Law & Policy* will publish other papers that were presented at Science for Judges programs. It is hoped that these articles will assist not only the participants who attend these programs but also a broader constituency of the legal community that reads these pages.
SCIENTIFIC JUDGMENT AND TOXIC TORTS—A PRIMER IN TOXICOLOGY FOR JUDGES AND LAWYERS

David L. Eaton, Ph.D., DABT, FATS*

I. GENES, ENVIRONMENT AND DISEASE

Remarkable progress has been made in the past decade in understanding the molecular basis of many chronic diseases such as cancer, degenerative neurological diseases (Alzheimer’s, Parkinson’s), heart disease, and asthma. Although the molecular basis for such diseases has become more apparent, the exact “cause” is seldom identified for a disease in general, and especially for a disease in an individual. It is now recognized, however, that most such chronic diseases result from a complex interplay between our genes and our environment. While our parents predetermine our genes, our environment is somewhat controllable, and thus identifying “environmental risk factors” for chronic diseases holds great promise for disease prevention. It should be noted that “environment” in this context represents virtually everything in the world around us that is not “in our genes.” Thus environmental factors include lifestyle choices such as smoking, drug use and alcohol consumption, exposure to infectious agents (viruses, bacteria), as well as diet and nutrition, environmental pollution (air, water), and even behavioral and social factors such as exercise, reproductive choices, sexual activity, etc.

There is currently great scientific effort committed to

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identifying specific genetic characteristics (so-called “genetic polymorphisms”) that make one individual more susceptible to something in the environment than another. This area of research is sometimes referred to as “ecogenetics,” or the study of “gene-environment interactions.” There are many classic examples of genetic characteristics that make an individual sensitive to something in his environment. For example, the rare genetic disease, phenylketonuria (PKU), makes individuals with this genetic trait very sensitive to a normal component of our diet—phenylalanine. Phenylalanine is a normal building block of proteins, and in most people is an important nutrient in the diet. For a small part of the population with a mutation in the PKU gene, however, regular “doses” of phenylalanine found in the normal diet can lead to serious mental retardation if infants are exposed to phenylalanine. Because of this, genetic testing for PKU is mandatory in most states in the United States and is part of normal newborn screening. Those rare individuals who test positive for PKU can lead normal lives by following special diets and avoiding foods rich in phenylalanine.

Another common example of a “gene-environment” interaction occurs in many people of Asian descent who carry a genetic variant of a gene involved in alcohol metabolism. Normally, alcohol is fairly rapidly detoxified in the liver. But individuals with a variant form of the gene for an enzyme called “aldehyde dehydrogenase” (ALDH2) are less able to eliminate a toxic by-product of alcohol metabolism, acetaldehyde. If a person with the variant ALDH2 gene consumes even modest amounts of alcohol, toxic amounts of acetaldehyde can accumulate in the blood, causing a very uncomfortable reaction (“flushing” of the skin from vasodilatation, nausea, headache). Not surprisingly, alcoholism and alcohol-related diseases such as cirrhosis of the liver occur very

infrequently in people with this genetic trait.

There is currently a great deal of interest in identifying common genetic traits that might combine with factors in our environment to cause disease. It is hoped that, one day, physicians will be able to characterize, or “genotype,” the entire genetic code of a person, and based on the results (kept on a personal microchip medical card), identify whether the patient is at increased risk for certain diseases and potentially identify specific dietary, workplace, or other environmental factors that should be avoided to lower risk. While we are still a decade or more away from having scientifically validated tests for “environmental susceptibility” to most environmental/occupational hazards, similar approaches for identifying how individuals respond to therapeutic drugs is just around the corner (the field of “Pharmacogenomics”). Indeed, there are now several relatively widespread genetic tests that can identify in advance patients who are likely to have adverse reactions to otherwise “normal” therapeutic doses of specific drugs. The concept of “designer drugs” is becoming a reality, but so far in a limited way. For example, there is a common genetic variant in a gene called “N-acetyl transferase.” This gene is involved in the detoxification of a variety of therapeutic drugs, and people with the “slow” genetic variant exhibit increased toxicity (but also enhanced therapeutic effects at lower doses) to a variety of common drugs. Knowing this predisposition in advance allows physicians to prescribe the proper dose.

How will such genetic information be used in the courtroom? In the realm of genetic testing for drug sensitivity, there will be medical malpractice claims filed against physicians who fail to order genetic tests before prescribing certain drugs, once such procedures become the standard of care. Drug companies will

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attempt to increase drug safety and limit liability by identifying in advance drugs that may elicit adverse responses in small segments of the population because of genetic sensitivity. In the environmental and occupational arena, employers might use genetic tests as a way of identifying and removing “sensitive” individuals from certain workplace exposures. While such practice might conceivably lower the occurrence of chemical-induced occupational diseases, it is obviously also a means of employment discrimination. It is also likely that plaintiff and defense attorneys will utilize genetic susceptibility as an argument for, or against, causation in toxic tort cases. Currently, however, the scientific data supporting the use of genetic susceptibility information in toxic tort litigation is extremely limited. In the vast majority of circumstances, specific and measurable genetic “susceptibility markers” often do little more than shift a person “up” or “down” the dose-response curve. Such differences tend to be modest (less than a two-fold difference in susceptibility), and the impact of the genetic trait is often lost in the “noisy background” of poor exposure assessment. That is, if one can only “guess” the dose, duration, and frequency of exposure to a specific chemical within a factor of 5 or 10 (not uncommon in toxic tort cases), a genetic factor that theoretically doubles or halves the risk from a given dose will not be particularly informative against the high level of uncertainty of the actual “exposure.” Thus, although genetic information will increasingly find its way into toxic tort

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litigation, the fundamental concepts of toxicology and epidemiology continue to serve as the foundation for establishing causation in toxic tort claims. The following information is provided as a “primer” in basic toxicology, as it relates to toxic tort litigation. For a more detailed discussion of considerations of how the science of toxicology and epidemiology should be used in the courtroom, the reader is referred to the Federal Judicial Center’s Reference Manual on Scientific Evidence. This publication includes chapters devoted to toxicology and epidemiology, as well as medical testimony and use of DNA in the courtroom.

II. BASIC TOXICOLOGY RELEVANT TO TOXIC TORT LITIGATION

Toxic substances may take many forms, including both human-made (synthetic) and natural chemicals. Although the adverse effects of physical agents such as ionizing radiation fall under the broad rubric of toxicology, this discussion will focus on chemical agents. There are many “sub-disciplines” within the field of toxicology, and a variety of approaches and techniques are used to evaluate the toxicological characteristics of chemicals. A detailed review of the basic principles of toxicology is beyond the scope of this article. The following brief review highlights some of the key principles of toxicology that must be considered in any attempt to establish whether a chemical exposure was causally related to a specific adverse effect or disease in an individual.

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8 Mark Parascandola & Douglas L. Weed, Causation in Epidemiology, 55 J. EPIDEMIOLOGY COMMUNITY HEALTH 905, 905-12 (2001); see Marchant, supra note 6.
9 FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (2d ed. 2000).
10 A number of fundamental textbooks are available that review the principles of toxicology in depth. See J. MARK ELWOOD, CAUSAL RELATIONSHIPS IN MEDICINE (1988); ALFRED S. EVANS, CAUSATION AND DISEASE (1993); KENNETH J. ROTHMAN, CAUSAL INFERENCE (1988); MERVYN W. SUSSER, CAUSAL THINKING IN THE HEALTH SCIENCES (1973).
A. Types of Adverse Effects Produced by Chemicals

Virtually all substances are capable of inducing some form of toxic effect, and the type and nature of effects will vary depending on the

- dose (amount of substance that finds its way into the body)
- route (i.e., oral, inhalation, skin; injection)
- duration (days, weeks, months, years) and
- frequency (how many times per day, week, month, year)

of exposure.

A given chemical does not cause every possible effect, and the ability of a chemical to cause a particular effect depends upon a variety of factors, as discussed below. Typically, a specific chemical elicits a characteristic pattern of toxic (adverse) effects, although the appearance of specific effects will depend on the dose and other characteristics of exposure. Sometimes chemicals of a common type cause a generalized adverse response. For example, nearly all organic solvents derived from petroleum products (including mixtures such as gasoline or kerosene, or individual solvents such as benzene, hexane, or toluene) share some (but not all) symptoms in common: “defatting” of the skin following dermal exposure, and central nervous system depression (inebriation, loss of consciousness) following relatively high levels of inhalation exposure. However, even though different chemicals of the same general type (e.g., solvents) may have some common effects, they may also differ dramatically in other effects. For example, the industrial solvents benzene and toluene are very similar chemically, and share many common toxic effects noted above for solvents, but benzene is toxic to the bone marrow and can increase the risk of leukemia in workers, whereas these serious toxic effects have not been found for toluene. Thus, some chemicals act in very specific ways at the cellular level, and their effects may be largely limited to a characteristic type of response. As an example, the widely-used class of insecticides known as “organophosphates” inhibit a specific enzyme in the nervous system (acetylcholinesterase), and most of the signs and symptoms of toxicity can be attributed to this one mode of action. However, even small differences in chemical structure can sometimes make
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very large differences in the type of toxic response that is produced. This is especially true for chemicals that cause birth defects (teratogens) or chemicals that increase the risk of cancer (carcinogens).

B. Concepts of Dose and Exposure

“Dose” refers to the amount of chemical that enters the body. The units of dose are typically expressed as an amount of substance per kg of body weight (mg/kg bw). Thus, if a 132 lb woman (60 kg) absorbed 60 milligrams of a chemical in a glass of contaminated water, she would have a dose of 1 mg/kg bw. Dose is the single most important factor to consider in evaluating whether an alleged exposure caused a specific adverse effect. Indeed, the basic dictum of toxicology was stated by the Sixteenth Century Physician/Philosopher, Paracelsus, considered the “father of toxicology”: “All substances are poisonous—there is none which is not; the dose differentiates a poison from a remedy.”11

1. Relationship between “Exposure Concentration” and “Dose”

Dose and “exposure” in terms of media (e.g., air, water, soil) concentration are related, but not identical, terms. Exposure may be referred to as the presence of a chemical in a medium (e.g., air, water, food) that allows for direct contact with potential sites of absorption (e.g., gastrointestinal tract, lungs, skin). The units of such exposure are usually expressed as concentrations—e.g., milligrams of chemical per liter of water (mg/L), milligrams of chemical per cubic meter of air (mg/m³), milligrams of chemical per kilogram of food (mg/kg). Frequently, such concentrations are expressed as “parts per million” (ppm) or “parts per billion” (ppb). For chemicals dissolved in water, 1 part per million is the same as 1 milligram of chemical dissolved in 1 liter of water. One part per billion (1 ppb) is a thousand times less—1 milligram dissolved in a thousand liters of water, or 1 microgram of chemical dissolved in 1

liter of water. A part per trillion (ppt), is 1,000 times less than a part per billion. To provide some perspective on these units, consider the following:

- 1 ppm = 1 penny in $10,000, or 1 inch in the distance of 15.8 miles
- 1 ppb = 1 penny in $10 million, or 1 inch in 15,800 miles
- 1 ppt = 1 nickel of Bill Gates net worth (assuming $50 billion), or 6 inches in the distance between the earth and the sun.

Analytical tools developed in the past several decades make it possible to measure substances in water, food, soil or air at the ppt and even parts per quadrillion (ppqd; 1,000 times less than a ppt). It is evident from these simple analogies that, when discussing exposure to chemicals in drinking water, air, or soil, it is critically important that the relationship between exposure, as expressed as a concentration of a pollutant in a medium (measured in ppm, ppb, ppt or even ppqd) and the actual dose to a person not be lost. The science of toxicology can help understand whether the dose of a substance achieved following a particular exposure has any relationship to toxicity or disease.

2. Frequency and Duration of Exposure

Frequency and duration of exposure are important elements of “dose.” Effects caused by chemicals may differ depending on whether exposure was short-term (e.g., acute, single dose or a few days) or long-term (chronic, repeated over years). The dose of a chemical required to produce health effects also differs with frequency and duration of exposure. When exposure occurs repeatedly over weeks, months, or years, the dose is usually expressed as a dose rate, with units of mg of chemical per kg of body weight per day. The dose necessary to produce deleterious effects with short-term exposure is higher than the dose that produces toxic effects when repeated over a long time period. The body can usually tolerate or recover from high doses with brief short-term exposure as compared to long-term repeated exposure. For example, one night of moderate drinking may give you no more than a headache the next day, but heavy drinking frequently
for years could lead to liver cirrhosis and possibly liver cancer. However, it is also possible that repeated, low dose exposures—even for many years—will have no consequence at all, since the body is often able to completely detoxify low doses before they do any damage. This concept of “thresholds” will be discussed in more detail later.

Most chemicals that have been identified to have “cancer-causing” potential (carcinogens) do so only following long-term, repeated exposure for many years. Single exposures or even repeated exposures for relatively short periods of time (e.g., weeks or months) generally have little effect on the risk of cancer, unless the exposure was remarkably high and associated with other toxic effects. Relatively infrequent exposure may also have negligible health consequences even if continued over time because of recovery between doses.

3. Pathways and Routes of Exposure

“Pathways” are the means by which an environmental chemical may reach an “exposed” person. Chemicals can enter the body by four fundamental “routes”: (1) via oral exposure (e.g., ingestion of the toxic substance directly, or in food or drinking water), (2) via inhalation (e.g., breathing air or inhaling dust contaminated with the toxic substance), (3) via direct contact with the skin (e.g., spilling of a pesticide mixture on the skin), or (4) by direct injection into the body (e.g., introduction of a drug by intravenous injection). The “bioavailability”—or ability of the chemical to be taken into the blood stream—differs by route of entry. Most drugs and toxic chemicals will be well absorbed from the gut when ingested in a soluble form versus in other media such as soil. Many chemicals, however, are only slightly absorbed, if at all, if applied to the skin. However, fat-soluble chemicals in high concentration may be well absorbed across the skin, and this can lead to an important pathway of exposure for those using concentrated solutions in the workplace. The extent of inhalation absorption of chemical vapor will depend on a variety of factors, including the relative solubility of the chemical in blood versus air, the rate of breathing, and even whether one breathes through the nose or
mouth.

4. Site of Action in the Body

Ultimately, what matters is the actual concentration of a toxic substance at the “site of action” in the body. The concentration of a chemical in any given organ/tissue in the body is determined by complex interactions between the rates of exposure, and rates of absorption, distribution, metabolism, and excretion. Because chemicals differ in their solubility in body fluids/tissues, in how they are metabolized, and in what cellular processes are altered, toxic effects of a chemical may be limited to specific tissues or organs, referred to as its “target tissue.” For example, lead and mercury typically produce toxic effects associated with the brain and kidneys, whereas certain chlorinated solvents such as chloroform and carbon tetrachloride affect predominantly the liver (although in high doses they also affect the brain).

Many factors determine whether a chemical will be toxic to a particular organ. Some organs metabolize (biotransform) chemicals to toxic intermediates, leading to toxicity in that organ. In such instances, the relative ability of an organ or tissue to metabolize the chemical may determine whether the toxic effect is seen in that tissue. Certain tissues may also accumulate a chemical from the bloodstream at higher rates than other tissues, leading to toxicity in just that tissue. This is particularly true for tissue with a function (e.g., liver), but not necessarily for storage tissue, i.e., fat, which accumulates fat-soluble chemicals such as DDT, but is not directly injured. Metabolic pathways and the amount and type of toxic by-products produced or accumulated may also differ depending on the amount of chemical in the bloodstream (which, of course, is directly related to dose). For example, metabolic pathways at low doses that result in chemical detoxification may be overwhelmed at high doses leading to accumulation of toxic intermediates or production of greater amounts of toxic by-products by alternative pathways.
5. **Dose-response Relationship**

As noted above, the relationship between dose and effect (dose-response relationship) is the hallmark of basic toxicology. The “dose-response” in a given individual describes the relationship between the magnitude or severity of the effect(s) and the dose. In many instances, especially for acute toxicity, the slope of the dose-response curve is quite steep. That is, once a sufficient dose has been achieved to induce a toxic response, further increases in the dose may produce large increases in the response. In the individual, the nature of the response may change with increasing dose. For example, ingestion of one or two glasses of wine will result in an apparent “stimulatory” effect on the nervous system, often expressed as slight changes in personality or character. Further consumption of alcohol will lead to loss of coordination and reaction time, slurred speech, etc. Continued consumption of alcohol beyond this level of intoxication may result in loss of consciousness and even death.

Although individuals within a population may respond differently to the same dose of chemical, the reaction of the population as a whole nevertheless follows a “dose-response relationship” such that the number of people in a population that respond to a chemical exposure increases with dose. Inherent in this concept is that, for the vast majority of chemicals and types of responses, there are doses below which no individual will respond (e.g., a “threshold”) and doses above which nearly everyone responds. For example, no one would exhibit any detectable adverse effect of a few drops of wine or beer (e.g., the dose is below the threshold), yet most everyone in a population would show signs of intoxication after ingestion of an entire bottle of wine (over a relatively short period of time). In between these two extremes, there are clearly differences in the level of intoxication between individuals consuming one, two, three, or four glasses of wine. In a similar fashion, there is inherent human variability in response to chronic exposures to chemicals. Dose-response relationships in populations also exist for both acute and chronic exposures to toxic substances.
6. Concept of “Thresholds”

For most types of dose-response relationships following chronic (repeated) exposure, thresholds exist, such that there is some dose below which even repeated, long term exposure would not cause an effect in any individual. Most toxicological responses, including neurological, reproductive, and developmental effects, exhibit thresholds (e.g., there is a dose below which the probability of an individual responding is essentially zero). One key objective in toxicology is to identify doses for a population below which no one will respond. However, in the case of chemical carcinogens, particularly those that increase risk of cancer by causing direct damage to DNA in cells, many regulatory agencies assume that there are no “thresholds,” and that risk is proportionate to dose at all levels of exposure—e.g., as the dose of carcinogen increases, the probability of developing cancer increases in a proportionate, “linear” fashion.

Nonetheless, many scientific and practical reasons indicate that, at very low doses, the significance of such risks, if real, become trivial and are lost in the background of other daily risks. For example, it is well known that cigarette smoking is strongly associated with increased risk for lung and bladder cancer (and other types), and that the probability of developing such smoking-related cancers is related to both the amount (cigarettes per day) and the frequency (years of smoking) of smoking over a lifetime. It is also recognized that the carcinogenic properties of cigarette smoke are strongly related to the ability of components of cigarette smoke to damage DNA (cause mutations), and thus it might be assumed that the dose-response relationship for smoking would be a “non-threshold” (linear at low doses) response. However, while a linear, non-threshold response to cigarette smoke may be hypothesized on theoretical grounds, from a practical

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perspective one’s level of increased risk from smoking one cigarette over a lifetime, or even one cigarette a month for a lifetime, is not likely to be distinguishable from “background” risk for cancer from all other causes, known and unknown.

Not all chemical carcinogens increase cancer risk by causing mutation. For such “non-genotoxic” carcinogens, it is generally thought that the dose-response relationship follows a typical threshold-type response. Thus, it is often important to distinguish between “genotoxic” (particularly those that act directly on DNA to cause mutations) and “non-genotoxic” carcinogens for regulatory and risk assessment purposes. Practical thresholds may also exist for “genotoxic” carcinogens that damage DNA by indirect mechanisms (e.g., production of sufficient “reactive oxygen species” to cause oxidative damage, or sufficient inhibition of DNA repair mechanisms), because a sufficient amount of the chemical is needed before enough damage to the DNA occurs to lead to cancerous cells.

C. Chemical Exposures and Chronic Diseases

Traditional toxicology tests in laboratory animals are designed to identify toxic responses following various periods of exposure.\(^{14}\) Acute toxicity studies examine the toxic effects after single, high doses and are useful to understand the specific organ systems affected by the chemical, as well as the general “potency” of its effect (e.g., does it require microgram, milligram, or gram quantities to produce evidence of toxicity?). Additional “sub-chronic” (usually ninety days of daily exposure) and “chronic” (usually lifetime, or two years of continuous daily exposure) studies are often done to further examine whether the chemical is capable of causing other types of toxic effects following repeated exposures. Such studies may demonstrate that repeated exposure to a chemical could cause liver or kidney or brain damage, for example. Special “3-generation” studies may be done in animals to determine if the chemical can cause reproductive effects and/or

\(^{14}\) CASARETT AND DOULL’S TOXICOLOGY: THE BASIC SCIENCE OF POISONS, supra note 11, at chs. 2, 11-34.
birth defects. Today, new chemicals entering commerce, such as a new pesticide, may be subjected to specialized tests to determine if it can cause neurological effects on learning and behavior, or cause toxicity to the immune system. Each of these toxicological end-points can be the subject of toxic tort litigation. However, regardless of the end-point, the basic concept of “dose-response” remains essential in evaluating a causal connection between an alleged exposure and a particular disease. As noted above, for non-cancer end points, it is generally accepted that “thresholds” exist, and that doses below the threshold represent no risk. However, determining the “true” threshold for humans is difficult, if not impossible, and requires consideration of human variability. Thus, regulatory agencies often determine “safe” levels of exposure for non-cancer endpoints by dividing the highest dose that does not cause any evidence of toxicity upon repeated exposure to a group of laboratory animals (the so-called “No Observable Adverse Effect Level,” or NOAEL) by some “uncertainty” factor.\(^1\) Usually the factor is 100 or 1000, although the choice of what uncertainty factor to use is dictated by the nature of the toxic response, the quality and quantity of the experimental animal data, and the level of understanding of the mechanism of action of the toxic substance.

Determining the causal relationship between a chemical exposure and a particular chronic disease requires careful consideration of a variety of factors, some of which may be unique to the particular end point in question. For example, establishing an association between a particular drug or chemical and a birth defect requires careful consideration of the exact timing of exposure during pregnancy. Thalidomide, responsible for development of thousands of limb malformation in Europe many decades ago, requires that exposure occur during a very specific period—as short as a few days—early in pregnancy.\(^2\) Exposure to the drug after the critical period during embryonic development

\(^1\) _Id._ at ch. 4.

when the limb buds are forming will not produce that particular birth defect, regardless of dose. Likewise, because the drug is relatively rapidly eliminated from the body, exposure very early in pregnancy—but that was stopped several days prior to the period of limb bud development—also would not produce the birth defect.

Although there is great interest in understanding how environmental factors might contribute to chronic neurological diseases such as Alzheimer’s and Parkinson’s disease, there are relatively few examples where environmental exposures have been shown to contribute to these diseases. Perhaps the most notable example is that of a batch of synthetic heroin that was contaminated with a substance known as MPTP, and subsequently sold on the streets of San Francisco. Numerous young men (under the age of 30) presented with “rapid onset” symptoms essentially identical to Parkinson’s disease. On detailed investigation, it was learned that they had all used a synthetic heroin substance shown later to have contained MPTP.17 This substance is selectively toxic to certain nerve cells in the brain. These same cells, called “dopaminergic neurons,” are lost progressively with age in all people, resulting in Parkinson’s disease in some (those with a somewhat accelerated loss of cells). Thus, the street drug was able to do in weeks what normally takes a lifetime of “normal” aging. There is now great interest to find other environmental factors that might contribute to the enhanced rate of loss of dopaminergic neurons that seems to be the hallmark of Parkinson’s disease. One environmental chemical, an herbicide called “paraquat,” has a strong structural similarity to the active metabolite of MPTP, and thus there has been substantial toxicological and epidemiological inquiry into whether environmental or occupational exposure to paraquat might contribute to Parkinson’s disease. At this point in time, there is limited toxicological and epidemiological data suggestive of a link between paraquat exposure and Parkinson’s disease, but there remains great controversy and uncertainty over whether paraquat or other pesticides represents a substantial risk factor for Parkinson’s disease.

There is also substantial interest in how chemicals might modify the immune system. There are three ways by which chemical interactions with the immune system could be important. In the first, the chemical may cause direct toxicity to cells of the immune system, thereby interfering with normal immune functions. Numerous chemicals, including “dioxin,” have the ability to interfere with normal immune function, and at sufficient doses, may disrupt immune function.\(^{18}\) This could lead to enhanced susceptibility to infection, or perhaps even increased risk of cancer, since the immune system plays an important role in destroying precancerous and cancerous cells. Establishing whether a particular chemical has induced immune dysfunction in an individual, however, would require application of the same basic principles of toxicology and epidemiology as for any other type of toxic effect, including “dose-response” and the concept of thresholds.

The second way in which a chemical might interact with the immune system is through the development of an “allergic” reaction to the chemical itself. This is illustrated by the common allergies to penicillin. Some chemicals are capable of triggering the immune system to develop antibodies against the chemical (or, more accurately, to a protein in the body that has been modified by the chemical), and subsequent exposures to that chemical can induce an allergic response. This is a major concern for many drugs, as allergic responses can be fatal. Once “sensitization” has occurred (e.g., the individual has developed antibodies to a specific chemical), relatively small doses of the chemical may be sufficient to trigger a response. Thus, people with allergic sensitization to a specific chemical may respond at a dose much lower than the “average” person, and the response will be qualitatively different (e.g., rather than causing liver damage at a high dose seen in most people, the “allergic” individual may have an asthmatic attack, or develop skin rashes or GI disturbances, at much lower doses). One of the most controversial areas in toxicology and environmental medicine is that related to a number of syndromes such as

“Multiple Chemical Sensitivity” (MCS), Gulf-War Syndrome, Sick Building Syndrome, Chronic Fatigue Syndrome, etc., for which an immunological basis may be involved.\textsuperscript{19} As noted by Kipen and Fiedler:

Symptoms, and especially those without clear underlying medical explanations, account for a large percentage of clinical encounters. Many unexplained symptoms have been organized by patients and practitioners into syndromes such as chronic fatigue syndrome, multiple chemical sensitivity, sick building syndrome, Gulf War syndrome, and the like. All these syndromes are defined solely on the basis of symptoms rather than by medical signs. Some of the above-described conditions overlap strongly with explained conditions such as asthma. The relationship of such symptoms and syndromes to environmental exposure is often sharply debated, as is the distinction between the various syndromes.\textsuperscript{20}

Litigation in this area often pits toxicologists, epidemiologists, and/or environmental and occupational medicine specialists against another group of physicians identified as “clinical ecologists.” As noted by Goldstein and Henefin:

Clinical ecologists . . . have offered opinions regarding multiple-chemical hypersensitivity and immune-system responses to chemical exposures. These physicians generally have a background in the field of allergy, not toxicology, and their theoretical approach is derived in part from classic concepts of allergic responses and immunology. This theoretical approach has often led clinical ecologists to find cause-and-effect relationships or


low-dose effects that are not generally accepted by toxicologists.\textsuperscript{21}

A third way that chemical exposures might involve the immune system involves the development of autoimmune diseases such as lupus, rheumatoid arthritis, and scleroderma. These are important and disabling diseases, yet our understanding of why the immune system sometimes goes awry is limited. Autoimmune diseases arise when the immune system begins to recognize normal tissues as “abnormal” and mounts an attack to destroy the tissue (similar to transplant rejection, where the transplanted organ is recognized as foreign by the immune system). Because the etiology of autoimmune disease is largely unknown and unpredictable, there have been many efforts to identify environmental factors that contribute to the development of autoimmune diseases. Probably the most extensively studied disease in this regard is lupus (Systemic Lupus Erythematosus, SLE). About a half a dozen drugs have been definitively linked with lupus, with dozens more implicated.\textsuperscript{22} However, the list of non-drug “environmental” chemicals that have been definitively shown to cause lupus (or other autoimmune diseases) is much shorter. Some inorganic substances, in particular silica, gold, cadmium, and mercury, have been shown to induce autoimmunity in animals and humans. There is suggestive data that exposure to organic solvents, certain chlorinated hydrocarbons such as vinyl chloride, trichloroethylene, and hexachlorobenzene, can also induce autoimmunity, although the scientific evidence (both toxicological and epidemiological) for this is marginal. It remains an area of scientific interest and controversy.

\textbf{D. Environment and Cancer Risk}

Claims of cancer, or increased cancer risk, or fear of cancer,
following chemical exposures are often key elements of toxic tort litigation, and thus I will devote a substantial amount of space to this particular form of toxic response. While it is clear that some chemical pollutants (potentially found in air, food, and/or water) have the ability to cause cancer in either or both experimental animals and humans, deciding whether a particular chemical exposure has “more probably than not” been a “substantial contributing factor”—or whatever the relevant burden of proof might be—in a particular person’s cancer (or risk of cancer, or fear of cancer) is a major challenge for scientists, lawyers, judges, and jurors. To facilitate an understanding of the scientific challenges that are faced in such litigation, it is perhaps useful to look at the “big picture” of what scientists know—and don’t know—about the causes of cancer.

1. Major Causes (Risk Factors) of Cancer

Over the last fifty or so years, a tremendous amount of epidemiological data has been collected on the relationship between a variety of “environmental factors” and the incidence of cancer. Studies comparing cancer risks in different populations with various lifestyle, genetic, cultural, dietary, and behavioral characteristics have led to a reasonable understanding of the major “risk factors” for cancer. These data are of course based on the incidence of cancer in large populations, and thus it is difficult to ascribe “individual” risk to a specific person from these data. Based on such analyses, it has been stated that 85-90% of all cancers are “environmentally-related” and thus potentially preventable. It should again be emphasized, however, that the term “environmentally-related” in this context refers to everything other than genetics (including smoking, diet, lifestyle, etc.) and does not equate directly to “environmental pollution.”

As illustrated in Table 1, approximately 35-40% of all cancer deaths are attributable to tobacco products. While much of this is

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lung cancer (the leading cause of cancer-related deaths in both men and women in most developed parts of the world), smoking also increases risk of oral, bladder, kidney, and several other cancers.

**TABLE 1—“BEST ESTIMATES” OF THE MAJOR RISK FACTORS FOR CANCER**

<table>
<thead>
<tr>
<th>Factors</th>
<th>Best Estimate (%)</th>
<th>Range (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tobacco</td>
<td>35</td>
<td>25 – 40</td>
</tr>
<tr>
<td>Diet</td>
<td>35</td>
<td>10 – 70</td>
</tr>
<tr>
<td>Cultural and Lifestyle factors</td>
<td>10</td>
<td>1 – 13</td>
</tr>
<tr>
<td>Infectious agents</td>
<td>10</td>
<td>5 – 20</td>
</tr>
<tr>
<td>Genetics</td>
<td>5</td>
<td>2 – 10</td>
</tr>
<tr>
<td>Occupation</td>
<td>4</td>
<td>2 – 8</td>
</tr>
<tr>
<td>Alcohol</td>
<td>3</td>
<td>2 – 4</td>
</tr>
<tr>
<td>Geophysical factors (e.g., radon)</td>
<td>3</td>
<td>2 – 4</td>
</tr>
<tr>
<td>Medicines/medical procedures</td>
<td>1</td>
<td>&lt;1 – 3</td>
</tr>
<tr>
<td>Pollution</td>
<td>2</td>
<td>&lt;1 – 5</td>
</tr>
<tr>
<td>Industrial Products</td>
<td>&lt;1</td>
<td>&lt;1 – 2</td>
</tr>
<tr>
<td>Food additives</td>
<td>&lt;1</td>
<td>&lt;1 – 2</td>
</tr>
</tbody>
</table>

The next most important factor—roughly equal in importance to smoking—is “diet.” What it is about diet that is so important remains uncertain. What is clear is that there are many aspects of the diet that can either increase or decrease cancer risk. For example, diets high in fruits and vegetables have consistently been shown to lower the risk of a variety of cancers. In some studies, seminal work of Sir Richard Doll. *Id.* Recognition of infectious agents as a substantial contributor to several types of cancer, especially for cervical and stomach cancer, became evident in the past decade. *Id.* The American Cancer Society also discusses the major causes of cancer in their book, entitled: **CANCER: WHAT CAUSES IT, WHAT DOESN’T** (2003), available for purchase at http://www.cancer.org.

diets high in animal fat have been associated with increased risk of some common cancers (e.g., breast), but the relationship is not always seen, and it remains unclear whether the amount and/or type of fat in the diet are important risk factors. There are also some chemical contaminants in the diet that may increase cancer risk, but again for most populations it is not clear how important natural dietary carcinogens (cancer-causing chemicals) are to overall cancer risk. In some parts of the world, however, a common mold contaminant of corn and peanuts—called “aflatoxin”—is certainly an important contributor to the very high incidence of liver cancer. It has been shown that aflatoxin is much more dangerous in populations where hepatitis B viral infections are common.25

The third most important category of risk factors revolves around cultural and lifestyle factors, which includes sexual practices and reproductive factors. Often these cultural factors interact with other environmental factors, such as viruses. For example, it is now recognized that almost all cervical cancer is due to infection with the human papilloma virus (HPV), which is transmitted through sexual activity. For reasons that are unclear, cervical tissue in teenage women seems more susceptible to HPV infection than that in older women. Thus, sexual activity at a young age is a major risk factor for cervical cancer. While this disease is relatively easily diagnosed (via Pap smear) and treated if detected early, large differences in access to medical care and sex education can make a huge difference in the mortality of this disease across populations.

Breast cancer is the second leading cause of cancer-related deaths among women in the United States and many other developed countries, trailing only smoking-related lung cancer. The major risk factor for breast cancer appears to be a constellation of reproductive factors that influence a woman’s “lifetime dose” of unopposed estrogen. Thus, the age of onset of menstruation, the

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age of onset of menopause, the number of children, the age of first pregnancy, and the extent of breast-feeding, all influence breast cancer risk. Thus, it is not surprising that breast cancer incidence and mortality is much lower in countries and cultures where women have their first children early in life, have multiple children, breast feed for extended periods, and often have dietary habits that postpone (or, at least don’t accelerate) the onset of menstruation, compared to a typical “suburban U.S.” lifestyle. Recently, there has been much public press coverage of the discovery of several “breast cancer genes” (BRCA1, BRCA2, BRCA3). Although there is little question that women who carry variant forms of the genes are at substantially increased risk of developing breast cancer (especially at a younger age), the overall contribution of these rather rare genetic causes of breast cancer is probably substantially less than 10% of all breast cancers. Thus, the large majority of breast cancers seem not to have major genetic contributors. But it remains uncertain whether there are important “environmental susceptibility” genes that might interact with environmental factor(s) to substantially increase breast cancer risk.

Of the various identifiable “environmental” factors not associated with diet or lifestyle, infectious agents seem to play a more important role than was expected only a decade ago. It is now clear that well over 90% of cervical cancers are due to HPV infections. Many cases of stomach cancer are directly attributable to a chronic bacterial infection from *Helicobacter* colit.


of liver cancer worldwide can be attributable to hepatitis B (and probably C) viral infections, and alcohol consumption.\(^29\) Even the HIV virus responsible for AIDS is associated with substantially increased risk for certain types of cancer.\(^30\) It is possible, although still not proven, that a significant fraction of human blood-related cancers (leukemias and lymphomas) have a viral etiology, as several leukemia viruses have been identified in animals.

What role do “man-made” chemical pollutants, such as heavy metals, pesticides, industrial solvents, asbestos, etc., play in overall cancer risk? As indicated in Table 1, “occupation” is thought to be responsible for 3-5% of all cancers, although there is reasonable hope and expectation that this will decline substantially as the long history of high-level occupational exposures to cancer-causing substances becomes a relic of the past.\(^31\) But the incidence of asbestos-related lung cancer and mesothelioma, derived from occupational exposures that occurred predominantly in the ’40s, ’50s, ’60s and early ’70s has not yet peaked, since latency period (time from first exposure to the development of clinical disease) may be as long as fifty to sixty years in some individuals. Greatly improved awareness and early identification of potential cancer-causing chemicals, coupled with significant improvements in workplace controls, monitoring, and worker education (at least in developed countries) should result in a drastic reduction in the incidence of occupationally related cancers in the future.

Probably the most uncertain and controversial contributor to cancer risk is that associated with environmental pollution.\(^32\)


\(^{31}\) See supra note 23 & Tbl. 1.

Although it is very difficult to make reasonable “estimates” of the contribution of environmental pollution to overall cancer incidence and mortality, most experts place the number at only a few percent, at most. However, even 1% of 500,000 deaths a year is not an insignificant number (5000) of potentially preventable deaths, so efforts to reduce the use and release of chemical carcinogens are not ill-founded. The challenge comes in balancing the potentially real, but very low, risks of cancer in a large population against the societal benefits that come from the industrial and consumer activities that contribute to the pollution. The basic ways that chemicals can increase cancer risk (chemical carcinogenesis) and the process of “carcinogenic risk assessment” for chemical pollutants are discussed in more detail below.

One example in the area of environmental carcinogenesis that has been the subject of substantial tort and regulatory litigation is that of “dioxins.” Dioxins represent a group of industrial by-products produced inadvertently in the chemical manufacture of trichlorophenol (TCP). TCP was widely used in the synthesis of the herbicide, 2,4,5 trichlorophenoxy acetic acid (2,4,5-T), a component of Agent Orange. TCP was also used in the manufacture of the antibacterial soap ingredient, hexachlorophene, so many antibacterial soaps were also contaminated with trace amounts of dioxins. Although there are more than a dozen specific “dioxin” chemicals, the term is generally used to refer to one


highly toxic form, 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD). When tested in experimental animals, TCDD is extremely toxic, causes cancer and birth defects at extraordinarily low doses, and is generally considered the most toxic and carcinogenic man-made chemical ever studied. Dioxins represent an interesting challenge to the courts for several reasons. First, there are very large species differences in susceptibility to the toxic—and presumably carcinogenic—effects of TCDD. For example, the single lethal dose of dioxin in guinea pigs is approximately 0.1 micrograms per kg of body weight, whereas the lethal dose in hamsters is more than 10,000 times greater. Second, although studies in rats and mice provide consistent evidence that “dioxin” is a potent and effective carcinogen, human epidemiology studies are less convincing. Furthermore, dioxin is not appreciably metabolized in the body, nor does not cause mutations, and the “mechanism” by which it causes cancer is uncertain. Because it is very soluble in fat and is not metabolized in the body, it remains in the body for many years following exposure. Because potentially tens of thousands of military personnel were exposed to dioxin during the Vietnam War, and because of the widespread use of certain herbicides containing small amounts of dioxins in agriculture, forest practices, utility and highway right of ways, and even residential property, it has been the subject of extensive toxic tort litigation. Although it is probably one of the most extensively studied chemical carcinogens, there remains substantial scientific uncertainty as to the actual levels of cancer risk to humans exposed to trace levels of dioxins in the environment.

2. General Mechanisms of Chemical Carcinogenesis

Chemicals that cause an increased incidence of cancer in a population (experimental animals or humans) following exposure are referred to as “carcinogens.” The process of chemical carcinogenesis is “multi-stage,” such that several events must

34 See sources cited supra note 33.
35 CASARET AND DOULL’S TOXICOLOGY: THE BASIC SCIENCE OF POISONS, supra note 11, at Ch. 8.
occur before a normal cell is transformed into a malignant (cancer) cell. Typically, the process of carcinogenesis is divided into four general stages: (1) initiation, (2) promotion, (3) progression and (4) metastasis. A chemical carcinogen may increase the incidence of tumors by acting at any or all of these various stages. One of the most important ways that a chemical may act as a carcinogen is by interacting with DNA in somatic cells to cause mutations. (Somatic cells refer to all cells in the body except sperm and egg cells (ova)). Mutations in somatic cells may lead to permanent changes in the DNA that result in critical changes in the way the cell controls its rate of cell division. Such a permanent alteration in DNA of a somatic cell is referred to as “initiation,” and represents the first stage of chemical carcinogenesis. Because initiation results in a permanent change in the DNA of a cell that is subsequently passed on to all “daughter” cells following division of the mutated cells, initiation is generally considered to be an irreversible process, and initiated cells may accumulate in the body throughout life.

By definition, all chemicals that are “initiators” are mutagenic, and thus short-term tests that demonstrate the mutagenic ability of a chemical make it a suspect carcinogen.\(^36\) However, not all chemicals that test positive in mutagenicity assays are carcinogenic for a variety of reasons. Nevertheless, a chemical that consistently tests positive in numerous different short-term mutagenicity assays is more likely to be carcinogenic than a chemical that routinely tests negative. However, as with all toxicological responses, the “dose-response” for mutagenesis is critically important to consider. Thus, when considering the potential health significance of exposure to chemical mutagens that may act as carcinogens, it is important to keep the total or cumulative “dose” in mind, as the critical issue is whether there is a biologically relevant increase in the “background” rate of DNA damage from all other sources over the lifetime of an individual.

Although initiation is an essential first step toward cancer, most initiated cells do not go on to become cancers because they usually require additional genetic changes and other external stimuli to

\(^{36}\) Id.
become true cancer cells. An initiated cell is analogous to a car whose accelerator is stuck part way on. As long as the brakes work, the speed and control of the car can be adequately maintained. However, if a second change occurs, resulting in the loss of the brakes, then the car can no longer be controlled. It should be recognized that the vast majority of mutations in a cell do not have any effect on cell growth and regulation, just as most mechanical malfunctions in a car do not result in a stuck accelerator or loss of brakes.

The second step of carcinogenesis, referred to as “promotion,” occurs when some external stimuli, including exposure to certain chemicals, increases the rate of cell proliferation of initiated cells or otherwise enhances the ability of an initiated cell to become cancerous, but does not directly interact with DNA. A chemical that increases cancer risk by acting as a promoter of carcinogenesis is generally considered to be less of a concern because the promoting stimulus goes away when the exposure stops—e.g., promotion is “reversible.” The process of promotion can be viewed as a relatively early stage in carcinogenesis where an initiated cell is stimulated to divide repeatedly to give rise to a small colony of initiated cells (a “preneoplastic” lesion).

The third stage of carcinogenesis, referred to as progression, represents the long period of time where the small colony of initiated cells acquires additional mutations that further transform the cell from a normal cell to a cancer cell. To return to the car analogy, additional mutations damage the cell’s “brakes,” “steering,” or other critical functions necessary to properly maintain control.

The probability of a single cell acquiring all of the necessary genetic changes to convert it from a normal cell to a cancer cell depends on a variety of factors, including the dose and duration of exposure to mutagenic substances. Exposure to man-made mutagenic chemicals can increase cancer risk. However, it should be recognized that the vast majority of DNA damage that occurs in our cells results from normal metabolic processes and exposure to natural components in the diet or to UV radiation in sunlight. As a cell “burns” sugars to produce energy it generates reactive by-products of oxygen. These by-products, called “free radicals” or
“reactive oxygen species” (ROS) can and do directly damage DNA. In addition, common chemicals found naturally in the diet and/or formed during cooking can also damage DNA (e.g., act as mutagens). Fortunately, the cells of the body have remarkable processes that can reduce the damage to DNA from ROS and mutagenic chemicals (both natural and man-made), as well as repair damaged DNA. Many vitamins and certain chemicals found naturally in the diet (especially in fruits and vegetables) act as “antioxidants” and can help protect cells from the DNA damaging effects of ROS and chemicals (both man-made and natural) that damage DNA. This is one reason why diet is so important in lifetime cancer risk. Many studies have demonstrated that diets high in fruits and vegetables lower the risk of many types of cancer.37

Because the probability of a single somatic cell acquiring all of the necessary genetic changes (mutations) to become a cancer cell is quite small and is a function of the period of time that a cell has to acquire such mutations, cancers that occur because of exposure to a carcinogen are both relatively rare in an exposed population and are usually not seen until many years after the initial period of exposure. For cancers caused by prolonged or repeated exposure to a chemical, the time frame from first exposure to when the disease becomes clinically evident is referred to as the “latency” period. In general, the latency period is somewhat inversely related to the extent of exposure (dose). For most human cancers that are related to chemical carcinogen exposure (e.g., cancers related to cigarette smoking), the latency period is usually twenty to forty years. Certain cancers (mesotheliomas) that arise from occupational exposure to asbestos typically are not seen for thirty or more years after first exposure.38 The shortest latency period possible appears to be at least a couple of years following very high levels of exposure to mutagenic chemicals used to treat cancers, especially leukemias.39 Because latency seems to be inversely related to dose,

37 See sources cited supra note 24.
39 Richard A. Larson, Michelle M. LeBeau, James W. Vardiman & Janet D.
very low levels of exposure to mutagenic chemicals may be of little practical consequence to an individual because (1) the extent of DNA damage is very small, relative to the “background” rate that occurs from all other sources, and (2) the latency period for developing a cancer is very long and may exceed normal life expectancy. Although these are very important practical biological considerations, they are often not considered in quantitative risk assessment of low dose carcinogen exposures by regulatory agencies, who usually assume that risk is directly proportional to dose at low doses (the “linearized dose-response” approach to cancer risk assessment).

Another factor that affects the occurrence of a cancerous cell is the rate of cell turnover, or “cell proliferation.” Because all cells have a background incidence of spontaneous mutations, the likelihood of a cell becoming mutated is related to the rate of cell replication, analogous to rolling dice. The more often the dice are rolled the more likely a specific number is to appear. This factor is especially important in considering the use of high doses of chemicals in laboratory animal test for cancer-causing potential. When doses of the test chemical are so high that they cause tissue damage (and thus stimulate cell division to repair the damage)—which usually would not occur at low doses—direct extrapolation of the rate of tumor formation in the animals given high doses to humans exposed to much lower doses that don’t cause tissue damage is of questionable scientific value. The particular rodent strains used also often have a high background rate of spontaneous tumors. Thus, any chemical that damages cells and causes considerable regeneration (i.e., cell proliferation) may increase the

Rowley, Myeloid Leukemia After Hematotoxins, 104 (Suppl 6) ENVTL. HEALTH PERSP. 1303, 1303-07 (1996).


42 See Gold, supra note 41; see also Zito, supra note 13.
likelihood of a cancerous cell occurring.

**E. Use of Toxicological Data to Assess Chemical Risks in Populations and Individuals**

It is important to recognize that the procedures commonly used in “risk assessment” for the purposes of establishing public health guidelines that represent “acceptable” exposure levels for large populations are often, in this author’s opinion, of marginal relevance to estimating “causation” in an individual—e.g., whether a particular chemical caused or contributed to a particular disease or illness in a given person. Although toxicological data—and the basic principles of toxicology outlined above—are useful for both (establishing guidelines for protection of public health and establishing “causation”), there are substantial differences in approach. Thus, use of toxicological data for these two distinct purposes will be discussed separately in the following sections.

**F. Use of Toxicological Data to Establish “Acceptable” Levels of Exposure for Large Populations (Public Health)**

Much of the available dose-response criteria for assessing chemical toxicity and risks to human health are based on protective guidelines developed by federal (e.g., EPA, ATSDR) and sometimes state agencies. The federal government and national organizations using similar approaches also set occupational health guidelines and standards for protection of workers. Guidelines for protection of the general public are usually more stringent than for workers, who are assumed to be part of a healthier and less sensitive population. Public health guidelines, however, should not be interpreted as predicting exact levels at which effects would occur in a given individual. Because a number of protective, often “worst-case” assumptions (e.g., exposure to any dose of a carcinogenic chemical based on animal studies confers a risk of cancer in humans, high daily exposure for a lifetime) are made in estimating allowable exposures for large populations, these criteria and the resulting regulatory levels (e.g., MCLGs, MCLs) generally
overestimate potential toxicity levels for nearly all individuals. Furthermore, because these guidelines are intended to be protective of all individuals in a population, including the very young, the very old, and other potentially “sensitive” individuals, the theoretical risks from exposure at the guideline level is likely to be substantially overestimated for the large majority of individuals in the population. Nevertheless, they can provide useful guidance to public health agencies that have the responsibility of protecting all individuals in large populations.

Public Health criteria developed by the EPA for individual chemicals usually include determination of non-cancer reference doses and “cancer potency” or “slope factors.” Non-cancer reference doses represent the dose below which no adverse health effects are expected, even in sensitive individuals exposed repeatedly at the defined level for many years. Reference doses are usually derived from “No Observable Adverse Effect Levels” (NOAELs) or “Lowest Observable Adverse Effect Levels” (LOAELs) in the toxicological literature. NOAELs and LOAELs are usually determined from experimental animal studies, rather than human exposures. The term “Reference Dose” is frequently used to refer to a dose of a chemical to humans that could be consumed on a daily basis for a lifetime with no chance of anyone exhibiting an adverse response (the specific definition of such “safe” doses varies from agency to agency and regulation to regulation). Reference Doses are obtained by dividing the “NOAEL” dose determined in animal studies by an Uncertainty Factor. Uncertainty Factors usually range from 100 to 1000, depending on the amount of uncertainty in, for example, extrapolating from animals to humans, short-term to long-term effects, average to sensitive members of the population. Generally, the more uncertainty factors required, the more likely it is that the Reference Dose will be lower than what would actually be necessary for protection of humans because each uncertainty factor errs on the side of overprotection. Thus, although health authorities can confidently expect that exposures below reference dose levels will not result in adverse effects, the converse is not

43 See sources cited supra notes 13 & 14.
true. Exposures in a given individual that exceed a reference dose level do not signify that effects are likely to occur because of the margin of “safety” built into these Reference Doses which are intended to provide guidance for protecting even sensitive members of the population. Thus, such regulatory levels are of substantial value to public health agencies charged with ensuring the protection of the public health, but are of limited value in judging whether a particular exposure was a substantial contributing factor to a particular individual’s disease or illness.

G. Determining Regulatory Guidelines for Chemical Carcinogens for Protection of Public Health

For carcinogens, most regulatory agencies have used “default” assumptions about the dose-response relationship such that it is assumed that the risk of developing cancer is proportionate to dose at all doses (e.g., there is no “threshold” dose). Thus, to establish socially acceptable levels of exposure to carcinogens commonly found in food, air and water, the EPA, FDA, and other regulatory agencies have established guidelines for conducting risk assessments. Using such procedures, “acceptable,” “tolerable,” “permissible,” or “safe” levels of exposure to a specific chemical are often established based on regulatory policy decisions on allowable risk, or tradeoffs between risk reduction and cost. For contaminants in drinking water, such levels are referred to as “Maximum Contaminant Levels,” or MCLs. The EPA has a longstanding policy that dictates that the desired level of cancer risk for a contaminant in drinking water is zero. Thus, for carcinogens the EPA has established MCLGs (Maximum Contaminant Level Goals) of zero. However, because zero levels are generally not

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44 See ENVTL. PROT. AGENCY, EPA 630/P-03/001A, NCEAA-F-0644A, DRAFT FINAL GUIDELINES FOR CARCINOGEN RISK ASSESSMENT (2003). Earlier adopted versions also have assumed linearity at low dose. Id.

45 See id.; Zito, supra note 13.

46 See ENVTL. PROT. AGENCY, supra note 44.

achievable by modern technology, the actual drinking water standards, MCLs, are usually based on other considerations such as technical feasibility, cost-benefit analysis, and background levels. However, even if the standard is based primarily on a technology or cost, MCLs for most such chemicals in drinking water must still be within an acceptable range of health risk. For cancer risk from chemicals in drinking water, the EPA has stated this range to be an excess lifetime risk of cancer over background of one in 1,000,000 to one in 10,000. However, there are some exceptions where MCLs have been established that yield theoretical excess lifetime cancer risks much greater than one in 10,000. The recent adoption of an MCL for arsenic in drinking water of 10 ppb is such an example.\(^4^8\)

Because the lifetime probability of dying from cancer for someone living in the United States is about 1 in 4 (25%, or 0.25 lifetime probability), a theoretical increase in lifetime cancer risk (mortality) of 1 in 100,000 would provide a potential increase in overall lifetime probability of dying from cancer from approximately 0.25 to approximately 0.25001. Thus, when citizens are confronted with evidence that their drinking water is contaminated with a “cancer causing chemical” at levels that exceed federal regulatory limits, it becomes important to ensure that the public understands how such standards are derived and the significance of the potential increase in risk, relative to other common risks encountered daily.

EPA cancer “slope factors” represent the slope of the dose-response relationship statistically extrapolated from studies of high dose exposure and cancer in laboratory animals or human populations. The EPA default assumption in these slope factors is that no dose of a carcinogenic chemical is without some risk of cancer and that one can extrapolate high dose exposures and the risk of cancer to low doses. The use of a slope factor in this

manner ignores the ample evidence that for many carcinogenic chemicals, practical thresholds may exist for significant cancer risk because of detoxification mechanisms at low doses (e.g., difference in metabolism of the chemicals at high dose versus lower doses) or because of the mechanisms of action. Therefore, these slope factors cannot be expected to accurately predict a risk of cancer, if any, in a given individual at low doses. Although they may be somewhat useful to make crude estimates of individual risk, many assumptions go into the determination of the cancer slope factor, and it is important to consider the relevance of the particular animal study from which the slope factor was determined when attempting to use such values in individual risk calculations.

H. Use of Toxicological Data in Assessment of Individual Causation

When assessing whether a particular potentially toxic substance is a substantial contributing factor to an individual's disease or illness, the “regulatory approach” is of little value, although much of the same toxicological and epidemiological data may be used in evaluating causation. The key scientific criteria used to establish causation between an alleged chemical exposure and a particular disease or illness includes the following basic concepts:

1. *The toxic substance in question must have been demonstrated to cause the type of illness or disease in question.* This addresses the issue of general causation as well as specific causation, and may be demonstrated either in humans following known exposures (usually from accidents, occupational exposures, or intentional exposures), or, in the absence of human data, in experimental animals intentionally exposed to the agent in question. Because most chemicals that are widely encountered in the environment, such as pesticides, metals, and industrial solvents, are manufactured, workplace exposure to humans may occur. Occupational health and safety regulations require workplace monitoring, and thus there is frequently a substantial amount of toxicologically relevant data from workplace monitoring that can
be used to assess whether a particular chemical is capable of causing a particular disease or illness. Indeed, virtually all synthetic chemicals identified by EPA or International Agency for Research on Cancer as “known human carcinogens” have been identified as such through studies of workers exposed to the chemical in the workplace. Workplace exposures are typically hundreds to thousands of times greater than incidental environmental exposures that might occur from contamination of drinking water, or off-site migration of chemicals via the air.

2. The individual must have been exposed to a sufficient amount of the substance in question to elicit the health effect in question. As noted above, the main tenant of toxicology is the “dose-response” relationship. If criterion (1) above has been established for a given chemical, then it must be established that the individual’s dose over a defined period of time was sufficient to cause the alleged health effect. It is not adequate to simply establish that “some” exposure occurred. Because most chemically induced adverse health effects clearly demonstrate “thresholds,” there must be reasonable evidence that the exposure was of sufficient magnitude to exceed the threshold before a likelihood of “causation” can be inferred. For carcinogenic chemicals that act via mutagenic action, a threshold may not be evident. Thus, although any level of exposure will theoretically increase the probability of developing the disease, the risk follows a dose-response relationship, and the dose must be sufficient to “significantly” elevate the risk above the background. What represents a “significant” increase in cancer risk is of course subjective and influenced by many factors. However, as noted above, because the process of chemical carcinogenesis is always associated with a “latency,” and the latency period is generally inversely related to dose, at very low doses of even “direct acting,” mutagenic carcinogens, the latency period might exceed life expectancy, thereby imparting a “practical” threshold.

3. The chronological relationship between exposure and effect must be biologically plausible. If a disease or illness in an individual preceded the established period of exposure, then it cannot be concluded that the chemical caused the disease, although it may be possible to establish that the chemical aggravated a pre-
existing condition or disease. For cancer cases, diagnosis of the cancer in a time frame close to the beginning period of exposure (i.e., within a few years) argues strongly against a causal relationship, since, as noted above, chemically-induced cancers have latency periods that are nearly always in excess of five years, and are somewhat inversely related to dose.

4. *The likelihood that the chemical caused the disease or illness in an individual should be considered in the context of other known causes.* Although this consideration may not be essential to establish general causation, it is a critical consideration in the quantitative assessment of whether the substance was “more likely than not” a cause or substantial contributing factor to the disease or illness in a specific person. This is especially important in cancer causation, because cancer is by its very nature a multi-factorial disease. As discussed above, chemicals that are mutagenic have the theoretical potential to increase cancer risk even at very low doses, although there is a point at which the theoretical risk is trivial, relative to all other causes, known and unknown. As there are literally hundreds, if not thousands, of mutagenic naturally-occurring chemicals present at low levels in our diet and thus also present theoretical cancer risks, it becomes important to put such theoretical, “low dose” risks in perspective.  

J. Multiple Exposures/Mixtures

Another area of relevance to human risk assessment for environmental pollutants is the fact that, unlike experimental animals, humans may be exposed to multiple different chemicals, diets, and lifestyle factors that affect the dose-response relationship for a given chemical. For chemical carcinogens, it is often assumed that the risks are additive even though they may not act through similar mechanistic pathways. That is, the risk for each chemical in a mixture is calculated separately, and the total risk from exposure to the mixture is simply the sum of the risks for each individual chemical. While there are examples of non-additive responses (both “synergistic,” where the response of two chemicals is greater

49 See Kipen & Fiedler, *supra* note 20.
than predicted from adding the individual response alone, and “antagonistic,” where one chemical appears to reduce the risk of the second), unless there is compelling evidence to the contrary, additivity of risks for all carcinogens is generally assumed. However, for carcinogens that act via different modes (e.g., genotoxic vs. non-genotoxic carcinogens), additivity is less certain, and mechanistic data may warrant consideration of non-additive models for interaction.

EPA risk assessment guidelines also consider non-cancer effects of chemicals to be additive, particularly if they effect the same endpoint at lower doses. If the chemicals act by the same mechanism, then their action could be additive even when exposure to each is below a dose that would cause effects.

III. FUTURE SCIENTIFIC OPPORTUNITIES AND CHALLENGES IN TOXIC TORT LITIGATION

The past decade has seen a tremendous advance in DNA-based technologies that offer exciting challenges and opportunities to the field of toxicology. The growing area of “toxicogenomics”—the application of new molecular technologies to understand how chemicals cause adverse responses in cells, tissues, and organisms—will eventually play an important role in toxic tort litigation. Rather than examining the effect of a chemical on one or a few biochemical pathways, the tools of toxicogenomics provide a means to examine the global response of a cell to a chemical stimulus, resulting potentially in a “fingerprint” alteration in expression of thousands of different genes (transcriptomics), proteins (proteomics), or cellular metabolites (metabonomics). The potential exists for such tools to provide convincing proof that a particular disease was related to a specific chemical exposure, through unique changes that potentially can be measured years after the exposure occurred. As noted by Marchant, however, “many obstacles and uncertainties remain to be resolved before toxicogenomics data should be used outside the research context for practical, regulatory or legal applications.”

50 See Marchant, supra note 6; see also John C. Childs, Toxicogenomics:
these new scientific approaches to linking specific diseases or illnesses to specific exposures can be proven reliable, judges, lawyers, and jurors must rely upon the basic scientific principles of toxicology and epidemiology to establish causation in toxic torts.

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CAUSATION: AN EPIDEMIOLOGIC PERSPECTIVE (IN FIVE PARTS)

Douglas L. Weed, M.D., Ph.D.*

I. THERE ARE TWO SIDES TO EVERY QUESTION—PROTAGORAS

How much scientific evidence does it take to claim causation? What kinds and characteristics of evidence are needed to claim that an exposure causes a disease?

Epidemiology appears to be uniquely positioned to answer these questions. Causation, after all, is an integral part of this key public health discipline. As the first half of a common definition states: “Epidemiology is the study of the distributions and (causal) determinants of disease in populations.”¹

Epidemiology’s search for disease causation has been a long one. For nearly two centuries, we have examined why populations suffer from cholera and tuberculosis, pellagra and scurvy, heart disease and cancer, dementia, suicide, and AIDS, to name a few examples. Significant progress has been made in our understanding of why populations get sick and how their health can and has been improved.² Indeed, the main reason epidemiologists study

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causation is to use scientific knowledge to control disease (and injuries) through preventive interventions. As the full definition in the Dictionary of Epidemiology states, “Epidemiology is the study of the distributions and (causal) determinants of disease in populations and the application of this study to control health problems.”

Identify causes, remove them from the environment, and prevent disease: this is the time-honored central mission of epidemiology and all other public health disciplines.

What epidemiologists do not do is study disease causation in order to assign responsibility for harm caused to individuals; specific causation is not a traditional problem for epidemiologists. For judges, legal scholars, and others involved in toxic tort litigation, however, the problem of specific causation is paramount. Binding together these two views—one from the world of epidemiology, the other from the law—is that both require an answer to the problem of general causation. Put another way, there are two sides to the questions of causation posed above, two very different reasons for answering the same question: one for public health decisions, the other for legal decisions.

My purpose in this paper is to describe how epidemiologists make claims about general causation, how they practice causal

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3 Dictionary of Epidemiology, supra note 1, at 62 (emphasis added). Definitions of epidemiology have undergone significant transformation in the past thirty years. In the 1970s and 1980s, epidemiology was often defined strictly as a science without reference to the public health application of the knowledge gained by scientific study; in the 1990s, definitions of epidemiology have emphasized the dual role of professional practitioners in scientific investigation and in public health interventions. Douglas L. Weed, Epistemology and Ethics in Epidemiology, in Ethics and Epidemiology 76-94 (Steven S. Coughlin & Tom L. Beauchamp eds., 1996); Douglas L. Weed & Robert E. McKeown, Science and Social Responsibility in Public Health, Envtl. Health Persp., 1804, 1805 (2003); Douglas L. Weed & Pamela J. Mink, Roles and Responsibilities of Epidemiologists, Annals Epidemiology 67, 68 (2002).

inference. I will identify some important problems that exist in that practice, and what the future holds for solving them.

II. HABIT IS THE ENORMOUS FLYWHEEL OF SOCIETY—WILLIAM JAMES

What follows is a brief description of the practice of causal inference in epidemiology, with the following simplifying assumptions:

1. Scientific evidence to be assessed has been made available through a systematic literature review.
2. A statistical association between the exposure (the purported cause) and the disease (the purported effect) has been established at a level of significance of $p < 0.05$.
3. All epidemiologic studies examined have measured all known confounders (an unreasonable assumption in many situations, but helpful for the purposes of this brief discussion).
4. Evidence from a randomized prevention trial is not available for the exposure-disease association under scrutiny.
5. A quantitative meta-analysis could be carried out, but will not be.


From a systematic literature review, different types of scientific evidence would emerge, including but not limited to laboratory-based “biological” studies, as well as several types of epidemiologic studies, e.g., case-control and cohort. Epidemiologists typically consider the potential biases in the

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results of such studies as well as the potential role of unknown confounders.\(^7\) If we can assume, however, for the sake of brevity in this description, that bias is not likely to be responsible for the results of these studies, then the practitioner of causal inference moves to the next step in the process: the examination of the summarized evidence in terms of Hill’s causal criteria. Excluding “experimentation” (see assumption number 4 above), there are eight such considerations:\(^8\)

1. Consistency
2. Strength of association
3. Dose response (or biological gradient)
4. Biological plausibility
5. Coherence
6. Temporality
7. Specificity
8. Analogy

These so-called causal criteria—of which only “temporality” is the only true criterion—are then “applied to” or “considered in the light of” the evidence.

The first decision to be made by the user is the selection of the

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\(^8\) These so-called “Hill’s criteria” emerged from a conversation in the medical and public health literature that can be traced back at least as far as the early nineteenth century in the works of Jakob Henle and Robert Koch, both of whom discussed the nature of causation in terms of infectious diseases. See Alfred S. Evans, *Causation and Disease: a Chronological Journey*, 108 AM. J. EPIDEMIOLOGY, 249, 249-58 (1978); *ALFRED S. EVANS, CAUSATION AND DISEASE* (1993). The extension of this discussion to the causation of chronic diseases—cancer, heart disease, mental illness, and diabetes, to name a few examples—began around 1950 and continues through today. The practice of causal inference, however, remains firmly rooted in the criteria proposed by Austin Bradford Hill in 1965. *DOUGLAS L. WEED, Causal and Preventive Inference*, in *CANCER PREVENTION AND CONTROL* 285 (Peter Greenwald, Barnett S. Kramer & Douglas L. Weed eds., 1995); Douglas L. Weed & Lester S. Gorelic, *The Practice of Causal Inference in Cancer Epidemiology*, 5 *CANCER EPIDEMIOLOGY BIOMARKERS & PREVENTION* 303, 303-311 (1996).
PROVING CAUSATION

criteria. In cancer epidemiology, for example, the most likely choice involves: consistency, strength, dose-response, and biological plausibility, leaving behind coherence, specificity, analogy, and (interestingly) temporality. In each individual application, the user will select those he believes to be most relevant.

After some written narrative discussion, typically a paragraph or two for each of the criteria selected, the user of this method then makes a claim about the extent to which the exposure and the disease under question are causally related. Sometimes recommendations regarding preventive interventions are also included.

This is a bare-bones—but reasonably accurate—account of the epidemiologic approach to causal inference. This is our habit, our way of solving a very important professional problem.

III. ONLY THE WEARER KNOWS WHERE THE SHOE PINCHES—OLD ENGLISH PROVERB

This description of the use of causal criteria could have included the following, more complete, set of steps:
1. Selection of the Criteria (as mentioned above)
2. Prioritization of the Criteria Selected
3. Assigning a Rule of Inference to each Criterion

Studies of the practice of causal inference have shown that epidemiologists rarely pay attention to the second and third steps above. It is unfortunate but true that a practitioner can undertake this practice precisely as described above without mentioning to those who review, edit, and eventually read the causal assessment

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10 See supra Part II.
in the peer-reviewed scientific literature, how these criteria are being prioritized (other than some are included and others are not). Similarly, it is exceedingly unusual for a practitioner to describe the rules of inference assigned to each criterion prior to their application. By “rules of inference” I mean the conditions under which one will accept or not accept the criterion as having been satisfied, or more likely satisfied. If, for example, the user of the method believes that causation is extremely unlikely if the summarized risk estimate—the relative risk estimate across the studies collected—is less than 2.0, then a reasonable rule of inference for that criterion, for that user, in that particular circumstance, would be that “relative risk estimates less than 2.0 will be considered unlikely causal” or something along those lines. The rules of inference used for the criterion of biological plausibility are especially mysterious. Other criteria can be similarly described.

In sum, the current user of causal inference methods in epidemiology can select the criteria they wish, prioritize them in any manner they wish, and assign rules of inferences to them (implicitly) without ever mentioning them. While it is possible to infer these various choices by careful reading, they need not be stated anywhere in the paper.

It is also true—and at least as unfortunate—that in many scientific journals, these sorts of causal assessments can occur without a systematic review of the literature. The studies selected for review may not, in these circumstances, represent those culled from a larger set using stated inclusion and exclusion criteria.11

Add to this ever-accumulating pile of subjective features the uncertainties stemming from loosening the overly simplistic assumptions regarding statistical significance, confounding, and bias, along with the potential (and documented) role of personal, social, moral, and political values in decision making, and it is fair

to say that the current practice of causal inference is, at best in trouble, and at worst in shambles.\footnote{Douglas L. Weed, Underdetermination and Incommensurability in Contemporary Epidemiology, 7 KENNEDY INST. ETHICS J. 107 (1997).}

IV. ALL PROGRESS IS PRECARIOUS, AND THE SOLUTION OF ONE PROBLEM BRINGS US FACE TO FACE WITH ANOTHER PROBLEM—MARTIN LUTHER KING

Given the current situation, what is most impressive about epidemiology’s role in the identification of potentially preventable causes of illness and injury is that so much scientific and public health progress has been made. Smoking is indeed a cause of lung cancer, laryngeal cancer, esophageal cancer, and bladder cancer. Human Papillomavirus does cause cervical cancer and HIV causes AIDS. The list of chemical carcinogens—asbestos, arsenic, aniline dyes, diethylstilbestrol, and cadmium to cite a few examples—is long. Radiation of many types is responsible for—causes skin cancer, breast cancer, and other diseases. Put another way, I do not want to give the reader of this brief paper the impression that the methods of causal inference are irremediable. But serious problems we do have.

What is to be done? Two approaches for improving the situation can be identified: one empirical, the other theoretical.

A. An Empirical Approach to Improving the Current Practice of Causal Inference

There are examples—call them “case studies”—of causal associations in the historical record (i.e., the peer-reviewed scientific literature) about which we can all agree on the outcome. For each, we can describe the evidence—the studies and their evidentiary characteristics—that existed at the time a causal claim was first made or, alternatively, at the time a consensus about causation was reached.

Smoking and cancer represents an excellent example. In 1964, a committee of scientists organized by the Surgeon General of the
United States carefully collected, summarized, and examined the evidence (in a manner remarkably more systematic than much of what is published today in 2003!). They concluded that lung cancer and laryngeal cancer were caused by smoking cigarettes. Esophageal cancer and bladder cancer, however, were spared this conclusion. In 1982, after eighteen years of additional research, a new committee was formed, again under the auspices of the U.S. Surgeon General. The same causal criteria from 1964 were applied to a new (expanded) body of evidence with somewhat different evidentiary characteristics. In the judgment of the committee, esophageal cancer joined the ranks of those caused by smoking.

How can this type of analysis assist us in improving the practice of causal inference? Here’s just one example: Careful study of the 1964 decision on esophageal cancer will allow us to describe what evidence—as reflected in the causal criteria and their rules of inference—was insufficient to make a causal claim. Careful study of the 1982 decision on esophageal cancer (in which the committee changed its mind about causation) will provide an estimate of the cumulative amount and minimum characteristics of evidence required to make a causal claim (for that committee).

In any such example of what we now consider to be a case of “known” causation, the extent to which the observed level of evidence—the kinds and characteristics of evidence—is representative of other causal associations is a fair question. Perhaps it would have been reasonable to claim causation with less (perhaps much less) evidence. Nevertheless, such an approach can provide empirical examples of the minimum level of evidence for causation aligned with a particular exposure-disease causal combination.

B. A Theoretical Approach to Improving the Practice of Causal Inference

Alternatively, we may approach the research problem by

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13 1964 SURGEON GENERAL’S REPORT, supra note 6.
examing the causal criteria, their rules of inference, and their prioritization of the criteria, in terms of connections to causal definitions, hypotheses, and theories. Simply put, for a given causal hypothesis or definition, what evidentiary conditions would be expected? Very little work has been done on this question in epidemiology.

On the other hand, setting out causal conditions based on what we believe to be reasonable assumptions is a time-honored approach in epidemiology and can be traced to the early discussion of this topic in the late 1950s and early 1960s. Hill’s 1965 classic paper is an excellent example of this approach. Each criterion is considered separately. For example, the reasoning for consistency goes like this: a causal association should be observed in different study populations, using different methods, examined by different investigators; it would be consistent, in other words. Here’s another example: a causal association is a plausible association; to put it another way, if a purported relationship goes against what we know is biologically possible, then we would be less inclined to call it causal. Similarly, a cause must precede its effect in time, the essence of temporality. This approach is extremely popular in epidemiology. Nearly everyone has their opinion on how the criteria should be used. And these opinions are reflected in the high level of subjectivity or personal preference discussed earlier in this paper.

Greater objectivity can be achieved if the criteria can be linked with general causal hypotheses (or general theories of causation or causal definitions). Currently, we have several definitions of causation to work with. Finally, the theoretical approach can be linked with the case-based empirical approach described above. Together, these two approaches are our best hope for progress in this difficult yet critical arena.

V. MORNING COMES WHETHER YOU SET THE ALARM OR NOT—

15 Hill, supra note 5, at 295-300.
16 Weed, Methods in Epidemiology, supra note 9, at 104-10.
In the end, my comments on general causation have been as much about the fuzzy future as they are about the dizzy present or the hazy past.

Epidemiologists have only recently recognized that their practice of causal inference is seriously ill. For nearly fifty years, ever since the so-called chronic diseases—cancer, heart disease, diabetes, and mental illness emerged as foci for “modern” epidemiology—we have (almost systematically) ignored how we might improve the practice of causal inference. A few recent studies have shown that this practice, after years of neglect, suffers from a variety of ailments not uncommon for methods more qualitative than quantitative, yet which aspire to provide more-certain-than-not results.

The methods of causal inference are often used uncritically and are subject to unacceptable levels of subjectivity. Their results—the causal claims and preventive recommendations—are susceptible to the whims of personal preference, what philosophers call “values.” Precisely opposite claims have emerged from investigators using the same causal criteria on the same evidence.

It is no exaggeration to say that any epidemiologist who claims he is an expert—that he can reliably make claims about causation—is either hopelessly naïve or a flagrant prevaricator. As noted earlier, I do not mean to suggest that prior claims about what factors or exposures cause illnesses are incorrect. We—the public health community—have made the right call in many situations. What I am suggesting, on the other hand, is that we have failed to use the past record of achievement in general causation to the public’s advantage. Couple our reluctance to look back and gain from our experience—our successes and failures—with our well-known aversion to theoretical development, and it is not surprising that we have made so little progress on a problem so central to our discipline.

What is needed for causation in epidemiology—and the cliché is unintended—is more research. Two approaches have been described: one, like both legal and moral reasoning, emerges from careful empirical study of recorded case studies; the second is a
theoretical approach both more speculative and potentially more generalizable.

The future comes to everyone at the same pace: sixty minutes per hour. To best meet that future for the problems of general causation, we must have the power to shape it through research and its application, what epidemiologists do best.
A CONCEPTUAL MODEL OF HEALTH CARE FRAUD ENFORCEMENT

Joan H. Krause*

INTRODUCTION

The numbers are staggering: an estimated 10 percent of the federal health care budget lost to fraud.¹ More than $12 billion improperly paid out by Medicare in fiscal year 2001—a number all the more striking in that it represents significant progress from prior years.² Corporate health care defendants settling fraud allegations for hundreds of millions of dollars in civil penalties and

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¹ See S. REP. NO. 99-345, at 3 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5268 (estimating 1 to 10 percent of the federal budget is lost to fraud). See, e.g., David A. Hyman, HIPAA and Health Care Fraud: An Empirical Perspective, 22 CATO J. 151, 159 (2002) (arguing that “[a]lthough the figure of 10 percent was an effective political statistic, it has no empirical foundation”).

² See DEP’T OF HEALTH & HUMAN SERVICES, OFFICE OF THE INSPECTOR GEN., NO. A-17-01-02002, IMPROPER FISCAL YEAR 2001 MEDICARE FEE-FOR-SERVICE PAYMENTS 1 (2002) (acknowledging the error rate represented a significant reduction from the $23.2 billion in improper payments identified in 1996, the first year such audits were conducted), available at http://oig.hhs.gov/oas/reports/cms/a0102002.pdf.
criminal fines.\(^3\) Federal health care fraud recoveries of more than a billion dollars a year, of which a significant percentage can be used to fund future enforcement efforts.\(^4\) If nothing else, it’s clear there is money in health care fraud—on both sides of the law.

Federal health care fraud enforcement takes place in an atmosphere characterized by an increasing number of requirements placed on the health care providers and professionals who participate in the federal health care programs, such as Medicare and Medicaid.\(^5\) The federal health care programs are subject to an enormous number of legal provisions, spanning hundreds of thousands of pages.\(^6\) While some commentators contend that the

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\(^5\) In the federal health care programs, the term “provider” technically refers to institutional entities, such as hospitals, home health agencies, and nursing homes. 42 U.S.C. § 1395x(u) (2003) (defining “provider of services”). Because they face similar fraud liability, this article will use the term “provider” to refer more broadly to both individual health care professionals and institutional entities. See OFFICE OF THE INSPECTOR GEN., SPECIAL ADVISORY BULLETIN: PRACTICES OF BUSINESS CONSULTANTS 1, n.1 (2001) (using term to include, “providers, suppliers, and practitioners that provide items or services payable in whole or in part by a Federal health care program”), available at http://oig.hhs.gov/fraud/docs/alertsandbulletins/consultants.pdf.

\(^6\) Several years ago, staff at one medical center counted 132,720 pages of Medicare laws and regulations alone. See Mayo Chronicles Medicare Regs: It’s 132,720 Pages of Red Tape, MODERN HEALTHCARE, Mar. 15, 1999, at 64.
recent proliferation of fraud cases can be blamed on the fact “that healthcare regulations have just become too complicated to understand,” their arguments have won little sympathy in the halls of Congress and the annals of public opinion.

At the same time, the legal provisions governing health care fraud have become similarly complex. At the federal level, health care fraud is subject to a curious hybrid of ex ante and ex post enforcement mechanisms. Not surprisingly, the powerful ex post enforcement powers exercised by federal officials—i.e., prosecutions resulting in massive criminal and civil liability—have received the most attention. Given that both the health care industry and the government share the goal of preventing fraud before it occurs, however, the focus has shifted in recent years to informal guidance offering advice to health care providers on how to structure their activities to fit the law. Some of this advice comes in the form of opinions responding to individual queries, while other guidance takes the form of broad policy statements applicable to the entire industry. This guidance does not operate as pure ex ante regulation because providers are not required to demonstrate compliance with these criteria before furnishing services to program beneficiaries. While not required for initial participation in the federal health care programs, however, compliance may be required in order to continue participation in the programs once fraud allegations are made. Thus, providers

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9 See, e.g., *infra* Parts III.B.1.a (discussing the advisory opinion process), III.B.1.b (discussing industry-wide fraud alerts) & III.B.1.c (discussing compliance guidances).
10 See Bhagwat, *supra* note 8, at 1282-85 (discussing public ex ante enforcement).
11 See Office of the Inspector Gen., Corporate Integrity Agreements: General Information (describing the requirements of Corporate Integrity Agreements, which often are required as part of settlement), at http://oig.hhs.gov/fraud/cias.html (last visited Feb. 2, 2003).
may have no practical choice but to “voluntarily” comply with the agency’s position as expressed in such guidance—even if it includes requirements not found in the underlying statutes or regulations.\textsuperscript{12}

In the health care context, this guidance currently is provided in three distinct ways: through the processes of \textit{regulation}, \textit{information}, and \textit{litigation}.\textsuperscript{13} Despite the fact that only regulations promulgated through the notice-and-comment process are legally binding, anti-fraud efforts increasingly rely on informal expressions of agency views, as well as the use of public and private litigation to address ambiguities in substantive regulation.\textsuperscript{14} While this development offers increased guidance to the industry as to the scope of permissible activities, it simultaneously raises troubling concerns about subjecting health care providers to unofficial—and potentially inconsistent—legal interpretations.

This article analyzes the tripartite health care fraud enforcement framework. Part I offers a brief introduction to health care fraud, focusing on recent federal fraud initiatives. Part II addresses three of the key federal health care fraud laws: the Civil False Claims Act (FCA), the Medicare & Medicaid Anti-Kickback Statute, and the so-called “Stark Law” prohibiting physician self-referrals.\textsuperscript{15} Part III analyzes the impact of the tripartite regulation-information-litigation model on health care providers. Part IV addresses the implications of this model, arguing that the combination of cumbersome rulemaking procedures, the proliferation of unofficial guidance, and the growing use of litigation may create an increasingly untenable situation for the health care industry.

The article concludes by offering suggestions for how this model could be refined, focusing on regulatory \textit{clarity} as a

\begin{footnotesize}
\begin{enumerate}
\item Bhagwat, \textit{supra} note 8, at 1287 (identifying similar “intermediate modes of enforcement”).
\item “Litigation” might well have been deemed “enforcement” by this Author—except that it does not rhyme.
\item See discussion \textit{infra} Part III.B.2.
\end{enumerate}
\end{footnotesize}
necessary precondition for a legitimate fraud enforcement framework. The principle of regulatory clarity requires the development of clear rules governing the conduct of health care providers, supported by substantial penalties for clear violations. Under the current system, by contrast, fraud is addressed through a confusing combination of intricately detailed rules and vague aspirational pronouncements. While this approach offers the flexibility needed to address new developments in the ever-changing health care market, it less clearly serves the goals of clarity and efficiency—raising the troubling possibility that, in the eyes of the health care industry, we are willing to sacrifice the legitimacy of the enforcement process.

I. HEALTH CARE FRAUD AS A NATIONAL FOCUS

Health care fraud has been a top priority for federal law enforcement at least since 1994, when former Attorney General Janet Reno deemed it her “number two priority,” second only to violent crime. Although one might question whether the Department of Justice (DOJ) had more pressing priorities at the time, the motivation for the announcement was clear: as the authors of one treatise note, health care fraud is “where the money is.” The first audit of Medicare fee-for-service payments found that more than $23 billion had been paid out improperly in fiscal year 1996 alone. Although the numbers have improved each year, auditors still estimate that $12.1 billion in improper Medicare payments were made in fiscal year 2001.

18 See DEP’T OF HEALTH & HUMAN SERVICES, supra note 2 (reviewing 1996 data).
19 Id. Of course, it is not clear that all these improper payments can be attributed to “fraud” rather than to errors or good faith disagreements. See Waste, Fraud, Abuse, and Mismanagement: Hearing Before the Task Force on Health of the House Committee on the Budget, 106th Cong. 117 (2000)
Consistent with this focus, recent years have seen more funds appropriated to the federal agencies with jurisdiction over health care fraud, particularly the DOJ and the Department of Health & Human Services (HHS) Office of Inspector General (OIG). The key to this funding was the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Among other things, HIPAA created a “Fraud and Abuse Control Program” designed to coordinate federal, state, and local health care fraud enforcement efforts. The centerpiece of this effort is the “Health Care Fraud and Abuse Control Account,” which funds health care fraud inspections, investigations, and prosecutions undertaken by the DOJ and OIG. HIPAA set Control Account appropriations at $104 million in fiscal year 1997, with an increase of up to 15 percent per year through 2003. In fiscal year 2001, the Attorney General and the Secretary of HHS certified $181 million for appropriation to the Control Account, with the Federal Bureau of Investigation (FBI) receiving a separate appropriation of $88 million.

The DOJ and OIG benefit in both direct and indirect ways from these appropriations. Directly, this guaranteed source of funding has permitted the hiring of additional FBI and OIG agents assigned specifically to health care fraud. Indirectly, a form of an

(statement of the OIG, explaining that the “objective is not to determine the extent of fraud in the Medicare program”), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_house_hearings&docid=f:64510.wais.

23 Id. §§ 1395i(k)(3)(A)-(B) (setting out the maximum amounts available for appropriation).
25 See, e.g., id. at App. (noting that the FBI’s total allotment was used to support 445 existing agents and to hire an additional 30 agents); Enforcement: Terrorism Focus Has Not Diverted Resources from Health Fraud Probes, FBI Official Says, 6 HEALTH CARE FRAUD REP. (BNA) 155, 156 (Feb. 20, 2002) (stating the FBI expected to hire 2,000 more health care agents over the next two
attenuated “bounty” system exists, whereby some of the money collected from health care fraud recoveries is available for appropriation back to the enforcement agencies. HIPAA directed the bulk of these recoveries to be deposited into the perennially near-insolvent Medicare Part A Trust Fund. A significant portion of this money, however, can be appropriated back to the Health Care Fraud and Abuse Control Account to fund future law enforcement activities. As one commentator has noted, “although this is not a pure bounty system, it is much closer than had previously been the case.”

These investments have clearly paid off. The DOJ recently announced that it recovered more than $980 billion in civil health care fraud suits and investigations in fiscal year 2002. This represents a slight reduction from fiscal year 2001, when the government won or negotiated more than $1.7 billion in health care cases and collected $1.3 billion. Rather than signifying a downturn in enforcement activities, however, this difference is largely attributable to the fact that awards often are not collected in the same year in which they are negotiated, and to the ease with years). In the fall of 2001, there were rumors that many of these agents had been pulled from health care investigations to staff anti-terrorism initiatives; however, the FBI later announced that health care fraud staffing remained unchanged. Id. (quoting FBI Health Care Unit Chief Timothy Delaney).

26 42 U.S.C. § 1395i(k)(2)(C) (authorizing the transfer of fines, penalties, and damages obtained in health care fraud cases to the Trust Fund); Sarah Lueck, Some Premiums for Medicare to Rise 12.4%, WALL ST. J., March 27, 2003, at B2 (reporting on Medicare’s insolvency).

27 42 U.S.C. § 1395i(k)(3) (explaining the appropriations process for the Health Care Fraud and Abuse Control Account).

28 Roger Feldman, The Regulation of Managed Care Organizations and the Doctor-Patient Relationship, 30 J. LEGAL STUD. 569, 574 (2001) (discussing fraud and abuse in medical care and the inefficient attempts to curb it). See also Hyman, supra note 1, at 158 (“Although this structure prevents the government’s fraud control system from operating on a pure bounty system, there is still considerable suspicion in the provider community on this point.”).


which a particularly large settlement can skew the statistics for any given year.31

In addition to pursuing allegations of fraud against individual providers, the government developed proactive initiatives targeting particular sectors of the health care industry for intensive scrutiny. The prototype for such initiatives was “Operation Restore Trust,” a coordinated federal/state effort in the mid-1990s focusing on fraud by home health agencies, nursing homes, hospices, and durable medical equipment suppliers in states with large Medicare populations.32 Subsequent national and regional initiatives have included the “72-Hour Window Project” targeting hospital bills for outpatient services provided within 72 hours of a related inpatient admission;33 the “Physicians at Teaching Hospitals” (PATH) investigations targeting academic institutions where attending physicians have billed for services actually provided by interns and residents;34 and the “Lab Unbundling Project” investigating hospital laboratories that may improperly have submitted separate bills for laboratory tests performed simultaneously.35 In the future, we are likely to see continued targeting of entire sectors of the health care industry, with better coordination among the relevant state and federal authorities.

Similarly, history teaches us that the anti-fraud focus tends to be cyclical. At the start of the 1990s, the focus was squarely on

31 Id. (“It should be emphasized that some of the judgments, settlements, and administrative impositions in 2001 will result in collections in future years, just as some of the collections in 2001 are attributable to actions from prior years.”).
35 See Gen. Accounting Office, supra note 33 (reviewing the Lab Unbundling Project).
prescription drug sales and marketing activities. Within a few years, the focus had shifted to fraudulent activities by laboratories, to PATH audits of teaching physicians, and to alleged improprieties by hospices and home health agencies. By the late 1990s, nursing homes increasingly found themselves under scrutiny for fraud based on alleged quality-of-care deficiencies. Most recently, there has been renewed interest in the activities of prescription drug companies, this time involving pricing practices in addition to sales and marketing activities. Thus, health care providers can take little comfort in current enforcement priorities: if one health care sector currently is not on the fraud “radar screen,” history tells us that it soon may be.

For a variety of reasons, it is not altogether clear what the Bush Administration will do with regard to health care fraud enforcement. Attorney General John Ashcroft indicated his support for some health care fraud initiatives in his confirmation hearings, albeit perhaps not as strongly as his predecessor. And after


38 See generally Bucy, supra note 34 (describing the PATH initiative).


September 11, 2001—and the recent corporate fraud scandals—the DOJ may have more immediate enforcement priorities. Clearly it would be a mistake, however, for health care providers to assume they can act with impunity because the government’s attention lies elsewhere.

II. KEY HEALTH CARE FRAUD LAWS

Health care fraud is addressed by a variety of federal and state laws. Some of these laws, such as the Medicare and Medicaid Anti-Kickback Statute, are directed at improper activities in the health care market. Others, such as the Civil False Claims Act (FCA), apply more broadly to entities that transact business with the federal government. Health care fraud also is actionable under broad criminal statutes such as Mail and Wire Fraud, which are applicable to criminal conduct regardless of the business context in which it occurs. Of these myriad statutes, the FCA, Anti-Kickback Statute, and “Stark Law” self-referral prohibitions are by far the most important to health care providers on a daily basis. An introduction to these laws is necessary before the tripartite enforcement model can be understood.


44 42 U.S.C. §§ 1320a-7b(b) (2003).


HEALTH CARE FRAUD ENFORCEMENT

A. Civil False Claims Act

The FCA was enacted in 1863 in response to reports of “rampant fraud” perpetrated on the Union army during the Civil War.47 While the statute prohibits a variety of fraudulent activities, the most commonly invoked provision imposes liability on a defendant when: (1) the defendant presents (or causes to be presented48) a claim for payment or approval; (2) the claim is false or fraudulent; and (3) the defendant’s acts are undertaken “knowingly.”49 This mental state includes not only actual knowledge, but also deliberate ignorance or reckless disregard of truth or falsity.50 The types of “claims” subject to the Act include “any request or demand . . . for money or property” if any portion thereof comes from the federal government.51


48 “Cause to be presented” liability generally applies where the person responsible for the falsity does not actually submit the claim, but rather directs others (who may not know of the falsity) to submit the claim on his behalf. See, e.g., United States v. Kensington Hospital, 760 F. Supp. 1120, 1125 (E.D. Pa. 1991) (alleging that physicians who were suspended from the Medicaid program “caused” a hospital to submit improper bills on their behalf).

49 See 31 U.S.C. § 3729(a)(1) (2003). See also BOESE, supra note 47, at 2-9 (noting that violations of § 3729(a)(1) are the most common cause of liability under the FCA). A fourth potential element, harm to the government, remains controversial. See Joan H. Krause, Health Care Providers and the Public Fisc: Paradigms of Government Harm Under the Civil False Claims Act, 36 GA. L. REV. 121, 162-89 (2001) (discussing judicial approaches to fiscal harm under the FCA). Other relevant FCA provisions include § 3729(a)(2) (prohibiting the use of false records or statements to get a false or fraudulent claim allowed or paid); § 3729(a)(3) (prohibiting conspiracies “to defraud the government by getting a false or fraudulent claim allowed or paid”); and § 3729(a)(7) (prohibiting “reverse false claims,” in which false records or statements are used “to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government”).


51 See id. § 3729(c).
Violators are subject to a civil penalty of $5,500 to $11,000 per claim, plus three times the amount of damages sustained by the government. Due to the way health care services are billed, it does not take long for such penalties to reach significant levels. Most health care providers generate a bill for each occasion of services rendered to each patient, resulting in the submission of thousands of small claims a year. Fraud tends to occur in small amounts, such as a few cents or a few dollars per claim. While treble damages are likely to be relatively reasonable in such cases, the per-claim penalties mount quickly. In *United States v. Krizek*, for example, a psychiatrist was accused of submitting 8,002 claims, each inflated by approximately $30, for total damages of $245,000. At trial, the government requested penalties of $10,000 per claim, for a total of $81 million. Combined with the threat of exclusion from federal health care programs, the FCA is one of the major reasons health care providers desire to settle fraud allegations. Thus, this general anti-fraud law has become a key

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52 Id. § 3729(a); 28 C.F.R. § 85.3(a)(9) (1999) (increasing statutory penalties by 10 percent).
53 See Bucy, *supra* note 34, at 38 (“Because of the billing structure for most health care services (one claim per service, per patient) even a small health care provider will submit thousands of claims each year.”). See also Timothy Stoltzfus Jost & Sharon L. Davies, *The Empire Strikes Back: A Critique of the Backlash Against Fraud and Abuse Enforcement*, 51 ALA. L. REV. 239, 259 (describing “a steady stream of small claims, resulting, in the aggregate, in enormous volumes of claims”).
54 See Bucy, *supra* note 34, at 38 (“[A]lthough the total amount of loss per fraud scheme may be large, health care fraud usually is committed in small dollar increments ($2 per claim form, for example).”).
55 See Jost & Davies, *supra* note 53, at 260 (“Even if individually quite small . . . astronomical sums are quickly reached.”).
56 111 F.3d 934, 936 (D.C. Cir. 1997).
57 Id. On appeal, the D.C. Circuit upheld FCA liability on a theory of “reckless disregard,” but remanded for a variety of evidentiary issues pertaining to the calculation of damages and penalties. Id. at 943. The appeals in the case continued through 1999, at which time the D.C. Circuit noted, “It is time for the parties to stop refighting battles long-ago lost and for the district court to bring this prosecution to an expeditious close.” United States v. Krizek, 192 F.3d 1024, 1031 (D.C. Cir. 1999).
58 See 42 U.S.C. § 1320a-7 (2003) (setting forth grounds for exclusion from
HEALTH CARE FRAUD ENFORCEMENT

component of the government’s war against health care fraud.

One reason the FCA has been so successful is the law’s *qui tam* provisions, which permit private “relators” who sue on the government’s behalf to retain 15 to 30 percent of the proceeds of the suit—creating a powerful incentive for private parties to police their neighbors in the health care market. 59 Since amendments in 1986 modernized the Act and made it more lucrative to pursue *qui tam* actions, the number of health care-related FCA suits has grown exponentially. 60 By 1998, nearly two-thirds of the *qui tam* suits filed concerned the federal health care programs, compared to only 12 percent in 1987. 61 This powerful civil law can thus be invoked not only by federal prosecutors, but also by competitors, employees, and even patients and their families—making the FCA a significant threat to health care providers who receive payment from federal health care programs.

Traditionally, health care FCA cases have involved misrepresentation of the facts surrounding the services for which payment is requested, such as the submission of claims for services that were never rendered. 62 Still unanswered is the question of whether the FCA can be used as a vehicle for suits alleging violations of other federal health care program requirements. Recently, prosecutors and *qui tam* relators have invoked the law in situations where health care services were in fact delivered to patients, but where the claimants may have violated underlying legal requirements (such as the federal anti-referral laws) in federal health care programs); Krause, *supra* note 49, at 202-12 (discussing FCA settlements). See also Joan H. Krause, “Promises to Keep”: Health Care Providers and the Civil False Claims Act, 23 CARDOZO L. REV. 1363 (2002) [hereinafter Krause, “Promises to Keep”].

59 See 31 U.S.C. §§ 3730(b), (d) (2003) (noting that a private person who brings a civil action may potentially receive 15 to 30 percent of the proceeds, depending on factors such as whether the government joins in the suit).


62 See, e.g., Peterson v. Weinberger, 508 F.2d 45, 47-48 (5th Cir. 1975) (imposing liability on a physician who billed Medicare for physical therapy services that had not been performed).
furnishing the care.\textsuperscript{63} Although few court opinions address the merits of such suits, these arguments have been quite successful at generating settlements.\textsuperscript{64}

\textbf{B. Medicare & Medicaid Anti-Kickback Statute}

The Medicare & Medicaid Anti-Kickback Statute is the major federal law affecting financial relationships within the health care market.\textsuperscript{65} The statute prohibits offering, paying, soliciting, or receiving any “remuneration” to induce someone to refer patients to any facility, or to purchase, lease, or order any item or service, for which payment may be made by a federal health care program.\textsuperscript{66} Unlike the FCA, the Anti-Kickback Statute is a \textit{criminal} law specifically targeting improper activities involving health care items and services.\textsuperscript{67} This broadly-drawn statute governs a wide range of financial relationships, including those among health care providers, between health care providers and their patients, and between health care providers and the manufacturers/suppliers from whom they purchase health care products. At core, the statute seeks to limit the influence of financial incentives over health care decisions, demanding that such decisions be made solely on the basis of which products and services will best serve the interests of the \textit{patient}, rather than the provider.\textsuperscript{68}

\textsuperscript{63} See Krause, “Promises to Keep”, supr\textit{a} note 58, at 1391-1406 (discussing health care FCA cases).
\textsuperscript{64} See id. at 1404; infra Part III.C.2.a.
\textsuperscript{65} 42 U.S.C. § 1320a-7b(b) (2003).
\textsuperscript{66} Id.
\textsuperscript{67} Id. § 1320a-7(b) (specifying criminal penalties).
\textsuperscript{68} See, e.g., Thomas N. Bulleit, Jr. & Joan H. Krause, \textit{Kickbacks, Courtesies, or Cost-Effectiveness?: Application of the Medicare Anti-Kickback Law to the Marketing and Promotional Practices of Drug and Medical Device Manufacturers}, 54 \textit{Food & Drug L.J.} 279, 282 (1999) (“The main purpose of the anti-kickback law may be summarized most succinctly as preventing inappropriate financial considerations from influencing the amount, type, cost, or selection of the provider of medical care received by a federal health care program beneficiary.”); Medicare and Medicare Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, 54 Fed. Reg. 3,088, 3,089 (proposed Jan. 23,
HEALTH CARE FRAUD ENFORCEMENT

More specifically, the statute prohibits: (1) the knowing and willful; (2) offer or payment (or solicitation or receipt); (3) of any form of remuneration; (4) to induce someone to refer patients or to purchase, order, or recommend; (5) any item or service that may be paid for under a federal health care program. Several aspects of this definition require elaboration. First, because the statute prohibits both the offer/payment and the solicitation/receipt of remuneration, both parties to an improper transaction are subject to prosecution (provided, of course, they have the requisite intent). Second, the definition of “remuneration” is quite broad, incorporating payment made “directly or indirectly, overtly or covertly, in cash or in kind.” As such, the prohibition extends beyond simple kickbacks and bribes to reach not only the exchange of money, but anything of value or any type of benefit offered to the referring party, including relieving that party of a financial burden she would otherwise have to bear.

Third, the concept of intent is key to understanding the statute. Unfortunately, intent has been used to refer to two similar yet distinct concepts in Anti-Kickback jurisprudence. The first is the general motivation behind the questionable financial relationship—whether it was designed to induce the referral of patients or the purchase of items or services. In this respect, the law has been interpreted quite broadly to encompass situations in which even one purpose of the remuneration—rather than the sole or primary purpose—is to induce prohibited referrals. Recognizing that few

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69 42 U.S.C. § 1320a-7b(b).
70 Id. §§ 1320a-7b(b)(1) & (2).
72 See, e.g., United States v. McClatchey, 217 F.3d 823, 835 (10th Cir. 2000) (“[A] person who offers or pays remuneration to another person violates the Act so long as one purpose of the offer or payment is to induce Medicare or Medicaid patient referrals.”); United States v. Greber, 760 F.3d 68, 72 (3d Cir. 1985) (“If the payments were intended to induce the physician to use [defendant’s] services, the statute was violated, even if the payments were also
transactions are entered into without at least some contemplation of business advantage, however, the Tenth Circuit recently acknowledged that “a hospital or individual may lawfully enter into a business relationship with a doctor and even hope for or expect referrals from the doctor, as long as the hospital is motivated to enter into the relationship for legal reasons entirely distinct from its collateral hope for referrals.” Whether it will be feasible to parse the parties’ motivations in such a detailed manner remains to be seen.

The second meaning of intent tracks the traditional criminal law definition of mens rea: did the parties make or receive the improper payments with the requisite “knowing and willful” state of mind? In Hanlester Network v. Shalala, the Ninth Circuit held that a violation of the statute could not be found unless the defendant both knew that the law prohibited giving or receiving remuneration in return for referrals and acted with the specific intent to violate the statute. Although this narrow interpretation was heartening to the health care industry, it remains confined to those parties falling within the Ninth Circuit’s jurisdiction. Courts in other circuits have declined to adopt such a stringent intent standard, finding that the Anti-Kickback Statute is not the sort of “highly technical . . . regulation that poses a danger of ensnaring persons engaged in apparently innocent conduct,” for which

intended to compensate for professional services.”).

73 McClatchey, 217 F.3d at 834. The court, however, gave no indication of how to separate the parties’ collateral hopes and expectations from their “purpose” in such situations. See also United States v. Bay State Ambulance & Hosp. Rental Serv., Inc., 874 F.2d 20, 30 (1st Cir. 1989) (approving a jury instruction that prohibited conviction if the improper purpose was “incidental” or “minor”).

74 Mens rea is defined as “[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime; criminal intent or recklessness.” BLACK’S LAW DICTIONARY 1999 (7th ed. 1999).

75 51 F.3d 1390, 1400 (9th Cir. 1995) (relying on Ratzlaf v. United States, 510 U.S. 135 (1994), in which the Supreme Court addressed willfulness in the context of the prohibition against structuring financial transactions to avoid currency reporting requirements, 31 U.S.C. § 5322).
specific intent is appropriate.\textsuperscript{76} At present, then, the applicable \textit{mens rea} standard will vary depending on the jurisdiction in which the action is brought.

Finally, it is important to remember that the statute applies to referrals made in connection with beneficiaries of any of the federal health care programs.\textsuperscript{77} For many years the prohibition applied only to Medicare and Medicaid patients, leaving an apparent loophole for improper behavior in other federally-funded programs.\textsuperscript{78} As of January 1, 1997, however, the prohibition is applicable to all federal health care programs other than the Federal Employees Health Benefits Program (FEHBP).\textsuperscript{79} While a case involving significant monetary damage to the federal health care programs may present a particularly attractive target for federal prosecutors, no actual payment by the government is required; the mere potential for increased costs will suffice.\textsuperscript{80}

Penalties for violating the statute are severe, consisting of both criminal and civil/administrative sanctions: violation of the statute is a felony, punishable by up to five years in prison and/or a fine of


\textsuperscript{77} 42 U.S.C. § 1320a-7-b(b) (2003).


\textsuperscript{79} \textit{Id.} The FEHBP, the health insurance program for federal employees, is likely excluded for two reasons: (1) it is an employment benefit program, rather than a social welfare or entitlement program; and (2) it is administered by the Office of Personnel Management, rather than by HHS. \textit{See} 5 C.F.R. § 890 (2003).

\textsuperscript{80} \textit{See, e.g.,} United States v. Ruttenberg, 625 F.2d 173, 177 (7th Cir. 1980) (“The potential for increased costs if such . . . agreements become an established and accepted method of business is clearly an evil with which the court was concerned and one Congress sought to avoid in enacting [the statute].”).
up to $25,000. Upon conviction, the defendant is subject to exclusion from all federal health care programs, a potentially fatal blow for entities that derive substantial revenues from such business. In lieu of a criminal prosecution, the OIG may also seek “permissive” exclusion of the provider. Prior to being excluded, the provider will receive notice and an opportunity to request a hearing before an administrative law judge (ALJ). Although the provider has the right to an attorney, to discovery, and to present evidence on its behalf, the administrative hearing is not identical to a trial and the ALJ is not bound by the Federal Rules of Evidence. Thus, one of the most severe penalties available for violating the statute—exclusion from all federal health care programs—can be imposed without a full-fledged civil or criminal proceeding.

Prior to the late 1990s, the OIG had indicated that it would not seek to exclude entities who were not paid directly by the federal health care programs, such as drug manufacturers who sell their products to physicians and pharmacists (who may in turn submit claims for reimbursement). In 1998, however, the OIG reversed course and issued regulations permitting the exclusion of entities that “indirectly furnish” items and services to federal health care program beneficiaries. Because of the potential for exclusion—as

81 42 U.S.C. § 1320a-7b.
82 The OIG must exclude individuals and entities convicted of a felony related to health care fraud, and may exclude them for misdemeanor convictions. See 42 U.S.C. § 1320a-7(a).
83 42 U.S.C. § 1320a-7(b)(7) (permitting the exclusion of “[a]ny individual or entity that the Secretary determines has committed an act which is described in section . . . 1128B . . .”); 42 C.F.R. § 1001.951 (2003) (permitting exclusion in limited circumstances).
86 See Health Care Programs: Fraud and Abuse; Amendments to OIG Exclusion and CMP Authorities Resulting from Public Law 100-93, 57 Fed. Reg. 3298, 3300 (Jan. 29, 1992) (declining to invoke the exclusion authority against manufacturers).
87 See Health Care Programs: Fraud and Abuse; Revised OIG Exclusion Authorities Resulting from Public Law 104-191, 63 Fed. Reg. 46,676 (Sept. 2,
well as civil and criminal sanctions—it is fair to say that the Anti-Kickback Statute now poses a significantly stronger threat to drug manufacturers than in the past.

Violations of the statute are also punishable by civil and administrative monetary sanctions. The government has the authority to impose a civil monetary penalty (CMP) for violation of the statute in the amount of $50,000 for each violation, plus not more than three times the remuneration involved. In theory, this provision has the potential to dwarf even the FCA provisions, under which penalties presently are limited to $11,000 per violation. In reality, however, this relatively new CMP has not often been invoked.

As noted above, some courts have now permitted qui tam actions under the FCA based on allegations that the defendant violated the Anti-Kickback Statute. In United States ex rel. Pogue v. American Healthcorp. Inc., for example, a relator alleged that the defendant hospitals and physicians had submitted claims for services furnished pursuant to referrals that violated the Medicare & Medicaid Anti-Kickback Statute and the Stark Law. The relator argued that because compliance with the anti-referral laws was a prerequisite for participation in Medicare and Medicaid, any claims submitted in violation of these provisions were, by definition, false and fraudulent. In other words, the relator posited that the defendants were liable because the government would not have paid them for their services had it

1998) (codified at 42 C.F.R. § 1001.10 (2003)). The OIG characterized its about-face as a “clarification,” rather than a change in policy. Id.

88 42 U.S.C. § 1128A(a)(7) (2003) (imposing civil penalty on a person who “commits an act described in paragraph (1) or (2) of section 1128B(b)”).

89 Id.


91 See supra notes 63-64 and accompanying text.

92 914 F. Supp. 1507, 1508 (M.D. Tenn. 1996) (denying defendants’ motion to dismiss).

known of the referrals. While this proposition has not been accepted by all jurisdictions, such cases raise troubling concerns for providers—especially to the extent they essentially create a private right of action for kickbacks.

The language of the Anti-Kickback Statute is very broad, as have been judicial interpretations of the law. As commentators have noted, “[t]he statute has been held applicable to a wide variety of financial relationships that are quite different from an obvious kickback for a patient referral or a bribe to recommend the purchase of specific products or services.” Read literally, the statute prohibits the transfer of any amount of remuneration to a potential referral source—including a hospital or drug company offering physicians free pens, paper, or coffee and donuts. Intuitively, it may appear that such minor gifts are unlikely to influence physician referral practices, and are not worth the time and energy required for a successful prosecution. The statute contains no dollar threshold, though, and the few cases to

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94 914 F. Supp. at 1509.

95 See, e.g., United States ex. rel. Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 902 (5th Cir. 1997) (rejecting per se approach and limiting FCA’s application to situations in which the claimant falsely certifies compliance with a condition that is a prerequisite for payment).

96 Bulleit & Krause, supra note 68, at 283.

97 But see Mary-Margaret Chren et al., Doctors, Drug Companies, and Gifts, 262 J. AM. MED. ASS’N 3448, 3449 (1989) (“Even mundane things . . . can have significance when they are gifts—a book is not simply a book if it is used to engender a response.”); Ashley Wazana, Physicians and the Pharmaceutical Industry: Is a Gift Ever Just a Gift?, 283 J. AM. MED. ASS’N 373, 376 (2000) (concluding that there is “an independent association between benefiting from sponsored meals and formulary additional requests” for drugs). Although prosecutors might appear to be unlikely to pursue such small cases, the OIG repeatedly has warned the industry about offering even minimal gifts to referral sources. Cf. Notice, Publication of OIG Special Advisory Bulletin on Offering Gifts and Other Inducements to Beneficiaries, 67 Fed. Reg. 55,855 (Aug. 30, 2002), available at http://oig.hhs.gov/fraud/docs/alertsandbulletins/SABGiftsandInducements.pdf (permitting providers to offer beneficiaries “inexpensive gifts” under 42 U.S.C. § 1320a-7a(a)(5), defined as gifts having no more than $10 individual retail value and no more than $50 annually per patient).
recognize a *de minimis* exception have set the bar extremely low.\(^\text{98}\) Thus, while the statute is very good at prohibiting all financial ties that *might* impermissibly influence referral decisions, it is not very good at distinguishing truly problematic activities from ones that are neutral—or perhaps even beneficial for the industry.\(^\text{99}\)

Fortunately, Congress has “recognized that the Anti-Kickback Statute’s broad language ha[s] the potential for creating confusion in the health care industry regarding the legality of many commonplace business arrangements.”\(^\text{100}\) The statute contains explicit exceptions for a few categories of activities, including discounts and payment to employees.\(^\text{101}\) Moreover, Congress directed the Secretary of HHS to issue regulations exempting additional practices from the scope of the law.\(^\text{102}\) These regulations—known as the “safe harbors”—identify “transactions that are deemed to pose little or no threat of abuse or to be otherwise desirable or legitimate arrangements,” and hence do not violate the statute.\(^\text{103}\) The initial safe harbors were published in 1991; a second set of exceptions followed in 1992, with significant

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\(^{98}\) See, e.g., Inspector General v. Hanlester Network, Dec. No. 1275 (HHS Dept. App. Bd., App. Div., 1991), *reprinted in* Medicare & Medicaid Guide (CCH), 1992-1 Transfer Binder, ¶ 39,566 at 27,763 n.34 (noting that “*de minimis* or very remote forms of remuneration, such as drug samples or recruitment lunches, may not be subject to prosecution . . . If the remuneration offered is unlikely to affect physician referral decisions, it is probably not intended to induce referrals” under the statute).

\(^{99}\) See Aspinwall, supra note 76, at 182-84 (discussing the need for a rule of reason” analysis to prevent the Anti-Kickback Statute from restricting the development of innovative cost-effective health care arrangements).


\(^{101}\) See 42 U.S.C. § 1320a-7b(b)(3) (2003) (exempting practices such as discounts, employment compensation, and group purchasing organizations from the scope of the prohibition).


amendments finalized in 1999. Pursuant to HIPAA, the OIG is required to solicit recommendations from the public for adding or revising the safe harbors on an annual basis.

The safe harbors address a variety of common business transactions, such as personal services contracts and the lease of office space and equipment, as well as such health-care-specific activities as the sale of a medical practice and subsidization of malpractice insurance. As the name suggests, “parties who structure their business arrangements to satisfy all the criteria of an applicable safe harbor are sheltered from liability under the Anti-Kickback Statute.” In general, the safe harbor requirements are very narrow and do not provide protection for many real-life business arrangements. Because a statutory violation can be proven only if there is sufficient evidence of intent, however, arrangements that do not fall within a safe harbor are not necessarily illegal.

In determining whether to prosecute under the statute, the OIG has said that it will look to a variety of factors, including: (a) the

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105 See 42 U.S.C. § 1320a-7d(a).


107 Rabecs, supra note 100, at 7.

108 42 C.F.R. § 1001.952. While each safe harbor has specific criteria, common requirements include: (1) a signed written agreement; (2) a minimum one-year term; (3) payment consistent with “fair market value”; and (4) compensation set in advance and not dependent on the volume/value of referrals or other business between the parties. See, e.g., 42 C.F.R. § 1001.952(d) (describing the criteria for personal services and management contracts).

109 See Medicare and State Health Care Programs, 56 Fed. Reg. at 35,954 (stating that the legality of an arrangement will depend upon a fact-specific analysis).
potential for increased charges or costs to payers, especially the government; (b) the potential encouragement of overutilization (i.e., the ordering or performance of health care services beyond those which are medically necessary); (c) the potential for adverse effects on competition; and (d) the intent of the parties.\textsuperscript{110} As discussed below, recent years have seen a proliferation of Anti-Kickback guidance in addition to the safe harbors, including Advisory Opinions, Special Fraud Alerts, and Special Advisory Bulletins.\textsuperscript{111}

\textbf{C. Limitations on Physician Self-Referrals ("Stark Law")}

Originally introduced by Representative Fortney “Pete” Stark as the “Ethics in Patient Referrals Act of 1989,” the so-called “Stark Law” was enacted as part of the Omnibus Budget Reconciliation Act of 1989.\textsuperscript{112} The Stark Law is a civil statute designed to prohibit the referral of Medicare and Medicaid patients to health care providers with whom the referring physician has a financial relationship.\textsuperscript{113} The statute was enacted in response to studies suggesting an unexplained increase in the utilization of Medicare laboratory services when the referring physician had a financial interest in the laboratory to which the patients were referred.\textsuperscript{114}

The original legislation, which has come to be known as “Stark I,” took effect on January 1, 1992, and applied to the referral of Medicare patients for clinical laboratory services.\textsuperscript{115} Several years later, as part of the Omnibus Budget Reconciliation Act of 1993

\textsuperscript{110} See id. at 35,954, 35,956.
\textsuperscript{111} See infra Part III.B.
\textsuperscript{115} See Pub. L. No. 239, § 6204, 103 Stat. 2106 (specifying the original prohibition).
(OBRA ‘93), Congress extended the prohibition to Medicaid patients and expanded it to include a list of ten additional “designated health services”—including inpatient and outpatient hospital services, outpatient prescription drugs, physical and occupational therapy, and home health services—as of December 31, 1994.\(^{116}\)

The Stark Law takes a different approach than the Anti-Kickback Statute, which looks for abuses on a case-by-case basis.\(^{117}\) Instead, Stark prohibits all patient referrals if a relevant financial relationship exists, subject to numerous narrowly drawn exceptions.\(^{118}\) In its most basic form, the law prohibits referrals of patients for designated health services if the referring physician (or an immediate family member) has a “financial relationship” with the entity providing the services—a category that includes both ownership/investment and compensation relationships.\(^{119}\) An entity that provides such designated health services may not bill anyone for services furnished as a result of a prohibited referral.\(^{120}\) To the extent it contains no intent requirement, the law is in essence a strict liability prohibition.

The relevant definitions under the statute are correspondingly broad.\(^{121}\) Most notably, the compensation arrangements that trigger the prohibition include any arrangement involving any remuneration—directly or indirectly, overtly or covertly, in cash and in kind—between the physician (or an immediate family member) and the health care entity.\(^{122}\) Ownership and investment interests include those held in equity, debt, or by any other means.\(^{123}\) Prohibited referrals include (a) the request or


\(^{117}\) 42 U.S.C. § 1320a-7b(b) (2003).

\(^{118}\) 42 U.S.C. §§ 1395nn(a)-(e).

\(^{119}\) Id. § 1395nn(a) (general prohibition).

\(^{120}\) Id.

\(^{121}\) Id. § 1395nn(h).

\(^{122}\) Id. § 1395nn(h)(1).

\(^{123}\) Id. § 1395nn(a)(1). To further complicate things, HHS interprets these
establishment by a physician of a plan of care that includes the
provision of designated health services, and (b) the request by a
physician for an item or service for which payment may be made
under Medicare Part B, including a request for consultation with
another physician as well as any test or procedure ordered by, or
performed by or under the supervision of, the consulting
physician.124

Unlike the Anti-Kickback Statute, the Stark Law is not a
criminal statute and is not punishable by imprisonment. From the
perspective of health care providers, however, the consequences
may be nearly as dire. The statute prohibits payment for a
designated health service furnished pursuant to a prohibited
referral: claims for such services will be denied, and any payments
erroneously received must be refunded.125 Moreover, any person
who knowingly submits or causes a bill to be submitted for
prohibited services is subject to a civil monetary penalty of up to
$15,000 for each such service.126 If those provisions are not
onerous enough, violation of Stark also constitutes grounds for
exclusion from the federal health care programs—the equivalent of
a financial “death penalty” for many health care providers.127

The harshness of the Stark prohibition is mitigated, to a certain
extent, by numerous statutory exceptions.128 Yet here, too, the law
is stricter than the Anti-Kickback Statute: because there is no intent
requirement, the law is violated unless all the criteria for an

Definitions to apply to “indirect” as well as “direct” financial relationships. See

124 42 U.S.C. § 1395nn(b)(5).
125 Id. § 1395nn(g)(1)-(2).
126 Id. §§ 1395nn(g)(3) (per-service penalty) & (g)(4) (imposing a penalty
of up to $100,000 for an “arrangement or scheme” designed to circumvent
the prohibition).
127 Id. § 1395nn(g)(3)-(4) (referencing exclusion provisions in 42 U.S.C. §
1320a-7). For a discussion of the ways in which such civil actions can be
considered to have a “punitive” effect, see generally, Kenneth Mann, Punitive
Civil Sanctions: The Middleground between Criminal and Civil Law, 101 Yale
128 42 U.S.C. § 1395nn(b)-(e).
exception are met. The exceptions are divided into three categories: (1) general exceptions, which apply to both ownership and compensation arrangements; (2) exceptions relating only to ownership or investment interests; and (3) exceptions relating to compensation arrangements. General exceptions include such things as ancillary services provided in a physician’s office (such as an in-office laboratory) or services provided by another physician in the referring physician’s group practice. Exceptions applicable to ownership/investment interests include the types of investments that might be made by a layperson, such as the purchase of publicly traded securities or mutual funds. Not surprisingly, the exceptions applicable to compensation arrangements include a number of common business practices, many of which have corresponding Anti-Kickback safe harbors (such as the rental of office space or equipment, bona fide employment, and personal services arrangements).

As described below, a great deal of uncertainty continues to surround the status of the Stark II regulations, which have yet to be completed. Moreover, issues similar to those under the Anti-Kickback Statute have arisen regarding the propriety of using alleged Stark Law violations as the basis for suits under the FCA. In fact, the majority of alleged Stark Law violations thus
far have been brought via *qui tam* suits, rather than as direct enforcement of the statute by HHS.136

### III. CURRENT THEMES IN FRAUD AND ABUSE

With that brief overview, this article now turns to a discussion of current federal efforts to eliminate health care fraud and abuse. Recent scholarship provides a variety of perspectives on these efforts. Some commentators decry the expanded use of the fraud laws, arguing that recent initiatives are unfair and ultimately will work to the detriment of both providers and patients.137 While acknowledging that minor adjustments may be necessary, other commentators stress that “fraud and abuse is morally wrong and fiscally harmful,” and praise recent enforcement innovations.138 The debate—in part practical, in part theoretical—shows few signs of abating.139

1997) (addressing an FCA suit based on alleged Stark and Anti-Kickback violations).


137 *See, e.g.*, Boese & McLain, *supra* note 103, at 55 (arguing that the *Thompson* decision “perpetuated a regime in which health care providers are subjected to a degree of uncertainty that undermines the bedrock principles of the rule of law”); Krause, *supra* note 49, at 212 (arguing that widespread provider perception that the laws are being used unfairly may jeopardize the legitimacy of the anti-fraud agenda); Dayna Bowen Matthew, *An Economic Model to Analyze the Impact of False Claims Act Cases on Access to Healthcare for the Elderly, Disabled, Rural and Inner-City Poor*, 27 *AM. J. L. & MED.* 439, 467 (2001) (arguing that false certification cases are “flawed tools . . . likely to have a disproportionately negative impact on the availability of healthcare to the poor”).

138 Jost & Davies, *supra* note 53, at 318 (arguing that only “targeted corrections” are needed).

139 *See* Hyman, *supra* note 1, at 174 (noting that assessment of whether
Rather than adopting one of these viewpoints, the tripartite conceptual model addressed here focuses instead on the mechanisms by which government officials communicate with the provider community about permissible behaviors. Currently, such communications take the form of regulation, information, and litigation. Despite the fact that only properly promulgated regulations are legally binding, health care fraud efforts increasingly have followed the latter two approaches. On the positive side, this development offers increased guidance to health care providers as to the scope of their permissible business activities. At the same time, however, it raises the possibility that providers may be subjected not only to additional—but perhaps also to inconsistent—legal interpretations from these varied sources.

A. Regulation

By regulation, I mean the development of official, binding guidance through traditional notice-and-comment procedures in accordance with the Administrative Procedure Act (APA). The APA requires an agency such as HHS to provide notice and an opportunity for public comment regarding all proposed “rule makings.” The Social Security Act reiterates this requirement for the Medicare program, providing that “[n]o rule, requirement, or other statement of policy . . . that establishes or changes a substantive legal standard governing the scope of benefits [or] the payment for services shall take effect unless” properly promulgated by the Secretary of HHS.

Notice-and-comment rulemaking has a long history in the health care context, particularly under the Anti-Kickback Statute. The Statute itself contains several exceptions, and Congress

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141 Id. § 553. A “rule” is defined as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.” Id. § 551(4).
directed the Secretary of HHS to develop additional “safe harbor” regulations exempting additional practices from the scope of the law.\textsuperscript{143} Although the basic contours of the safe harbors were established by the early 1990s, notice-and-comment rulemaking continues to play a key role in their development. As the OIG recently stated, “Congress intended the safe harbor regulations to be evolving rules that would be updated periodically to reflect changing business practices and technologies in the health care industry.”\textsuperscript{144}

For example, HIPAA explicitly required HHS to engage in a negotiated rulemaking process to develop a new exception for risk-sharing arrangements, such as those commonly found in managed care.\textsuperscript{145} HIPAA similarly invoked the traditional APA process by requiring the Secretary of HHS to publish an annual notice soliciting proposals for new and revised safe harbors, with the resulting amendments to be made through notice-and-comment procedures.\textsuperscript{146} Most recently, this procedure was used to develop a new safe harbor exempting health care facilities from liability for restocking certain ambulance supplies used in transporting

\begin{itemize}
\item \textsuperscript{143} See 42 U.S.C. 1320a-7b(b)(3) (2003) (exempting practices such as discounts, employment compensation, and group purchasing organizations from the scope of the prohibition); Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93, § 14, 101 Stat. 697-98 (requiring development of safe harbors); 42 C.F.R. § 1001.952 (listing current safe harbor provisions).


\end{itemize}
For a long time, the traditional notice-and-comment process was virtually the only way for health care providers to obtain guidance from the government on how to interpret the fraud laws. As a result, attorneys pored over the lengthy preamble to each Federal Register notice, trying to glean some nugget of regulatory intent to help decipher the complicated language of the law and regulations. The government was not blind to this phenomenon, and the agencies artfully used the notices to convey information that was not explicitly contained in the regulations themselves—such as the factors that would be taken into account in determining whether to pursue a particular Anti-Kickback allegation.

Over time, however, it became abundantly clear that the traditional regulatory process was too cumbersome to respond to the practical realities of the complex health care market. This observation is by no means limited to health care; the administrative law literature is replete with examples of the “ossification” of the formal rulemaking process. In the health care fraud context, however, this phenomenon denies providers the immediate guidance they need to determine the legality of many

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149 See, e.g., Jody Freeman, Collaborative Governance in the Administrative State, 45 UCLA L. Rev. 1, 11-14 (1997) (describing the disadvantages of the traditional agency rulemaking process); Thomas O. McGarity, Some Thoughts on “Deossifying” the Rulemaking Process, 41 Duke L. J. 1385 (1992) (describing how rulemaking “has become increasingly rigid and burdensome”); Mark Seidenfeld, Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking, 75 Tex. L. Rev. 483 (1997) (defining ossification as “the inefficiencies that plague regulatory programs because of analytic hurdles that agencies must clear in order to adopt new rules”).
commonplace business transactions. In particular, the time lag between a Notice of Proposed Rulemaking and the issuance of a Final Rule raises the possibility that industry practice—and the law itself—may change significantly in the interim. As but one example, the OIG proposed several new Anti-Kickback safe harbors in 1993, and proposed to amend a number of the existing safe harbors in 1994. The amendments were not finalized, however, until after the Clinton Health Plan debates had resulted in the enactment of HIPAA—which created a new statutory exception and required the development of additional safe harbors concerning risk sharing arrangements.

Similarly, the dynamic nature of the health care market and the innovative ways in which health care providers seek to adjust to changing market conditions create a situation in which the official regulations always seem to be one step behind industry practice. Due to the pace of health care innovation—as well as the existence of a few entrepreneurial providers who seek to “game” the increasingly complex system—the financial arrangements regarding health care (and the attendant forms of fraud) essentially are moving targets. The OIG has acknowledged this, noting,


152 “Gaming the system” refers to “an artificial restructuring of employment or social relationships to maximize individual benefits.” Edward G. Grossman, Comparing the Options for Universal Coverage, HEALTH AFF.,
“Congress intended the safe harbor regulations to be evolving rules to reflect changing business practices and technologies in the health care industry.”\(^{153}\) Although health care fraud regulations are designed to provide flexibility, by necessity they are based on a loose snapshot of industry practice at a single point in time. Enshrining such practices in law not only risks the creation of regulations that are outdated from the moment of creation, but also raises the possibility of freezing the industry at a sub-optimal point in time. As a result, according to Professor James Blumstein, current health care fraud enforcement is analogous to a “speakeasy,” where “conduct that is illegal is rampant and countenanced by law enforcement officials because the law is so out of sync with the conventional norms and realities of the marketplace.”\(^ {154}\)

Perhaps no topic illustrates the perils of health care fraud regulation as much as the ongoing saga of the Stark Law. As described above, the current law is derived from two different pieces of legislation: (1) an initial prohibition on physician self-referrals of Medicare patients for clinical laboratory services, which took effect on January 1, 1992; and (2) the OBRA ‘93 expansion covering additional categories of designated health services, which took effect as of December 31, 1994.\(^ {155}\) By December 2003, however, the Stark II regulations had yet to be completed.

The initial regulations implementing the Stark I prohibitions

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\(^{155}\) See supra Part II.C.
were proposed in the spring of 1992. The proposal resulted in the submission of almost three hundred comments to the Health Care Financing Administration (HCFA, now renamed the Centers for Medicare and Medicaid Services (CMS)). As a result, the final rule was not published until August of 1995—three years after the original law went into effect, and eight months after the expanded Stark II provisions had become effective. While indicating its intention to publish a separate notice of proposed rulemaking for Stark II, HCFA stated:

[W]e believe that a majority of our interpretations in this final rule with comment will apply to the other designated health services. Until we publish a rule covering the designated health services, we intend to rely on our language and interpretation in this final rule when reviewing referrals for the designated health services in appropriate cases.

In the interim, health care lawyers were forced to improvise, offering their best guesses as to the meaning of the Stark II provisions based on the broad statutory language and extrapolating from analogous, but not identical, Stark I regulations.

And a long interim it turned out to be. After two and a half years of uncertainty, proposed Stark II regulations were published in January of 1998. Far from clarifying the prohibitions,
however, the proposal proved to be exceedingly controversial, in large part because some of the provisions went beyond what the statute required (or perhaps allowed). The rule included a number of new exceptions to the self-referral ban and proposed significant revisions to components of the key group practice definition, leading one group of attorneys to conclude that the proposal “raise[s] as many questions as it answers.”

Once again, any hope of a speedy resolution to these questions was dashed. A “final” Stark II rule was published in January of 2001, three years after the proposed rule and a full six years after the revised law went into effect. Despite filling 110 pages of the Federal Register, however, the Stark saga was by no means over. Instead, HCFA indicated that the regulations merely comprised Phase I of the final regulations, addressing the basic Stark II prohibition, definitions, and general exceptions; a subsequent “Phase II” rule would be needed to address the remaining provisions of the statute, including additional exceptions, reporting requirements, and sanctions. Moreover, HCFA delayed the effective date of the regulations for a year to allow time for providers to comment and comply with the new requirements.

Health care providers were not amused. A prominent group of


161 See, e.g., Id. at 1,682 (refusing to exclude lithotripsy from the definition of “inpatient hospital services” despite requests to do so). This decision was later held to be erroneous. Am. Lithotripsy Soc’y v. Thompson, 215 F. Supp. 2d 23 (D.D.C. 2002) (holding that inclusion was contrary to congressional intent).


164 Id. at 856-965.

165 Id. at 856, 859-60 (describing phases).

166 Id. at 859.
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health care attorneys criticized the one-year delay, “call[ing] the rule a ‘virtual’ regulatory event” and deriding HCFA’s “post-publication schizophrenia.” Nevertheless, providers and their attorneys set to work to bring practices into compliance before the rule took effect in January 2002. Unfortunately, even the one-year delay was marked by problems. Soon after taking office in January 2001, President Bush postponed for sixty days the effective date of any regulations that had not yet gone into effect, generating short-lived confusion about the future of the Stark II rule under the new Administration. In November of 2001, CMS delayed the effective date of one provision (the definition of the phrase “set in advance” as applied to percentage compensation arrangements) yet again, in order to give the agency time to reconsider its approach. When the rule finally went into effect in January 2002, it inadvertently contained minor errors that CMS had intended to repeal, which will require further revisions to the Phase


168 Medicare and Medicaid Programs; Physicians’ Referrals to Health Care Entities With Which They Have Financial Relationships: Delay of Effective Date of Final Rule and Technical Amendment, 66 Fed. Reg. 8771 (Feb. 2, 2001) (codified at 42 C.F.R. pts. 411 & 424 (2003)). Despite the initial confusion, CMS took the position that the Administration’s action only delayed a discrete subsection of the regulations concerning home health agencies, which had been scheduled to take effect in February 2001. Id.

I regulations. Thus, more than a decade after the enactment of the original Stark legislation, health care providers do not yet have access to final regulations interpreting the law’s complicated prohibition. As one commentator wryly noted, “[a]lthough the intent was to provide comprehensive bright line rules, regulators have had great difficulty in figuring out where the lines are.”

While most health care fraud regulations do not have quite as tortured a history as the Stark Law, this saga illustrates that traditional regulation can be an extraordinarily cumbersome process. In the complicated and constantly evolving arena of health care financial relationships, the advantages offered by binding regulations, developed after extensive public input, may well be outweighed by the necessity of generating more timely forms of guidance.

B. Information

Growing concern about the disadvantages of traditional notice-and-comment rulemaking led to the development of what I call information: the proliferation of sources of health care fraud guidance outside the traditional regulatory process. These informal forms of guidance are used to convey the agency’s current interpretation of the law to the health care community. As former HHS Inspector General June Gibbs Brown noted in an Open Letter to Health Care Providers, “[t]hrough public awareness efforts . . . we alert the provider community of our concerns and hope to encourage self-correcting behavior.” As described below,


172 Letter from June Gibbs Brown, Office of Inspector General, An Open
however, the necessity of relying on informal interpretive materials can have significant repercussions for health care providers, both under administrative law principles and in terms of day-to-day practice.

1. Forms of Health Care Fraud Information

Various forms of health care fraud information are now available to health care providers, including both statutorily mandated advisory processes and informal guidance mechanisms developed solely within HHS. While some types of guidance are binding on the entities who request the advice, they may not be binding on the general public—although judges may nonetheless find the agency’s views to be persuasive. Among the most common forms of fraud guidance are Advisory Opinions, Special Fraud Alerts, Compliance Program Guidances, and Special Advisory Bulletins.

a. Advisory Opinions

HIPAA required the Secretary of HHS, in consultation with the Attorney General, to provide written Advisory Opinions as to whether a proposed transaction would, *inter alia*, violate the Anti-Kickback Statute or subject the requestor to civil monetary penalties or exclusion. Advisory Opinions are thus an example

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173 See infra notes 208-12 and accompanying text.

174 See 42 U.S.C. § 1320a-7d(b) (2003); 42 C.F.R. pt. 1008 (2003). The original Advisory Opinion mandate expired in August 2000, but was permanently reinstated as part of the 2001 appropriations process. See Consolidated Appropriations Act, Pub. L. No. 106-554, § 543, 114 Stat. 2763 (2001). A similar process is required under the Stark Law, although few opinions have been issued. See 42 U.S.C. § 1395nn(g)(6) (2003); 42 C.F.R. §§ 411.370 (2003) et seq. Despite initial concern that Advisory Opinions could only be requested for activities already underway, the regulations made clear that requests may pertain to activities “which the requestor in good faith plans to undertake.” 42 C.F.R. § 1008.15(a) (2003); see also 42 U.S.C. § 1128D(b)(2) (2003) (opinions are available concerning arrangement/activity or proposed
of “voluntary preclearance,” a form of intermediate ex ante regulatory enforcement. 175 Mindful of resource constraints and inter-agency conflicts, Congress specified that Advisory Opinions could not address whether a transaction involves fair market value or whether an individual qualifies as a bona fide employee under the Internal Revenue Code. 176 While Advisory Opinions are binding only as to the Secretary of HHS and the requestor(s), they are made available to the public (in redacted form) on the agency’s web site. 177 Even if third parties are not entitled to rely on the conclusions, however, Advisory Opinions nonetheless function as valuable sources of information as to the agency’s likely views regarding analogous transactions.

Despite offering a relatively informal mechanism for obtaining guidance from the OIG, the Advisory Opinion process remains cumbersome. 178 Although the OIG is required to issue an Opinion within sixty days after accepting a request, that time period is tolled by requests for additional information, requests for payment, and decisions to seek external expert consultation. 179 Moreover, in order to obtain an Opinion the requestor must submit “[a] complete and specific description of all relevant information bearing on the arrangement . . . and on the circumstances of the conduct,” including copies of all operative documents for existing arrangements, and copies of drafts, model documents, or

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175 Bhagwat, supra note 8, at 1289. For a description of similar processes in other agencies, see, e.g., id. at 1289-91 (describing various agency practices); Spencer Weber Waller, Prosecution by Regulation: The Changing Nature Antitrust Enforcement, 77 OR. L. REV. 1383, 1395 (1998) (describing business review letters issued by the DOJ Antitrust Division).

176 42 U.S.C. § 1320a-7d(b)(3).

177 See id. § 1320a-7d(b)(4); 42 C.F.R. § 1008.53 (identifying affected parties). A complete list of advisory opinions is available at http://oig.hhs.gov/fraud/advisoryopinions.html (last visited Feb. 28, 2004).


179 42 C.F.R. § 1008.43(c).
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Significant resources thus must be expended to develop the information needed to support the request—a request that may well result in the abandonment of the transaction. In addition, the OIG retains the right to rescind, terminate or modify a previous Opinion upon reconsideration of the issues involved, although the requestor will be given an opportunity to discontinue or modify its actions. Thus, the advice available through the Advisory Opinion process is by no means as timely, easily obtained, or reliable as it might first appear.

b. Special Fraud Alerts

The OIG periodically issues Special Fraud Alerts in areas in which the agency believes there may be abuse, particularly those involving improper referrals under the Anti-Kickback Statute. Rather than setting out discrete tests for liability, Special Fraud Alerts merely identify “suspect practices” that may attract scrutiny. While a health care provider who engages in one of

\[\begin{align*}
180 & \text{id.} \ § 1008.36(b)(4). \\
181 & \text{See Scott D. Godshall, Death By Regulation: HHS’s Advisory Opinion Guidelines, ANDREWS HEALTH CARE FRAUD LITIG. REP., May 1997, at 3. “In other words, regulatory advice—which may kill the deal entirely—is not available until the parties have gone through the time and expense of drafting and negotiating each of the contracts and agreements necessary to finalize the deal... In terms of business planning and compliance, a decision to withhold regulatory advice until the deal is all but executed is a decision to make the advice largely meaningless.” Id.}
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\[\begin{align*}
182 & \text{42 C.F.R. § 1008.45 (explaining procedures for rescission, termination, or modification).} \\
184 & \text{See, e.g., id. at 65,375-76 (listing suspect hospital incentives, such as the provision of free or significantly discounted items, spaces, or services); Special Fraud Alert: Prescription Drug Market Schemes (Aug. 1994), reprinted in id. at 65,376 (identifying possible improper payments and gifts from drug manufacturers, including those offered to physicians in exchange for prescribing a manufacturer’s products); Special Fraud Alert: Arrangements for the Provision}
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these suspect practices is not automatically in violation of the law, the Fraud Alert serves to put the provider on notice that the practice may attract attention.

Special Fraud Alerts occupy a unique position on the spectrum of health care fraud guidance. Unlike the safe harbors or Advisory Opinions, there is no explicit legislative authority for the issuance of Fraud Alerts; instead, they are an exercise of the agency’s general administrative interpretive authority.\(^{185}\) For many years, the OIG issued internal fraud alerts “to identify fraudulent and abusive practices within the health care industry.”\(^{186}\) In 1989, the agency began to issue periodic alerts intended for wider publication distribution, explaining:

[T]he OIG Special Fraud Alerts have served to provide general guidance to the health care industry on violations of Federal law (including various aspects of the anti-kickback statute), as well as to provide additional insight to the Medicare carrier fraud units in identifying health care fraud schemes.\(^{187}\)

Despite their unofficial status and highly fact-specific nature, the OIG has viewed such Alerts quite favorably; indeed, the agency offered the Special Fraud Alert mechanism as an alternative to adopting an earlier iteration of the Advisory Opinion process.\(^{188}\)

Congress officially recognized the existence of Special Fraud Alerts in HIPAA, which created a mechanism for private parties to

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\(^{185}\) See infra notes 227-30 and accompanying text (discussing interpretive authority).

\(^{186}\) See Notice, Publication of OIG Special Fraud Alerts, 59 Fed. Reg. at 65,373 (describing the history of fraud alerts).

\(^{187}\) Id.

\(^{188}\) See Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, 56 Fed. Reg. 35,952, 35,959 (July 29, 1991) (codified at 42 C.F.R. pt. 1001 (2003)) (declining to create an advisory opinion process for Anti-Kickback queries, and indicating “that OIG fraud alerts are the best mechanism for imparting practical and continuing guidance to individuals and entities seeking to avoid violations of the statute”).
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request that the OIG issue an Alert to “inform the public of practices which the [OIG] considers to be suspect or of particular concern” under the federal health care programs. In recent years, Special Fraud Alerts have addressed such topics as nursing home arrangements with hospice programs, home health fraud, rental of physician office space by entities to which the physician refers patients, and physician liability for fraudulent medical equipment and home health certifications.

c. Compliance Program Guidances

One of the most significant recent developments in health care fraud and abuse has been the increasing emphasis on corporate compliance. Since the mid-1990s, it has become standard practice for the OIG and DOJ to require health care providers to enter into corporate integrity agreements (CIAs) as a condition of settling health care fraud allegations, most often in return for the OIG’s agreement not to seek the provider’s exclusion from the federal health care programs. Although each CIA is tailored to the specific conduct at issue, common elements include the appointment of a compliance officer, the development of compliance training procedures in key areas (such as billing rules), the development of confidential mechanisms by which employees can report potential violations, and the submission of reports to the government documenting the provider’s compliance efforts.

189 42 U.S.C. § 1320a-7d(c) (2003) (permitting such requests).
190 A complete list of Special Fraud Alerts can be found at http://oig.hhs.gov/fraud/fraudalerts.html#1 (last visited July 15, 2002).
191 See Office of Inspector Gen., Corporate Integrity Agreements: General Information, http://oig.hhs.gov/fraud/cias.html#1 (last visited Feb. 14, 2003). As the OIG explains, “A provider or entity consents to these obligations as part of the civil settlement and in exchange for the OIG’s agreement not to seek an exclusion of that health care provider or entity from participation in Medicare, Medicaid and other Federal health care programs.” Id. See also Thomas E. Bartrum & L. Edward Bryant, Jr., The Brave New World of Health Care Compliance Programs, 6 ANNALS HEALTH L. 51, 55 (1997) (explaining CIA requirements).
192 A list of common elements, as well as a list of current CIAs, can be found on the OIG’s web site. See http://oig.hhs.gov/fraud/cias.html#1 (last
reporting and oversight provisions are onerous and typically last for at least five years.\footnote{Id.}

Not surprisingly, the emphasis has moved from compliance as a \textit{remedy} to compliance as a \textit{preventive} mechanism. The genesis of voluntary compliance efforts, resulting in so-called “corporate compliance programs,” can be traced to the Federal Sentencing Guidelines for Organizations, which went into effect in 1991.\footnote{See U.S. SENTENCING GUIDELINES MANUAL ch. 8 (sentencing of organizations) (2001); Bartrum & Bryant, supra note 191, at 55 (tracing the emphasis on corporate compliance to the Guidelines).} The Guidelines permit the court to reduce an organization’s culpability score “[i]f the offense occurred despite an effective program to prevent and detect violations of the law.”\footnote{U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f).} An effective program requires, at a minimum, that the organization: establish, communicate, monitor, and enforce compliance standards and procedures for its employees and contractors; assign responsibility for compliance to specific high-level personnel; refrain from delegating authority to individuals with a history of illegal behavior; and take appropriate steps when an offense is detected.\footnote{Id. at § 8A1.1, Commentary 3(k). These provisions also form the basis for the common CIA elements noted above. See supra note 192 and accompanying text.} Although the Guidelines only apply to organizations convicted of criminal activities, the OIG has indicated that a compliance program may also benefit organizations accused of violating civil laws—both by preventing some improper activities from occurring in the first place and by minimizing the organization’s exposure if wrongdoing is detected and reported on a timely basis.\footnote{See, e.g., Publication of the OIG Compliance Program Guidance for Hospices, 64 Fed. Reg. 54,031, 54,033 (Oct. 5, 1999) (describing the benefits of a compliance program). For details as to when such leniency may be applicable, see id. at 54,033 n.5 (referencing sources); 31 U.S.C. § 3729(a) (2003) (providing that a person who voluntarily discloses a violation of the FCA may be subject to double, rather than treble, damages).}

Rather than requiring each health care provider to create a
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program anew, the OIG has published a series of “Compliance Program Guidances” designed to guide members of a particular sector of the health care industry in establishing their own voluntary compliance programs. While adherence to these Guidances are not mandatory (and may not be feasible for smaller entities), the documents provide valuable advice as to what the OIG believes are the key compliance issues for such providers. As the OIG has stated:

The adoption and implementation of voluntary compliance programs significantly advance the prevention of fraud, abuse and waste in these health care plans while at the same time further the fundamental mission of [the providers] . . . . [R]egardless of a [provider’s] size and structure, the OIG believes that every [provider] can and should strive to accomplish the objectives and principles underlying all of the compliance policies and procedures recommended within this guidance.199

The OIG issued a Model Compliance Plan for Clinical Laboratories in 1997, following several highly publicized fraud settlements involving national laboratory companies.200 By June 2003, the OIG had issued Compliance Guidances for hospitals, clinical laboratories, home health agencies, third-party medical billing companies, durable medical equipment suppliers, hospices, Medicare+Choice organizations, nursing facilities, individual and small group physician practices, pharmaceutical manufacturers,
and ambulance companies.\textsuperscript{201} Thus, a wide range of health care providers can consult Guidances directly targeting their practices, while many others can argue by analogy from Guidances designed for similar entities.\textsuperscript{202}

d. Special Advisory Bulletins

The OIG has also issued several Special Advisory Bulletins, which offer additional guidance as to whether health care activities will violate federal law.\textsuperscript{203} Bulletins are similar to Special Fraud Alerts in that they address a range of impermissible activities, rather than answering specific queries from health care providers.\textsuperscript{204} In other respects, however, the issues addressed in Bulletins do not fit the Special Fraud Alert model, in part because they concern a wider range of fraud laws. Recent Bulletins have addressed the practices of billing consultants, the patient anti-dumping statute, the effect of exclusion from the federal health care programs, and the offering of gifts and other inducements to beneficiaries.\textsuperscript{205} Although Bulletins are not explicitly authorized by law, the OIG typically grounds its authority in HIPAA’s broad mandate that the agency provide “guidance” to the health care

\textsuperscript{201} For a complete list, see HHS, Office of Inspector General, Fraud Prevention & Detection, Compliance Guidance, at http://oig.hhs.gov/fraud/complianceguidance.html (last visited June 16, 2003).
\textsuperscript{202} It is unclear whether the compliance effort ultimately will prove successful. See Hyman, \textit{Health Care Fraud and Abuse}, supra note 171, at 566 (arguing “there is a big difference between a compliance program and a compliance norm, and provider norms have proved extremely resistant to change”).
\textsuperscript{204} \textit{Id.}
\textsuperscript{205} \textit{Id.} The issuance of an informal Bulletin does not preclude the subsequent development of binding regulations on the topic. See, \textit{e.g.}, Solicitation of Public Comments on Exceptions Under Section 1128A(a)(5) of the Social Security Act, 67 Fed. Reg. 72,892 (Dec. 9, 2002) (following up on the August 2002 Special Advisory Bulletin: Offering Gifts and Other Inducements to Beneficiaries).
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industry regarding fraudulent conduct.206

Perhaps the most controversial Special Advisory Bulletin to date was the July 1999 Bulletin concerning “Gainsharing Arrangements.”207 In that Bulletin, the OIG construed a civil monetary penalty (CMP) provision prohibiting hospitals from knowingly making payments to a physician as an inducement to reduce or limit services to Medicare/Medicaid beneficiaries under the physician’s care.208 The OIG interpreted this provision to prohibit “gainsharing,” which it defined as “an arrangement in which a hospital gives physicians a percentage share of any reduction in the hospital’s cost for patient care attributable in part to the physicians’ efforts.”209 While acknowledging that hospitals have legitimate reasons for desiring that physicians support cost-containment efforts, the OIG nonetheless stated that the CMP prohibited a hospital from compensating a physician directly or indirectly based on cost savings derived from the treatment of the physician’s own patients.210 The Bulletin has proven to be quite controversial, particularly in light of the Internal Revenue Service’s earlier approval of the tax consequences of similar arrangements.211

206 See Notice, Publication of the OIG Special Advisory Bulletin on Gainsharing Arrangements and CMPs for Hospital Payments to Physicians to Reduce or Limit Services to Beneficiaries, 64 Fed. Reg. 37,985 (July 14, 1999), available at http://oig.hhs.gov/fraud/docs/alertsandbulletins/gainsh.htm [hereinafter Special Advisory Bulletin on Gainsharing Arrangements] (stating that “[t]he Fraud and Abuse Control Program, established by [HIPAA], authorized the OIG to provide guidance to the health care industry to prevent fraud and abuse, and to promote the highest level of ethical and lawful conduct”).

207 See id.


209 See Special Advisory Bulletin on Gainsharing Arrangements, supra note 206.

210 Id.

211 See, e.g., Gregory M. Luce & Jesse A. Witten, HHS IG’s Gainsharing Prohibition Lacks Legal Support, 3 HEALTH CARE FRAUD REP. (BNA) 753 (Aug. 11, 1999) (characterizing the OIG’s reasoning as “dubious,” and arguing that “the OIG relied upon a selective account of the legislative history”); IRA Approves Gainsharing Programs in Two Unreleased Private Letter Rulings, 8
Similar to Special Fraud Alerts, the issuance of such Bulletins is purely within the agency’s discretion. In fact, the Gainsharing Bulletin itself arose out of several requests for Advisory Opinions concerning gainsharing arrangements. Finding that a variety of concerns made the issue unsuitable for individual Opinions, including the high risk of abuse, the need for ongoing oversight, and the need for comprehensive regulations rather than case-by-case analysis, the OIG chose instead to issue the industry-wide Bulletin. It is likely this mechanism will be used in the future to disseminate information outside the Special Fraud Alert context, especially when the government’s concerns encompass laws beyond the Anti-Kickback Statute.

e. Other Forms of Guidance

In addition to these categories, the OIG from time to time offers other types of guidance to the health care industry. For example, the HHS Inspector General periodically posts “Open Letters” to the health care community on the agency’s web site, designed to explain the agency’s goals and priorities. In addition, the OIG periodically releases redacted versions of Anti-Kickback-related correspondence. For example, in April 2000, the OIG posted copies of two letters addressing providers who impermissibly charge the federal health care programs amounts that are “substantially in excess” of the provider’s usual charge for the services provided. While these postings have the virtue of

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212 See Special Advisory Bulletin on Gainsharing Arrangements, supra note 206.
213 Id.
214 Id.
216 The correspondence is available at HHS Office of Inspector General, Fraud Prevention & Detection, Fraud Alerts, Bulletins, and Guidance,
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making the OIG’s current interpretations accessible to anyone with an Internet connection, their legal effects remain unclear.

2. Reliance on Informal Guidance

The government’s evolving views of these informal sources of fraud guidance is instructive, particularly with regard to Advisory Opinions. Despite numerous requests from health care providers, historically the OIG was vehemently opposed to instituting an Advisory Opinion process under the Anti-Kickback Statute.217 During the notice-and-comment period for the proposed safe harbor regulations, the agency received numerous comments requesting the development of an advisory mechanism.218 Citing the statute’s criminal provisions, which are enforced by the DOJ, the OIG concluded that it lacked “authority to make judgments that are within the exclusive domain of another agency.”219 Noting the practical problems caused by the “knowing and willful” intent requirement, as well as the resources that such a process would require, the OIG argued that the safe harbor regulations were the most appropriate mechanism for addressing provider concerns:

[W]e do not believe that an advisory opinion process is a necessary or appropriate mechanism for keeping the Department aware of new developments in industry practice and ensuring that the regulation remains current... We believe that periodic updating of this regulation, with the opportunity for public input, is the best way to ensure that these regulations remain practical and relevant in the face of changes in health care delivery and payment arrangements.220

http://oig.hhs.gov/fraud/fraudalerts.html#3b (last visited July 15, 2002).

217 See, e.g., Godshall, supra note 181, at 3 (describing the convoluted Advisory Opinion regulations as “demonstrat[ing] the agency’s continuing opposition” to the process); supra note 188 and accompanying text.


219 Id.

220 Id.
The OIG’s comments thus reflected serious concerns about agency authority and resources, as well as a clear preference for the traditional regulatory process.

With the passage of HIPAA, however, many of these concerns disappeared. The explicit grant of advisory authority to HHS, combined with a mandate for interagency coordination, assuaged concerns about potential interference with DOJ investigations. Resource concerns were addressed by the HIPAA funding provisions, including the creation of the Fraud and Abuse Control Program. Over time, OIG personnel apparently realized that the advisory process could be a very good way of making the agency’s views known in a timely and informal manner. By the summer of 2001, agency personnel appeared to have done an about-face, and strongly supported permanent extension of the Advisory Opinion authority.

In addition to this curious pedigree, the proliferation of these quasi-official forms of guidance has important practical implications for health care providers. For one thing, there are many more places to look for guidance on specific fraud issues than in the past. In addition to consulting the statute and safe harbors, and poring over the relevant Federal Register preambles, health care attorneys now must scrutinize all relevant Advisory Opinions, Special Fraud Alerts, Compliance Program Guidances, Special Advisory Bulletins, and other forms of guidance. Although most of this information is available on the OIG’s web site, it tends to be organized in loose topical and chronological fashion (rather than, for example, keyed to the relevant statutory provisions).

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221 See 42 U.S.C. § 1395i(k)(3) (2003) (describing appropriations to the Health Care Fraud and Abuse Control Account); supra Part I.

222 See Testimony of Lewis Morris, Assistant Inspector General for Legal Affairs, Before the Senate Special Committee on Aging, at http://oig.hhs.gov/reading/testimony/2001/072601lm.pdf (July 26, 2001) (“In addition to assisting the health care industry [to] comply with the law, the advisory opinion and safe harbor mechanisms enhance the OIG’s understanding of new and emerging health care business arrangements and guide the development of new safe harbor regulations, fraud alerts, and advisory bulletins.”).

Moreover, this additional guidance does not necessarily clarify the ambiguities faced by providers on a daily basis. Especially with Advisory Opinions and correspondence, attorneys must try to extrapolate general principles from the government’s response to a specific set of facts, and then combine that information with the binding guidance found in the law and safe harbor provisions. Thus, there is a distinct risk that the proliferation of unofficial sources of guidance results simply in more—rather than better—information regarding health care fraud.

In addition, because such unofficial guidance generally is not binding, such advice is not always consistent. For example, in its July 1999 Special Advisory Bulletin, the OIG stated that gainsharing arrangements were not an appropriate topic for Advisory Opinions. But in January 2001, with little fanfare (and even less attention to the previous Bulletin), the OIG issued an Advisory Opinion approving a transaction that was in essence a gainsharing arrangement. Perhaps, as the OIG argued, the new proposal departed so significantly from previous gainsharing proposals that different treatment was warranted, or perhaps the Opinion signaled the OIG’s retreat from its previous hard-line prohibition. Of course, no one would argue that agency interpretations should not evolve over time; indeed, the ability to be responsive to changes in industry practice is one of the greatest advantages of informal guidance. Nonetheless, the lack of any formal mechanism to warn of policy shifts can make it difficult for health care providers to plan future transactions that may implicate these concerns.

Moreover, administrative law principles have significant repercussions for health care providers who seek to challenge—or

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224 See Special Advisory Bulletin on Gainsharing Arrangements, supra note 206 (stating that requests “contain common elements that preclude our issuance of any favorable opinion,” including high risk of abuse, need for ongoing oversight, and need for comprehensive regulation in the area).


226 Id.
even to rely on—such quasi-official agency interpretations. As noted above, pursuant to the APA, the Social Security Act requires notice-and-comment rulemaking for any “rule, requirement, or other statement of policy . . . that establishes or changes a substantive legal standard governing the scope of benefits [or] the payment for services” under the Medicare program.\(^{227}\) However, the APA requirement does not apply “to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.”\(^{228}\) In determining whether rulemaking is required, courts have focused on whether the rule is “interpretive” or “legislative” in nature.

An interpretive rule simply states what the administrative agency thinks the [underlying] statute means, and only reminds affected parties of existing duties. On the other hand, if by its action the agency intends to create new law, rights, or duties, the rule is properly considered to be a legislative rule.\(^{229}\)

It is likely that most of OIG fraud guidance would qualify as interpretive rules under this test, and hence would not be subject to challenge unless they adopted a new position that was inconsistent with prior law or regulations.\(^{230}\)

Disputes over the nature of agency policy usually arise when a health care provider seeks to challenge the agency’s informal interpretation as contrary to established law, and thus subject to the APA rulemaking requirements.\(^{231}\) In the majority of cases, federal

\(^{228}\) 5 U.S.C. § 553(b)(A).
\(^{229}\) Metropolitan Sch. Dist. v. Davila, 969 F.2d 485, 489 (7th Cir. 1992); see also Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993) (providing the test for determining whether a rule is interpretive or legislative).
\(^{230}\) See Shalala v. Guernsey Mem’l Hosp., 514 U.S. 87, 100 (1995) (stating “that APA rulemaking would . . . be required if [the rule] adopted a new position inconsistent with any of the Secretary’s existing regulations”).
\(^{231}\) Many such cases arise when a provider asks a court to enjoin the enforcement of the challenged provision. The timing of judicial review of Medicare cases is complex and has been extensively litigated, generally in the context of whether a provider has “exhausted” the relevant administrative
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courts have held that Medicare manuals, letters, and directives are interpretive in nature. Indeed, the Supreme Court described one of the Medicare program manuals as “a prototypical example of an interpretive rule.”232 On rare occasion, however, courts have found a specific policy to be contrary to law. For example, in *Loyola University of Chicago v. Bowen*, the Seventh Circuit refused to defer to the Secretary’s interpretation of regulations governing hospital reimbursement for education expenses, on the grounds that the Medicare Carriers Manual provision on which the Secretary relied contained a requirement not found in the law or regulations.233 As the court noted, “[a]lthough the Secretary’s interpretation of his own regulations is usually accorded substantial deference . . . such deference is appropriate only if the Secretary’s interpretation of the regulation is consistent with the language of

review processes prior to going to court. Briefly, prior to 1986, the Social Security Act did not permit judicial review of the amount of Medicare Part B benefits. See *United States v. Erika, Inc.*, 456 U.S. 201, 208 (1982). Moreover, the Supreme Court had held that judicial review of claims “arising under” Medicare Part A was available only after the claimant pursued all levels of available HHS review and the Secretary rendered a “final decision.” See *Heckler v. Ringer*, 466 U.S. 602, 605-06 (1984). However, in the 1986 case of *Bowen v. Michigan Academy of Family Physicians*, the Supreme Court permitted an immediate judicial challenge to a Medicare Part B regulation, noting that the law “simply does not speak to challenges mounted against the method by which such amounts are to be determined rather than the determinations themselves.” 476 U.S. 667, 675-76 (1986) (emphasis added). The situation was further complicated by a 1986 amendment permitting judicial review of the “amount of benefits” under both Medicare Part A and Part B, which may have mooted the amount/methodology distinction and required exhaustion of remedies for all disputes. See *Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874* (codified at 42 U.S.C. § 1395ff(a) (2003)); *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 14, 20 (2000) (interpreting *Bowen* to permit review in cases where plaintiff “can obtain no review at all unless it can obtain judicial review in a [federal question] action”).

232 *Guernsey Mem’l Hosp.*, 514 U.S. at 99 (construing a Provider Reimbursement Manual provision authorizing the Secretary to depart from generally accepted accounting principles when making certain reimbursement decisions).

233 905 F.2d 1061, 1071-72 (7th Cir. 1990) (rejecting the Secretary’s contention that education activities must occur in a facility that is “part of the provider” in order to be reimbursed by Medicare).
the regulations themselves.” 234 Unless such a showing could be made regarding one of the OIG’s informal fraud guidance documents, however, a challenge likely would be unavailing. 235

Unlike HHS’ interpretation of the Medicare billing requirements, however, the focus of fraud guidance is not primarily on reimbursement methodology. Of course, the Medicare carriers and intermediaries strive to identify fraud (and to deny payment) at the time bills are submitted. 236 But the primary manner in which the fraud laws are enforced is through the administrative, civil, and criminal adjudication processes outlined above. 237 While a carrier or intermediary may “flag” a particular set of claims as raising concerns under the FCA or the Anti-Kickback Statute, the contractor has no authority to adjudicate the claimant’s guilt; instead, the case must be referred to the OIG (and possibly on to the DOJ) for investigation and prosecution. 238 In any resulting litigation against the claimant, the agency’s guidance will likely play a pivotal role in determining whether the law was violated.

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234 Id. at 1071; see also Am. Lithotripsy Soc’y v. Thompson, 215 F. Supp. 2d 23 (D.D.C. 2002) (holding that regulation defining lithotripsy as a Stark II “designated health service” was contrary to Congressional intent).

235 See, e.g., Guernsey Mem’l Hosp., 514 U.S. at 94-95 (finding that the Manual provision authorizing departure from generally accepted accounting principles “is a reasonable regulatory interpretation, and we must defer to it”); Downtown Med. Ctr./Comprehensive Health Care Clinic v. Bowen, 944 F.2d 756, 768-69 (10th Cir. 1991) (finding that a Medicare Carrier’s Manual provision construing billing requirements was “reasonable and not inconsistent with the statute and regulations”).

236 See, e.g., 42 U.S.C. §§ 1395nn(g)(1) (providing that no payment may be made for designated health services furnished pursuant to a prohibited referral under the Stark Law) & 1893 (creating the Medicare Integrity Program, under which HHS is authorized to enter into contracts with entities—including existing carriers and intermediaries—to carry out a variety of fraud detection and prevention activities).


238 See, e.g., United States v. McClatchey, 217 F.3d 823 (10th Cir. 2000) (finding sufficient evidence from which the jury could have convicted the defendant of violating the Anti-Kickback Statute).
even in situations where the agency’s interpretation is not directly binding.

For example, Advisory Opinions are binding only on the parties who request them. In *Zimmer, Inc. v. Nu Tech Med., Inc.*, a manufacturer of orthopedic products sought to extricate itself from a consignment agreement with a supplier by arguing that the contract violated the Anti-Kickback Statute. In support of its contention, the manufacturer sought and received an Advisory Opinion from the OIG characterizing the agreement as “problematic” and “potentially abusive,” and refusing to immunize the relationship from prosecution. While noting that the Opinion did not bind any agency other than HHS, the court acknowledged that “[n]onetheless, courts give great deference to agency regulations and agency interpretations of those regulations,” and found it proper for the plaintiff to introduce the Opinion into evidence. The court ultimately agreed with the OIG’s analysis of the facts and held that because the agreement violated the Anti-Kickback Statute, it was void and unenforceable under Indiana law.

As this example suggests, courts will look to the agency’s interpretation of the fraud and abuse statutes not only in enforcement actions against a defendant health care provider, but also in civil actions between the parties to an agreement. For example, in *Polk County v. Peters*, a hospital unsuccessfully sued a physician for money the hospital had advanced pursuant to a recruitment agreement. Noting that the OIG had issued a Special Fraud Alert detailing suspect hospital incentives to physicians—many of which were present in the case—the court found the

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240 54 F. Supp. 2d 850, 853 (N.D. Ind. 1999).
243 54 F. Supp. 2d at 863.
agreement to be in violation of the anti-referral statutes, and thus void and unenforceable under Texas law. Such cases raise the possibility that plaintiffs may be able to use this guidance as a tool to help them avoid onerous health care contracts as against public policy—something of an odd result for guidance designed primarily to protect patients, rather than to assist providers who are dissatisfied with their business deals.

Just as health care providers have a limited ability to challenge such informal sources of agency guidance, it similarly is unclear how far they are entitled to rely on them to defend their actions. As the Supreme Court has noted, “[i]nterpretive rules do not require notice and comments, although . . . they also do not have the force and effect of law and are not accorded that weight in the adjudicatory process.” It is well-accepted that the government cannot be estopped by erroneous representations made by its employees and agents, particularly regarding questions of benefit entitlements. In the health care context, courts have held that providers are not entitled to rely on erroneous oral advice from carriers and intermediaries with regard to Medicare rules and regulations. The fact that the relevant forms of OIG guidance are

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245 Id. at 1455-56. Another district court cited the same Special Fraud Alert in a similar physician recruitment case, but found that unlike in Polk, the agreement’s language was ambiguous enough to preclude summary judgment with respect to whether patient referrals were required in return for the hospital’s payment. See Feldstein v. Nash Community Health Servs., Inc., 51 F. Supp 673 (E.D.N.C. 1999).


247 See Office of Personal Mgmt. v. Richmond, 496 U.S. 414, 414 (1990) (holding that erroneous oral and written advice regarding a claimant’s eligibility for disability benefits did not entitle the claimant to benefits that were not authorized by law).

248 In so holding, courts often focus on the provider’s duty to be familiar with relevant program requirements. See, e.g., Heckler v. Community Health Servs. of Crawford County, 647 U.S. 51, 64 (1984) (refusing to bind the government to oral advice given by a fiscal intermediary regarding whether certain salary payments were reimbursable as reasonable costs under Medicare, and noting that “[a]s a participant in the Medicare program, respondent had a duty to familiarize itself with the legal requirements for cost reimbursement”); Downtown Med. Ctr./Comprehensive Health Care Clinic v. Bowen, 944 F.2d
written, however, is unlikely to provide protection; indeed, the challenged advice in one such case included not only oral statements, but also an outdated government form containing the erroneous information.\footnote{249} It is not inconceivable, then, that a provider might have difficulty relying on informal guidance in its defense, at least if the government’s views have since changed.

Nonetheless, a provider’s reliance on fraud guidance should be strengthened by the fact that the majority of health care fraud laws require evidence of the defendant’s fraudulent intent before a violation can be established.\footnote{250} Although reliance on erroneous agency statements will not establish a defense as a matter of law, the fact that the defendant sought in good faith to comply with such advice may establish that the defendant lacked the requisite intent needed to violate the law.\footnote{251} Moreover, to the extent the government desires that informal guidance strengthen its relationship with the industry, it would be counterproductive to revise agency policy without giving providers enough time to comply with new interpretations.\footnote{252} For example, mindful that the Special Advisory Bulletin on Gainsharing Arrangements would

\footnote{756, 760, 771 (10th Cir. 1991) (refusing to estop the government from denying reimbursement for physical therapy and psychological services on the ground that the Medicare carrier erroneously had advised the provider that it could bill for the services under a single provider number).} \footnote{249 \textit{See} Office of Personal Mgmt., 496 U.S. at 417.} \footnote{250 \textit{See}, e.g., 42 U.S.C. § 1320a-7b(b)(1)-(2) (2003) (prohibiting defendants from “knowingly and willfully” engaging in acts that violate the Anti-Kickback Statute); 31 U.S.C. § 3729(a)(1) (2003) (barring defendants from “knowingly” submitting false claims under the FCA). The major exception is the Stark Law, which has no intent requirement. \textit{See} 42 U.S.C. § 1395nn(a)(1) (2003) (outlining the prohibition).} \footnote{251 \textit{See}, e.g., United States ex. rel. Oliver v. Parsons Company, 195 F.3d 457, 464 (9th Cir. 1999) (“A contractor relying on a good faith interpretation of a regulation is not subject to liability . . . because the good faith nature of his or her action forecloses the possibility that the scienter requirement is met.”).} \footnote{252 \textit{Cf.} William E. Kovacic, \textit{The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets}, 6 SUP. CT. ECON. REV. 201, 203 (1998) (arguing that “[r]educing idiosyncratic risks of doing business with federal purchasing agencies is a key step toward establishing effective public/private partnerships . . . ”).}
come as a surprise to many providers, the OIG agreed to “take into consideration in exercising its enforcement discretion whether [such an] arrangement was terminated expeditiously following publication of the Bulletin.” Thus, providers are unlikely to be penalized for following agency advice as long as they seek to revise their practices in a timely fashion. Nonetheless, providers may find the potential for liability due to their reliance on outdated advice to be unsettling, particularly when combined with other practical difficulties raised by the proliferation of informal guidance sources.

C. Litigation

The problems with both traditional forms of regulation and the proliferation of informal guidance mechanisms have generated attempts to address legal and regulatory ambiguity through litigation based on novel interpretations of the underlying provisions. The majority of these cases have been brought under the FCA, either as direct government prosecutions or as private actions under the law’s broad qui tam provisions. Such litigation is traditionally viewed as an example of ex post enforcement, under which the government investigates and prosecutes conduct by entities who have violated the rules against health care fraud. The situation is complicated, however, by the existence of an inordinate number of “gray areas” in federal health care program reimbursement, the difficulty of detecting fraud during claims processing, and the concomitantly low risk of an individual provider being caught and disciplined for any misbehavior. As

253 Special Advisory Bulletin on Gainsharing Arrangements, supra note 206. See also 42 C.F.R. §§ 1008.45(b)(2)-(3) (2003) (providing that if the OIG terminates or modifies a previously issued Advisory Opinion, it “will not proceed against the requestor . . . if such action was promptly, diligently, and in good faith” discontinued or modified within a reasonable period of time).

254 See Bhagwat, supra note 8, at 1282-88 (describing public ex post enforcement).

255 See Hyman, Health Care Fraud and Abuse, supra note 171, at 538-39 (describing the low likelihood of fraud being detected and punished); supra note 6 and accompanying text (explaining the complexity of federal health care
Professor David Hyman has noted, “program administrators can compensate for a low risk of detection/conviction (that is, ex ante underinvestment in claims review) by imposing substantial ex post sanctions for misconduct,” an approach that may be “relatively unproblematic from an economic perspective... [but] questionable on psychological grounds.” Moreover, when the threat of such litigation can only be reduced by the defendant’s agreement to abide by novel program conditions not otherwise imposed by law or regulation, the settlement process may have the effect of transforming an ex post enforcement mechanism into an ex ante means of imposing compliance as the “price” of continued participation in the programs. Thus, while these cases have met with a certain degree of practical success, they raise a variety of troubling procedural and jurisprudential concerns.

1. Procedural Concerns

The procedural issues involved in the litigation process primarily concern the role of the *qui tam* relator, particularly the question of whether the relator has standing to maintain the suit if the government declines to intervene. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, a company was accused of billing the government for more hours than its employees actually spent on federally funded projects; the United States declined to intervene in the suit. The Supreme Court held that in such circumstances, the relator has standing to sue as a

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256 Hyman, *Health Care Fraud and Abuse*, supra note 171, at 540. See also *id.* at 564 (characterizing the current process as the “haphazard extraction of ex post discounts from some providers and the ritual sacrifice (either through conviction/program exclusion or the imposition of staggering defense costs) of other providers”).

257 Bhagwat, *supra* note 8, at 1287 (describing immediate forms of enforcement).

258 See *Krause*, *supra* note 49, at 158-61 (presenting a detailed analysis of standing and fiscal harm). *See id.* at 136 n. 60 (discussing other procedural issues raised by *qui tam* suits).

partial assignee of the government’s own damages claim. By holding that the relator has standing only in a derivative capacity, however, Stevens left open the issue of whether the government would have standing in the absence of its own financial injury.

The Stevens Court did offer a modicum of guidance:

It is beyond doubt that the complaint asserts an injury to the United States—both the injury to its sovereignty arising from violation of its laws (which suffices to support a criminal lawsuit by the Government) and the proprietary injury resulting from the alleged fraud.

In recognizing that the requisite harm can arise both from a “proprietary” injury and from an injury to the government’s “sovereignty,” the Court suggested that the government can be harmed under the FCA in ways that are not primarily financial, such as by violation of underlying program requirements or interference with government functions. Because the allegations in the case concerned both sovereign and proprietary injury, however, the Court had no occasion to address whether non-proprietary injury, standing alone, would suffice. While Stevens suggests that government standing is unlikely to be at issue in most FCA cases, the question may remain open in the rare case where it can be shown that the government suffered no conceivable harm from the defendant’s acts.

Moreover, while Stevens resolved the Article III standing question, it did not address whether qui tam suits violate the Article II Appointments or Take Care Clauses of the United States Constitution. The Article II issues have been developed most fully in Riley v. St. Luke’s Episcopal Hospital, where a former

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260 Id. at 846 (holding “that the United States’ injury in fact suffices to confer standing on respondent Stevens”).
261 Id. at 844.
262 See Krause, supra note 49, at 167-84 (discussing non-financial ways in which government can be harmed by false claims).
263 529 U.S. 765.
264 U.S. CONST. art. II, §§ 2, 3; see Stevens, 529 U.S. at 848 n.8. But see Stevens, 529 U.S. at 878 (Stevens, J., dissenting) (arguing that the evidence was “sufficient to resolve the Article II questions” as well).
nurse sued a hospital under the *qui tam* provisions.\(^{265}\) Despite the plaintiff’s allegations that the defendants had conspired to defraud the United States Treasury, the government declined to intervene in the suit.\(^{266}\) In 1997, before the *Stevens* case reached the Supreme Court, a district court dismissed the suit for lack of standing.\(^{267}\) On appeal, a fifth circuit panel held that Riley had standing to sue, but that the suit violated the separation of powers doctrine and the Take Care Clause.\(^{268}\) The court subsequently agreed to rehear the case *en banc*, but delayed its decision pending the Supreme Court’s opinion in *Stevens*.\(^{269}\) Finally, in May 2001, the Fifth Circuit issued an *en banc* opinion holding that the alleged delegation of prosecutorial power to the relator does not violate the Take Care or Appointments Clauses.\(^{270}\) Nonetheless, in the absence of guidance from the Supreme Court, the issue remains controversial.

2. *Jurisprudential Concerns*

While the constitutional contours of FCA enforcement remain confusing, judicial precedent offers a framework under which these issues eventually may be clarified. More troubling, however, are the fundamental fairness issues raised by permitting the litigation process to be used to make *substantive* legal

\(^{265}\) Riley v. St. Luke’s Episcopal Hosp., 252 F.3d 749 (5th Cir. 2001) (*en banc*) (reversing the panel’s decision that the *qui tam* provisions violated the Take Care Clause and separation of powers principles).

\(^{266}\) *Id.* at 751 (relating procedural history).


\(^{269}\) *Id.*

determinations in the absence of traditional legislative and regulatory rulemaking procedures. In the health care fraud context, these concerns center on one particular phenomenon: the fact that the vast majority of such cases settle, rather than proceeding to trial.\footnote{See Aussprung, supra note 37, at 3.}

The enormous potential liability under the Act, which includes not only tremendous civil penalties but also the specter of exclusion from federal health care programs, convinces many health care providers to settle FCA allegations for more reasonable sums plus the government’s agreement not to pursue exclusion.\footnote{See Krause, “Promises to Keep”, supra note 58, at 1413 (arguing that settlements permit unchecked prosecutorial discretion); Aussprung, supra note 37, at 3 (noting “only a small minority of health care fraud and abuse cases go to trial”); supra notes 53-57 and accompanying text (explaining the astronomical penalties that may be imposed under the FCA). This appears to be part of a broader trend in civil litigation. See Hope Viner Samborn, The Vanishing Trial, A.B.A.J., Oct. 2002, at 24 (discussing the decline in number of federal trials and the increase in settlements and alternative dispute mechanisms).}

As health economist Uwe Reinhardt has noted, “[r]ather than engaging in a long, protracted fight to set the record straight, throughout which share prices suffer and business slumps, a health company’s best bet may simply be to hand over the fines and get on with business.”\footnote{Reinhardt, supra note 7. See also William M. Sage, Fraud and Abuse Law, 282 J. AM. MED. ASS’N 1179, 1180 (1999) (noting that “large organizations have such a large stake in avoiding exclusion from Medicare that they readily settle pending charges, making much of fraud control resemble a rebate program more than a law enforcement exercise”); Hyman, Health Care Fraud and Abuse, supra note 171, at 552 (arguing that “the FCA makes it possible for the government and qui tam relators to extract the equivalent of greenmail as a discount off list price”).}

While settlements may be preferable from the perspective of the parties involved in the litigation, they may not benefit the industry as a whole. To the extent settlement removes many factual and legal issues from judicial scrutiny, it may preclude a health care provider from arguing a range of issues that are crucial to the development of health care regulatory policy.\footnote{As one commentator has argued, “many aspects of the law are never}
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Settlements is an unofficial body of law comprised of legally untested theories of falsity and fraud—an amorphous body of quasi-legal guidance with no precedential value, but on which the government will nevertheless rely in future enforcement efforts.275

Admittedly, not all such settlements are equally troublesome. Many settlements dispose of purely factual issues, such as the truth or falsity of the claims submitted. For example, if a physician settles accusations that she “upcoded” bills by charging for a more expensive category of services than was rendered, the physician clearly will sacrifice her ability to prove that some of the challenged codes were in fact accurate.276 Although many settlement agreements make clear that the defendant is not admitting liability, it is equally clear that by settling, the defendant has waived the right to contest the truth of the government’s allegations.277 While the result might strike us as unfair if the government’s accusations lacked any evidentiary basis, the decision to settle these factual disputes is a strategic one based on whether the defendant wants to incur the time and expense of a trial.278

Litigated and never face the winnowing effects of judicial scrutiny.” Sarah A. Klein, False Claims Act: Protection or Persecution? AM. MED. NEWS, Feb. 15, 1999, at 6. Cf. Lars Noah, Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority, 1997 WISC. L. REV. 873, 926-27 (urging increased judicial oversight of agency consent decrees); Waller, supra note 175, at 1413 (decrying the “long-standing trend in which the courts appear to focus more on the enforcement of the private bargain reached by the parties rather than engage in a meaningful review of the public interest aspects of the private bargain itself” in the antitrust context).

275 See Aussprung, supra note 37, at 1 (describing settlements as “a de facto body of health care fraud and abuse law”).
276 Cf. Bucy, supra note 34, at 6 (describing a University of Pennsylvania PATH settlement based, in part, on allegations of upcoding for services rendered by physicians on the medical school faculty).
277 See, e.g., United States v. Mississippi Baptist Med. Ctr., Settlement Agreement, Oct. 10, 1999, reprinted in HEALTHCARE COMPLIANCE REP. (CCH) ¶ 130,318 (noting that “the Hospital by executing this Agreement does not admit to any liability or wrongdoing”).
278 See id. at ¶ 130,318 (“The United States and the Hospital disagree on whether any of the Claims described ... might qualify as ‘false claims’... However, to avoid the time, expense, and uncertainty of litigation, the parties
What is more troubling, at least to this author, are situations in which the settlement process is used to circumvent judicial review of legal theories of falsity, fraud, or other elements of the law. For example, defining the requisite elements of falsity and intent under the FCA has proven to be a complicated task for the judiciary, at times resulting in inconsistent opinions. At trial, this ambiguity offers the defendant an opportunity to try to persuade the judge that its interpretation of the rules was correct, or at least constituted a good faith error. As commentators have noted, however, “[w]hether or not a provider who innocently misconstrues a complex regulation would ever actually be found guilty in a court of law is in some ways moot if the provider cannot risk putting the issue of its culpability to the trier of fact.” Recent enforcement efforts offer many examples of this phenomenon, but two will suffice: (a) the “bootstrapping” of regulatory violations into a basis for FCA liability; and (b) the recent debate over the prices the Medicare program pays for prescription drugs.

a. FCA Liability Based on Regulatory Violations

As noted above, a major FCA dispute concerns whether the law can be used as a vehicle for allegations that the defendant has violated other legal provisions pertaining to the federal health care programs—provisions that do not themselves provide private rights of action. For several years, federal prosecutors and qui tam relators have invoked the FCA in situations where health care services were delivered to patients as claimed, but where the provider may have violated underlying legal requirements (such as the anti-referral laws) in furnishing the care. Although there are few reported opinions on the merits of these allegations, several courts appear sympathetic to the proposition that a violation of the

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279 See Krause, supra note 49, at 151-58 (discussing the judiciary’s tendency to confuse the elements of the FCA cause of action).

280 Jost & Davies, supra note 53, at 265.

281 See supra notes 63-64 and accompanying text.

282 See Krause, “Promises to Keep”, supra note 58, at 1391-1406 (discussing FCA cases).
ANTI-KICKBACK OR STARK PROVISIONS MAY RENDER SUBSEQUENT CLAIMS FOR LEGITIMATE HEALTH CARE SERVICES PER SE FALSE.

Not all courts have accepted this argument. In United States ex rel. Thompson v. Columbia/HCA Healthcare, the Fifth Circuit rejected such per se allegations, limiting FCA suits to situations involving the false certification of compliance with relevant laws.

As the court noted, “where the government has conditioned payment of a claim upon certification of compliance with, for example, a statute or regulation, a claimant submits a false or fraudulent claim when he or she falsely certifies compliance with that statute or regulation.” Under this approach, liability will hinge on whether certification of compliance with the relevant legal provisions truly is a condition of payment—often a difficult proposition to prove with regard to the federal health care programs.
A few years later, the Fifth Circuit appeared to retreat from its focus on express certification. In *United States v. Southland Mgt. Corp.*, the owners of a low-income housing project were accused of misrepresenting the condition of apartments subsidized by the Department of Housing and Urban Development (HUD). The government argued that the defendants’ payment vouchers falsely certified that the units were in “decent, safe, and sanitary condition,” despite the fact that repeated inspections had documented numerous deficiencies. HUD, however, continued to pay the vouchers while negotiating a corrective action plan. Given HUD’s knowledge of the true conditions of the premises, the district court held that the misrepresentations obviously were not material to the agency’s decision to disburse funds to the defendants.

While acknowledging that the FCA contains a materiality requirement, a panel of the Fifth Circuit disagreed with the district court’s reliance on how HUD factually handled the claims. Instead, the court cited *Thompson* for the proposition that materiality is to be judged by the legal requirements of the statute, noting that the “disposition of this claim clearly indicates that if a certification of compliance with a statute or regulation is a

States ex. rel. Thompson v. Columbia/HCA Health Care Corp., 20 F. Supp. 2d 1017, 1047 (S.D. Tex. 1998)). Failure to comply with the Anti-Kickback Statute does not necessarily lead to either non-payment or expulsion from federal health care programs. *Id.*

287 288 F.3d 665 (5th Cir. 2002).

288 *Id.* at 673.

289 *Id*.

290 95 F. Supp. 2d 629 (S.D. Miss. 2000). Moreover, the district court suggested the government’s prior knowledge of the defendants’ activities could preclude a finding of falsity and/or intent. *Id.* at 643.

[B]ecause the defendants were fully apprised of HUD’s awareness of the problems at the apartments which now form the basis of the Government’s suit, and in fact, corresponded with HUD with respect to those very same problems, there can simply be no reasonable finding that defendants “knowingly” made a false statement or claim to HUD regarding the condition of the property.

*Id.*

291 *Southland Mgt. Corp.*, 288 F.3d at 695.
prerequisite to the defendant’s legal entitlement to funds, the certification is a material misrepresentation and renders the claim false as a matter of law.” 292 To the extent the court focused on the language of the statute and regulations in the abstract, rather than the government’s actual payment procedures, litigants feared one avenue of FCA defense had been foreclosed.293

In April 2003, however, after rehearing the case en banc, the Fifth Circuit issued a new opinion upholding the district court’s judgment for the defendant property owners.294 This time, the court’s inquiry focused on the language of the agreement in question.295 Noting that the contract permitted HUD to undertake a variety of remedial actions against owners who failed to comply with program regulations, the court held that “[d]uring the corrective action period . . . claims for housing assistance payments are not false claims because they are claims for money to which the Owners are entitled (and which provide the wherewithal both to operate the property and to take the necessary corrective actions).”296 In essence, the en banc opinion returned the focus to the government’s actual payment decision rather than an abstract reading of the program requirements, suggesting that defendants should have an opportunity to prove their alleged misrepresentations were not truly material to the government’s payment decision and hence not actionable under the FCA.

Although much of the controversy thus far has centered on

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292 Id. at 679 (emphasis added). According to the dissent, the majority’s interpretation of this novel “claim materiality” requirement was “ingenious but wrong.” See id. at 693 (Jones, J., dissenting). See also Krause, supra note 49, at 188-201 (discussing FCA materiality requirement).
295 Id.
296 Id. at 676. In a separate concurrence, Judge Jones objected to the majority’s reliance on the contract terms, arguing that the case should have been affirmed because: (1) the defendants’ certifications were not material to HUD’s payment decision; and (2) the defendants could not “knowingly” have submitted false claims because the government was fully aware of the condition of the property. Id. at 678 (Jones, J., concurring). In her words, “[t]he government got exactly what it was willing to pay for.” Id.
attempts to base FCA suits on violations of the anti-referral provisions, the more significant long-term impact of this approach may result from its application in the quality-of-care context. Health care providers, particularly institutions, must satisfy a wide range of highly technical conditions for participation in the federal health care programs.\textsuperscript{297} Failure to satisfy these conditions will subject the provider to a variety of sanctions, including civil penalties and possible program exclusion.\textsuperscript{298} Recently, the government and \textit{qui tam} relators have argued that a request for payment submitted when the provider is out of compliance with any of these standards should be considered “false or fraudulent” under the FCA, even if the underlying noncompliance likely would not lead to any significant sanctions by program administrators.\textsuperscript{299}

One of the first uses of this approach occurred in \textit{United States ex. rel. Aranda v. Community Psychiatric Centers}, in which a psychiatric hospital was accused of failing to provide Medicaid patients with the “reasonably safe environment” required by federal law.\textsuperscript{300} The government argued that by billing Medicaid for patient care services, the hospital had implicitly and untruthfully certified that it was in compliance with all program-related quality requirements.\textsuperscript{301} The district court agreed this could be a viable

\textsuperscript{297} \textit{See}, \textit{e.g.}, 42 C.F.R. pt. 482 (2003) (describing the “conditions of participation” for hospitals).

\textsuperscript{298} \textit{See}, \textit{e.g.}, 42 C.F.R. § 488.406 (2003) (identifying remedies that may be imposed when long-term care facility fails to comply with conditions of participation).


\textit{[T]hese conditions are not conditions of payment. To the contrary, the relevant Medicare regulations make clear that if a condition of participation is not satisfied, the provider is not excluded from the program, and payment is not stopped unless the HCFA determines that an immediate threat to the health or safety of patients exists.}

\textit{Id.}

\textsuperscript{300} 945 F. Supp. 1485 (W.D. Okla. 1996) (alleging that the environment was not “reasonably safe” because patients suffered physical injury and sexual abuse).

\textsuperscript{301} \textit{Id.} at 1487.
theory of falsity and denied the hospital’s motion to dismiss, noting that the Medicaid law and regulations mandated compliance with certain quality standards.  

Similar allegations were made in *United States v. NHC Healthcare Corp.*, in which the government argued that the defendant nursing home “was so severely understaffed that it could not possibly have administered all of the care it was obligated to perform” for federal health care program patients.  

The district court held that this approach required the government to prove “that the patients were not provided the quality of care which promotes the maintenance and the enhancement of the quality of life,” as required by the Medicare and Medicaid programs.  

Citing *Aranda*, the court found that the FCA applied to the submission of claims for services not actually performed, and denied the defendant’s motion to dismiss.  

Federal prosecutors have invoked this theory more broadly against nursing homes that allegedly bill the government for “inadequate” care. Since 1996, the United States Attorneys Office for the Eastern District of Pennsylvania has taken the lead in these cases, negotiating a number of high-profile settlements. Although the facilities generally have not admitted any wrongdoing, common elements of these settlements include the payment of civil penalties, development of training and oversight procedures for specific problem areas, third-party monitoring of

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302 *Id.* at 1488. Because the opinion concerned a motion to dismiss, the court did not have occasion to address whether the plaintiff ultimately would have prevailed on the merits. For a detailed discussion of the implied certification approach, as contrasted with the explicit certification and per se approaches, see Krause, “Promises to Keep”, supra note 58, at 1392-1406.


304 *Id.*

305 *Id.*

quality conditions, and adoption of a corporate compliance program. While critics have argued that the inherently subjective issue of health care “quality” is better addressed through the health care licensing and disciplinary systems than through fraud prosecutions, quality of care clearly has become one of the government’s top fraud enforcement priorities. As the OIG warned in its Compliance Program Guidance for Nursing Facilities, “knowingly billing for nonexistent or substandard care, items, or services” may be actionable under the FCA. Thus, despite the lack of case law on the merits of these disputes, the FCA successfully has been used to negotiate settlements based on regulatory violations.

The consequences of using the litigation approach in this context are significant. In both the anti-referral and quality-of-care contexts, plaintiffs have successfully utilized FCA litigation to circumvent the normal adjudicative processes for determining whether an underlying violation has occurred and what sanctions may be appropriate. When the suits are brought by the government, this strategy allows prosecutors to negotiate a favorable resolution of the allegations without proving that a violation actually occurred. Of course, to the extent a settlement primarily benefits patients, it is difficult to argue that the result is anything but a success. But when the suit is brought by a private party under the FCA qui tam provision, the result is somewhat different: the circumvention of the standard regulatory appeals process results in the diversion of some part of the proceeds into the pockets of private individuals, rather than into the Medicare

307 See, e.g., Hoffman, supra note 306, at 154-55.
308 See Fabrikant & Solomon, supra note 299, at 160-61 (arguing that a more appropriate remedy is to strengthen federal and state regulatory agency oversight of such institutions).
310 See Timothy P. Blanchard, Medicare Medical Necessity Determinations Revisited: Abuse of Discretion and Abuse of Process in the War Against Medicare Fraud and Abuse, 43 ST. LOUIS U. L.J. 91, 94 (1999) (noting that when medical necessity disputes are handled through the administrative appeals process, rather than the FCA, health care providers often prevail).
HEALTH CARE FRAUD ENFORCEMENT

Trust Fund or the Health Care Fraud and Abuse Control Account. In such circumstances, the benefit to patients is reduced significantly.

b. Drug Pricing Issues

Another example of the use of FCA litigation to address regulatory ambiguity concerns the prescription drug industry, which has been under considerable scrutiny in recent years. In the past, the majority of this attention focused on drug sales and marketing practices, which potentially implicate the Anti-Kickback Statute.\footnote{See generally Bulleit & Krause, supra note 68.} As the OIG noted in a 1994 Special Fraud Alert on Prescription Drug Marketing Schemes:

Traditionally, physicians and pharmacists have been trusted to provide treatments and recommend products in the best interest of the patient. In an era of aggressive drug marketing, however, patients may now be using prescription drug items, unaware that their physician or pharmacist is compensated for promoting the selection of a specific product.\footnote{Office of the Inspector Gen., Special Fraud Alert: Prescription Drug Marketing Schemes (Aug. 1994), reprinted in Publication of OIG Special Fraud Alerts, 59 Fed. Reg. 65,372, 65,376 (Dec. 19, 1994).}

Because drug manufacturers do not submit bills directly to the federal health care programs, but rather sell their products to physicians, pharmacists, and patients, it has been difficult to reach these companies under traditional false billing theories. However, the recent extension of the exclusion sanction to include entities that indirectly furnish items and services to federal health care program beneficiaries has markedly strengthened the government’s negotiating position relative to drug manufacturers.\footnote{See 42 C.F.R. § 1000.10 (2003); supra notes 86-87 and accompanying text.}

In addition to their sales and marketing practices, prescription drug companies have come under scrutiny for allegedly inflating the prices paid for their products by the federal health care
programs, particularly Medicare. As of December 2003, Medicare generally reimbursed physicians on the basis of (i) their actual charges or (ii) 95 percent of the “Average Wholesale Price” (AWP) for drugs they administer in the office setting. Unfortunately, the Medicare statute and regulations did not define this “average” price. Instead, the Medicare contractors based their calculations on information contained in pharmaceutical pricing publications and databases, which in turn received information directly from the manufacturers. There is widespread agreement that the published prices do not reflect the actual price at which many physicians are able to purchase these products, due to volume discounts and other purchasing incentives. Thus, reliance on published AWP may result in payments that are significantly higher than what many physicians actually pay for the drug, resulting in a nice profit—or “kickback”—when the physician is reimbursed.

315 42 U.S.C. §§ 1395u(o)(1) & 13951(a)(1)(s) (2003). Medicare generally does not cover self-administered outpatient prescription drugs, such as pills. Id. § 1395x(s)(2)(A) (excluding coverage). Despite this significant limitation, preliminary estimates are that the program spent $8.4 billion on prescription drugs in 2002. See Medicare Program; Payment Reform for Part B Drugs, 68 Fed. Reg. 50428, 50429 (Aug. 20, 2003) (citing statistics).
317 Id.
318 See Kalb, supra note 314. Similarly, the Medicaid pricing provisions are notoriously complex. In brief, payment for single-source drugs may not exceed the lower of the estimated acquisition cost plus a reasonable dispensing fee, or the usual or customary charge. 42 C.F.R. § 447.331(b) (2003). Within these limits, states may develop their own reimbursement methodologies, which often are based on discounted AWP. See STATE MEDICAID MANUAL § 6305.1.B (stating that AWP, without a “significant” discount, is no longer an acceptable price estimate). In addition, the state Medicaid programs receive rebates from drug manufacturers, based on the greater of: (a) a statutory minimum percentage; or (b) the difference between the average price paid by wholesalers for products distributed for retail trade (“average manufacturer price”) and the “best price” paid for the product (i.e., the lowest price actually paid by any
The most famous example of “AWP fraud” to date involved TAP Pharmaceutical Products, which in October 2001 agreed to pay a record $875 million dollars to settle a variety of civil and criminal fraud allegations stemming from the sale of its cancer drug Lupron.\textsuperscript{319} The government alleged that TAP knowingly reported AWP information that was significantly higher than Lupron’s true average sales price, thus assuring Medicare reimbursement would remain artificially high.\textsuperscript{320} Of course, this strategy did not directly translate into higher revenues for TAP: because the company does not sell its products directly to the Medicare program, it could not directly reap the benefits of the inflated price.\textsuperscript{321} So the government further alleged that TAP “marketed the spread” between the discounted prices paid by its physician customers and the artificially high Medicare reimbursement—thus offering its customers a financial inducement to prescribe Lupron in violation of the Anti-Kickback Statute, and potentially implicating the FCA.\textsuperscript{322} Moreover, by concealing the true pricing structure from Medicare and falsely advising its customers to report AWP rather than the actual price of the drug, TAP allegedly caused its customers to submit false claims.\textsuperscript{323} Settlement of the FCA allegations accounted for approximately $560 million of TAP’s total payment, and disposed of two separate \textit{qui tam} cases against the company.\textsuperscript{324}


\textsuperscript{319} See Press Release, Dep’t of Justice, supra note 3. A consortium of patients and health plans are also pursuing civil actions for damages based on the company’s pricing activities. See In re: Lupron(R) Marketing & Sales Practices Litig., 245 F. Supp. 2d 280 (D. Mass. 2003) (denying in part and allowing in part the parent company’s motion to dismiss for want of personal jurisdiction).

\textsuperscript{320} See Press Release, Dep’t of Justice, supra note 3.

\textsuperscript{321} Id.

\textsuperscript{322} Id.

\textsuperscript{323} Id.

\textsuperscript{324} See Press Release, Dep’t of Justice, supra note 3. TAP also pleaded guilty to a conspiracy to violate sections 331 and 353 of the Prescription Drug Marketing Act of 1987 by selling drug samples, and paid a $290 million criminal fine. Id. The \textit{qui tam} suits included a suit filed by TAP’s former Vice
Perhaps the greatest surprise surrounding the TAP case—aside from the magnitude of the settlement—was the fact that AWP problems had long been a matter of common knowledge. For the past thirty years, the federal government has been aware that published AWP does not reflect the actual price paid for many prescription drugs. As early as 1974, the government sought to limit the prices paid to pharmacists under the Medicaid program, noting that “the published prices overstate[] the actual prices paid by pharmacists by an average of 15 to 18 [percent].”325 Similarly, in revising the Medicare physician payment methodology in 1991, HHS noted that “the Red Book and other wholesale price guides substantially overstate the true cost of drugs.”326 A series of reports by the OIG and GAO in the 1990s further illustrated the problem, concluding that physicians were able to purchase these products at significant discounts from AWP.327

Prior to late 2003, longstanding recognition of the problem had led to several failed legislative and regulatory attempts to revise the Medicare drug reimbursement methodology.328 In 2000, for example, HCFA sent a memorandum to the Medicare contractors announcing an “alternative” source of AWP information developed by the DOJ and the National Association of Medicaid Fraud

President of Sales, who claimed to have quit because of his concerns about the company’s sales and marketing practices, and a suit filed by a urologist employed by one of TAP’s HMO customers, who reported that he had been offered an “educational grant” if he agreed to reverse the HMO’s decision to cover one of Lupron’s less-expensive competitors. Id. The whistleblowers received approximately $95 million of the proceeds. Id.

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327 See, e.g., GEN. ACCOUNTING OFFICE, MEDICARE: PAYMENTS FOR COVERED OUTPATIENT DRUGS EXCEED PROVIDERS’ COSTS, GAO-01-1118 (Sept. 2001), at 4 (estimating that physicians are able to purchase most Medicare-covered drugs at average discounts of 13 to 34 percent off of AWP, with some discounts running as high as 65 to 86 percent).
Control Units. Two months later, HCFA instructed the contractors not to use the new data, noting that “congressional action may preclude the use of this alternative source.” Similarly, when Congress revisited the payment methodology in 1997, consensus could only be achieved to reduce payment to 95 percent of AWP—an amount clearly insufficient to offset the 13 to 34 percent actual discounts discussed above.

The reasons for these failures have been mostly political. Most significantly, efforts to revise drug payments have encountered strong opposition from the powerful oncology lobby, which has argued that the higher reimbursement reflected in the “spread” is needed to subsidize the special costs of storing and administering oncology drugs. Recent reports have suggested that there is

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330 Program Memorandum AB-00-115 from Department of Health and Human Services, Health Care Financing Administration (Nov. 17, 2000), available at http://www.cms.gov/manuals/pm_trans/AB00115.pdf; Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, 114 Stat. 2763, § 429 (imposing moratorium on administrative decreases in drug reimbursement rates until completion of GAO study of current payment methodology). In August 2003, CMS reopened the issue by publishing a notice in the Federal Register proposing to revise the drug payment methodology by one of four approaches: (a) enforcing “comparability” between prices paid by contractors for drugs for their Medicare and private policyholders; (b) applying a greater AWP discount; (c) setting prices based on increased market monitoring; and (d) establishing a competitive acquisition program for drugs. Centers for Medicare & Medicaid Services, Medicare Program; Payment Reform for Part B Drugs, 68 Fed. Reg. 50428 (proposed Aug. 20, 2003) (to be codified at 42 C.F.R. pt. 405). Due to subsequent legislative activity, however, the future of the CMS provisions is unclear. See infra notes 345-51 and accompanying text.


332 See Iglehart, supra note 316, at 182 (describing the oncology community’s opposition to reform efforts).
indeed a problem with the current oncology practice expense methodology.\textsuperscript{333} Under Medicare’s general budget-neutral approach to practice expenses, however, increasing oncologists’ reimbursement would have required an equivalent reduction in payments for other types of specialists.\textsuperscript{334} Faced with the wrath of the oncology lobby if drug reimbursement were reduced—and the wrath of other powerful physicians’ groups if oncologists’ reimbursements were increased at their own expense—turning a blind eye to the AWP loophole may have been the most palatable alternative.

Given this historical context, two aspects of the TAP case stand out. First, it is somewhat disingenuous to accuse a company of committing fraud when it takes advantage of a well-known loophole in current law—a loophole there has not yet been the political will to close. Second, and more important, the DOJ and HHS essentially used the fraud settlement process as a means of closing that loophole, at least with respect to TAP’s products. The government did this through TAP’s Corporate Integrity Agreement, which required the company to report the “Average Sales Price” (ASP) of each of its products on a quarterly basis.\textsuperscript{335} The ASP is defined as the average of all final sales prices charged by TAP for each product to all purchasers except (1) direct sales to hospitals and (2) sales not included in calculating the Medicaid

\textsuperscript{333} The GAO has agreed that the reimbursement methodology for oncologists should be revisited. See \textit{Gen. Accounting Office, Medicare Physician Fee Schedule: Practice Expense Payments to Oncologists Indicate Need for Overall Refinements}, GAO-02-53 (Oct. 2001).

\textsuperscript{334} See Iglehart, supra note 316, at 1595 (citing remarks by William J. Scanlon, director of health care issues for GAO). In the August 2003 Proposed Rule, CMS indicated its intent to resolve this issue by increasing the practice expense allocation for drug administration. 68 Fed. Reg. at 50,436-39. To the extent the payment increases were not offset by the savings from the revised drug reimbursement methodology, CMS stated that an exception to the budget neutrality requirement would apply. \textit{Id.} at 50,439.

\textsuperscript{335} See Corporate Integrity Agreement Between The Office Of Inspector General Of The Department Of Health And Human Services And TAP Pharmaceutical Products Inc., § III.D (Sept. 28, 2001) [hereinafter Corporate Integrity Agreement], available at http://oig.hhs.gov/fraud/cia/agreements/tap_pharmaceutical_products_9280l.pdf.
rebate “best price.” The ASP must be net of all volume discounts, prompt pay discounts, cash discounts, chargebacks, short-dated products, free goods, rebates, and all other price concessions, with the exception of bona fide charity care or grants. Thus, the ASP is a far more accurate assessment of the drug’s average market price than the company-reported AWP.

Clearly, the ASP reporting requirement was intended not only to track the price of the drugs, but also to permit CMS to alter their reimbursement. The CIA stated that the pricing information could be relied upon by CMS in establishing reimbursement rates for TAP’s products, although CMS could not change the rates without conducting “meaningful review for all government reimbursed therapeutically similar products.” Prior to late 2003, however, there appeared to be no authority for CMS to obtain ASP information from other manufacturers in the Medicare context, except on a voluntary basis (or pursuant to CIAs negotiated by other companies facing similar litigation). Moreover, to the extent the Medicare statute at the time mandated reimbursement on the basis of either actual charges or 95 percent of AWP, it is not clear that CMS had the authority to change reimbursement on the basis of ASP information: while ASP may be an average of all sales, it is not necessarily an estimate of the price paid by an individual physician, nor is it equivalent to the wholesale price. Nonetheless, the CIA was an attempt to accomplish via litigation

336 Id. at § II.D.2.a
337 Id.
338 Id. at § III.D.2.d. The information may also be used by state Medicaid programs in establishing reimbursement rates, subject to the provisions of TAP’s individual state settlement agreements. Id.
something the legislative and regulatory processes had thus far failed to achieve: a revision of the Medicare drug reimbursement methodology to more accurately reflect the prices paid by customers. As one observer has argued, prosecutors “are trying to use litigation to force companies to change their practices, not just to win damages.”

And it was clear that these efforts would not be limited to TAP. In the subsequent *Compliance Guidance for Pharmaceutical Manufacturers*, the OIG identified the “Integrity of Data Used to Establish or Determine Governmental Reimbursement” as one of the key risk areas for pharmaceutical manufacturers. As the OIG noted, “[t]he government sets reimbursement with the expectation that the data provided are complete and accurate. The knowing submission of false, fraudulent, or misleading information is actionable.” Given reports of similar investigations against many other large pharmaceutical companies, it was quite possible that the OIG would be able to use the CIA process to induce pricing changes for many of the products reimbursed by the Medicare program—thus, as a practical matter, facilitating the underlying goal without resorting to contentious legal or regulatory actions.

These suspicions were borne out in December 2003, when Congress finally passed the Medicare Prescription Drug, Improvement, and Modernization Act of 2003. Under the new legislation, reimbursement for outpatient prescription drugs in 2004 generally will be set at 85 percent of AWP, subject to adjustments based on market surveys. Beginning in 2005,


343 *Id.* at 23,733.

344 See, e.g., *TAP Pharmaceuticals, Bristol-Myers Squibb Targets of Federal Marketing, Pricing Probe*, 4 *Health Care Fraud Rep.* (BNA) 207 (2001) (describing investigations against other large pharmaceutical companies).


346 *Id.* at § 303(b)(2), 117 Stat. 2238-39 (to be codified at 42 U.S.C. §
payment for single-source drugs will be based on the lesser of: (1) the “average sales price,” which is defined broadly to include sales to all purchasers except certain “nominal” sales and those exempted from the Medicaid best price determination; or (2) the “wholesale acquisition cost” (WAC), which is defined as the manufacturer’s list price to wholesalers and direct purchasers.\(^{347}\)

The OIG will be required to conduct surveys to monitor the market prices of drugs, and reimbursement may be adjusted accordingly; manufacturers who misrepresent a drug’s average sales price will be subject to civil monetary penalties, as well as FCA liability.\(^{348}\)

Beginning in 2006, physicians will also have the option to obtain outpatient drugs through a competitive acquisition system.\(^{349}\) In order to address the oncology issues mentioned above, the drug pricing revisions are explicitly linked to an increase in practice expense reimbursement for drug administration, with such revisions exempted from the budget neutrality requirement.\(^{350}\)

It is far too soon to determine whether the new provisions will resolve this long-standing debate. Despite the practice expense revisions, oncologists have already complained that the post-2005 reimbursement methodology will disadvantage them economically.\(^{351}\) Moreover, the complexity of both the pricing and

\(^{347}\) *Id.* at § 303(c), 117 Stat. 2239-42 (to be codified at 42 U.S.C. § 1395w-3a(b)(4), (c)). Moreover, the definition of average sales price is similar to the definition of ASP found in the TAP CIA. *Id.;* Corporate Integrity Agreement, \(^{supra}\) note 335, at § II.D.2.d.

\(^{348}\) Pub. L. No. 108-173, § 303(c), 117 Stat. 2243-44 (to be codified at 42 U.S.C. § 1395w-3a(d)). H.R. CONF. REP. NO. 108-391, at 592 (2003) (“The Conferees intend that if a manufacturer knowingly . . . submits false information, that such information be considered a ‘false record or statement’ made or used ‘to get a false or fraudulent claim paid or approved by the government’ for purposes of” the FCA.).


\(^{350}\) *Id.* at §§ 303(a), 117 Stat. 2234-37, 2253 (providing for practice expense adjustments), (f) (prohibiting the Secretary of HHS from revising drug payment amounts in 2004 unless concurrent practice expense adjustments are made).

the practice expense revisions is likely to require extensive rulemaking by CMS, which—similar to other anti-fraud initiatives described in this article—may result in an unanticipated delay in implementation. For our purposes, however, it is significant that both these legislative changes and the most recent round of proposed regulatory amendments came about only after the widely publicized AWP fraud investigations and settlements demonstrated that the issue could be resolved. In this way, the litigation process not only foreshadowed, but in many ways provided a model for, the necessary statutory and regulatory changes.

IV. THE EFFECTS OF THE CURRENT REGIME

A. Regulatory Ambiguity and Prosecutorial Discretion

The resolution of regulatory ambiguity through selective litigation might not be of concern if all parties trusted the process to be fair. Unfortunately, the health care industry has alleged that the potential for astronomical FCA liability, combined with the threat of exclusion from federal health care programs, leaves providers virtually no choice but to settle disputes in which they might well prevail at trial. As one author has argued, “[p]roviders who believe they are blameless are under tremendous pressure to settle, because of the legal expenses associated with mounting a defense, and the high probability of bankruptcy and professional disgrace if the jury does not see things the same way the provider does.”352 Provider organizations have gone further, characterizing recent fraud enforcement initiatives as “border[ing] on extortion.”353 There is indeed some evidence to support these complaints, including a GAO report concluding that the United States Attorneys’ Offices participating in the “Operation Bad

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352 Hyman, supra note 1, at 155. See also id. at 166 (arguing that “settling these cases, at almost any price, became the only viable option” for hospitals targeted by the PATH initiative).

353 GEN. ACCOUNTING OFFICE, [Untitled Report], B-279893 (July 22, 1998), at 15 n.30 (describing comments made by the Louisiana Hospital Association).
Bundle” laboratory initiative had no evidentiary basis for targeting the hospitals they selected for investigation. And even the courts have acknowledged that the government’s enforcement efforts have, on occasion, been “rather draconian.”

That regulators wield significant power to encourage settlements—even in situations in which abstract legal analysis might favor the defendant—is not a novel proposition. Administrative law scholars have long acknowledged that, where not constrained by judicial review, the balance of power favors the government in settlement negotiations. As one commentator notes, “the agency possesses the ability to impose its will on the firm in ways which may not be authorized by the governing statute, may not have been envisioned by the creators of the agency, and indeed may exceed the agency’s formal powers.” Characterizing the process as “administrative arm-twisting,” another commentator argues that the practice “succeeds, and evades judicial or other scrutiny, in part because companies in pervasively regulated industries believe that they cannot afford to resist agency demands.”

In addition to raising concerns about fairness to the industry, this approach also promotes a form of “regulation by litigation”—the agency’s ability to demand compliance with conditions of participation that are not required, and perhaps not permitted, under current law. This danger arises under any enforcement scheme that permits the ex ante imposition of negotiated conditions before a regulated entity is permitted to participate (or

356 See, e.g., Bhagwat, supra note 8; Noah, supra note 274.
357 Bhagwat, supra note 8, at 1299.
358 Noah, supra note 274, at 922.
359 See Krause, supra note 49, at 210-12 (describing the importance of fair FCA enforcement to the perceived legitimacy of the anti-fraud agenda).
in this case to continue participating) in the relevant market:

The basic substantive concern . . . is that agencies and agency personnel will use the relatively unfettered authority they enjoy . . . in order to coerce compliance from regulated entities with substantive rules and interpretations which are of their own creation and are inconsistent with the norms laid out by the legislature or the courts.\footnote{Bhagwat, supra note 8, at 1304.}

Of course, the bare fact that an administrative agency interprets (or even makes) law is not improper; indeed, the whole of administrative law is predicated on the premise that agency expertise is necessary to give meaning to the broad laws passed by Congress.\footnote{See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (deferring to an agency’s interpretation of its own statutory mandate).} Moreover, the ability of an administrative agency to make law via means other than the traditional notice-and-comment or adjudicatory processes—such as through informal guidelines, advisory opinions, and public statements by agency officials—has been well-documented.\footnote{See, e.g., Waller, supra note 175, at 1404-05 (describing the development of antitrust guidelines); Bhagwat, supra note 8, at 1304-05 (describing the scope of delegated rulemaking authority).} The use of such informal processes, however, necessarily means that a great deal of agency lawmaking takes place outside the established process for judicial review of administrative actions.\footnote{See Bhagwat, supra note 8, at 1304-05 (noting that traditional rulemaking and adjudicatory processes occur in the context of judicial review, whereas “coerc[ed] . . . compliance [occurs] in a context where outside supervision is lacking”); Noah, supra note 274, at 936-37 (arguing that “[t]he opportunity to challenge agency action in court provides a critical deterrent to arbitrary action”).} This is particularly troubling in light of the fact that courts often defer to the positions expressed by the agency in such informal guidance.\footnote{See, e.g., Waller, supra note 175, at 1407-08 (noting that courts defer to the antitrust guidelines); Zimmer, Inc. v. Nu-Tech Med., Inc., 54 F. Supp. 2d 850, 862 (N.D. Ind. 1999) (agreeing with an OIG Advisory Opinion that found that an arrangement potentially violated the Anti-Kickback Statute); supra Part III.B.2.
suggests that all of these concerns may be present in current health care fraud enforcement.

Similar concerns arise with regard to the exercise of prosecutorial discretion outside the regulatory context, such as with the DOJ’s enforcement of the FCA in health care cases. Given the broad contours of the FCA and Anti-Kickback Statute, perhaps the extent of prosecutorial innovation in health care should not be surprising. As Charles Ruff once noted, “[l]ike Nature, the federal prosecutor abhors a vacuum. Given a statutory grant of jurisdiction, he will seek to bring within it any offense he finds unattended or even, in his view, inadequately attended.” 365 Congress is incapable of predicting all situations in which a new law may be invoked; instead, it enacts broad prohibitions which “are brought into contact with the real world only through the mediation of intricate judge-made doctrines that specify what these laws actually prohibit.” 366 Where a statute leaves room for interpretation as to the prohibited conduct, as with the anti-fraud statutes, prosecutors will be motivated to “bring previously undefined conduct to trial in the hope that the court will criminalize it.” 367 But while prosecutors play a necessary role in interpreting broad statutes, they must take care not to undertake the heart of the legislative function: defining the contours of prohibited public behavior. 368

Although understandable from the perspective of law enforcement, this process proves to be less than ideal for providing

366 Dan M. Kahan, Is Chevron Relevant to Federal Criminal Law?, 110 HARV. L. REV. 469, 471 (1996). As Kahan notes, “[t]o be sure, Congress must speak before a person can be convicted of a federal crime, but it needn’t say much of anything when it does.” Id.
367 Geraldine Szott Moohr, Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us, 31 HARV. J. ON LEGIS. 153, 179 (1994).
368 See Kahan, supra note 366, at 479-81 (explaining why “prosecutors end up with a significant share of delegated lawmakers authority”); Moohr, supra note 367, at 179 (noting that in such circumstances, “lawmaking devolves to law enforcers”).
notice to potential defendants. As scholars have long acknowledged, federal prosecutors have strong personal incentives to apply the law in ways that benefit their personal agendas rather than the public good. Moreover, individual prosecutors may “internalize the political benefits and externalize the practical and human costs of adventurous readings of federal criminal law.” Nowhere are those costs greater than in disputes over the proper scope “of statutes that mark the boundary line between socially desirable and socially undesirable behavior.” Health care anti-fraud statutes mark such a boundary: they protect against improper financial activities, while at the same time encouraging the provision of legitimate medical services and providing the flexibility necessary for the development of more efficient and higher quality delivery mechanisms. It is precisely in such circumstances where clear guidance is crucial in order to “avoid deterring desirable conduct.”

The danger is that an overemphasis on enforcement may lull regulators into complacency, where they seek to delay difficult policy decisions in the hopes that the desired results instead may be achieved through the litigation process. There is some evidence that this has occurred in health care. As one judge recently observed in the nursing home context, “although extensive regulatory authority exists for punishing unscrupulous facilities, the Government has increasingly opted for the expedited results of lawsuits under the FCA’s powerful threats of significant fines, treble damages, and costly litigation fees.”

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369 See Kahan, supra note 366, at 486-87 (noting the phenomenon of “prosecutorial overreaching”).
370 Id. at 487-88.
371 Id. at 485.
372 Hyman, supra note 1, at 539. See also Kahan, supra note 366, at 485 (arguing that “‘fair warning’ or notice” is most important in such situations); Noah, supra note 274, at 936 (arguing that “reliance on individualized bargaining undermines consistency and invites the standardless (and largely unaccountable) exercise of agency discretion”).
373 United States v. NHC Healthcare Corp., 115 F. Supp. 2d 1149, 1152 (W.D. Mo. 2000). A similar process appears to be underway in the Environmental Protection Agency, where commentators argue that “[w]ith the
ongoing pharmaceutical pricing investigations arose after more than thirty years of government awareness that the Medicare drug reimbursement system was flawed, during which time neither Congress nor HCFA/CMS was able to muster the political will to make the necessary changes. From both an academic and a practical perspective, it is problematic when enforcement is given a higher priority than clarifying the applicable regulations. So long as providers feel compelled to settle these allegations, however, there appears to be little incentive for regulators to make these necessary, and often controversial, policy revisions.

B. The Role of Private Relators

The fraud enforcement environment is complicated significantly by the presence of private relators under the FCA, who are free to bring suit even when the government declines to pursue the allegations. It is one thing to provide government prosecutors with the discretion to pursue novel interpretations of a broad statute; it is quite another to permit private individuals to reap multi-million dollar recoveries by using the FCA to pursue violations of ambiguous program rules containing no private rights of action. Although the drafters of the 1986 FCA amendments envisioned qui tam relators as helpful sources of information that otherwise would not have been available to the government, the reality has been quite different. The Supreme Court has

priority on meeting referral targets and collecting fines, enforcement officials forego opportunities to assist in diagnosing and solving the technical or production problems that can lead to noncompliance. This approach to enforcement robs the regulatory process of important feedback concerning how well the rules work.” Freeman, supra note 149, at 17.

374 See supra Part III.C.2.b. See also Patrick Hooper, Health Care Fraud Frenzy: An Exercise in Overzealous Law Enforcement, 1 HEALTH CARE FRAUD REP. (BNA) 799 (1997) (arguing that “Congress and federal and state agency policy-makers are delegating by default substantial policy-making authority to enforcement agencies and prosecutors”).


acknowledged this, cynically concluding that “qui tam relators are . . . motivated primarily by prospects of monetary reward rather than the public good.” Critics have argued that the FCA qui tam provisions undermine prosecutorial discretion by permitting relators to maintain suits that the government has declined to join, and by requiring the government to expend significant resources to review voluminous qui tam filings. While prosecutorial discretion may be an imperfect screen for preventing unjustified expansion of the FCA, it is infinitely preferable to a bounty system enforced by private individuals who have no obligation to further the government’s—or for that matter the patient’s—health care interests.

These observations are not unique to the health care industry. Statutory enforcement by private parties has long been subject to allegations of abuse. Indeed, the FCA qui tam provisions are now unique in American law in part because such statutes fell out of favor in England in the 1600s, “due in large part to abuses by the informers, such as fraudulent prosecutions and extortion.” Indeed, concern over the role of private parties in regulatory

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379 As Professor James Blumstein has argued, permitting such qui tam suits in the Anti-Kickback context “allows the pursuit of a suit for civil liability without the restraining influence of a government official’s exercise of prosecutorial discretion.” Blumstein, supra note 154, at 218. See also Marsha J. Ferziger & Daniel G. Currell, Snitching for Dollars: The Economics and Public Policy of Federal Civil Bounty Programs, 1999 U. ILL. L. REV. 1141, 1171, 1185 (1999) (noting that “private enforcers have no incentive to engage in discretionary nonenforcement” and that false “tips” can be costly because they consume scarce agency resources).
380 See William E. Kovacic, Whistleblower Bounty Suits as Monitoring Devices in Government Contracting, 29 LOY. L.A. L. REV. 1799, 1825 (1996) (“While the interests of public enforcement officials may not be perfectly congruent with taxpayer interests, it is likely that the aims of qui tam relators and taxpayers also are not invariably congruent.”).
381 Bales, supra note 270, at 386.
decisionmaking permeates administrative law. As Professor Jody Freeman has explained:

Private actors exacerbate all of the concerns that make the exercise of agency discretion so problematic. They are one step further removed from direct accountability to the electorate . . . . As nonstate actors, they remain relatively insulated from the legislative, executive, and judicial oversights to which agencies must submit . . . . [They] may pursue different goals and respond to different incentives than do public agencies, interfering with their capacity to be as public-regarding as we expect agencies to be. 382

Thus, there is a long-standing perception that it is improper for agencies to delegate substantial enforcement authority to private entities.

Compelling as it may be, however, this view of agency authority is far too simplistic. Private parties are given a role in enforcement precisely because experience has also shown us that administrative agencies, left to their own devices, are apt to be “captured by the interests they purport to regulate.” 383 As Professor Spencer Weber Waller has noted, “[p]ublic choice theory suggests that . . . regulation[] is rarely, if ever, practiced to maximize an abstract form of the public interest, but rather represents a battleground for warring private interests.” 384 In this context, the role of private “watchdogs” is crucial—as it was in fifteenth century England, where qui tam provisions first developed to counter disincentives for government officials to enforce the

382 Jody Freeman, The Private Role in Public Governance, 75 N.Y.U. L. REV. 543, 574 (2000) [hereinafter, Freeman, Private Role]; Kovacic, supra note 380, at 1831-32 (explaining reasons why relators may “attack conduct that is benign”).

383 Waller, supra note 175, at 1428. Moreover, private relators may be able to provide “inside information” that the government otherwise might not be able to obtain. See Pamela H. Bucy, Information as a Commodity in the Regulatory World, 39 HOUS. L. REV. 905, 940 (2002) (“Complex economic wrongdoing cannot be detected or deterred effectively without the help of those who are intimately familiar with it.”).

384 Waller, supra note 175, at 1428.
property laws. The need for public oversight was evident in the debates surrounding the 1986 FCA amendments, particularly with regard to the defense industry:

Congress believed that many public officials were active participants in the corruption and therefore were unlikely to enforce the law diligently. Congress wanted to give defense industry functionaries a strong incentive to inform on fraudulent defense contractors, and create an enforcement mechanism that was independent of the Department of Justice officials who often were part of the problem.

By providing an alternative source of information to supplement government investigations—and an alternate means of enforcement to counter government inertia—the qui tam provisions establish a mechanism for independent assessment of the government’s enforcement priorities. Thus, while private enforcement may impose significant costs, it also offers much-needed oversight.

The dangers of restricting the private role in enforcement can be illustrated by an all-too-recent example from the securities industry. During the 1990s, Congress became concerned with the volume of private securities fraud litigation, which critics characterized as “scandalous” and “legalized extortion by the plaintiffs bar.” In response, Congress sought to restrict the primary vehicle through which such private litigation had been brought: the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), which permit “[a]ny person injured in his business or property” to bring suit for treble

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385 Bales, supra note 270, at 386.
386 Id. at 388.
387 See Freeman, Private Role, supra note 382, at 663-64 (identifying advantages of private attorneys general); Ferziger & Currell, supra note 379, at 1200 (arguing in favor of properly constructed bounty systems).
388 See Bales, supra note 270, at 430 (arguing that “Congress made the policy choice, when it passed the FCA, that the benefits of vigorous enforcement of the laws prohibiting fraud against the government outweigh the drawbacks of dispersing prosecutorial power among the public”).
HEALTH CARE FRAUD ENFORCEMENT

In the Private Securities Litigation Reform Act of 1995 (PSLRA), Congress prohibited civil RICO suits based on allegations of fraud in the purchase or sale of securities. While the amendment was an efficient method of preventing frivolous suits in the short term, the long-term consequences of abolishing this mechanism of private oversight of the securities industry did not become apparent for several years. In hindsight, some commentators attribute the recent Enron debacle, in part, to the significant reduction in legal risks faced by auditors and other “gatekeepers” once such private litigation was no longer permitted. Thus, the health care industry should take a lesson from the securities industry: in our zeal to level the playing field for health care providers relative to qui tam relators, we must take care not to enact similarly counterproductive measures that allow fraud to flourish undetected, with similarly disastrous consequences.

C. Reconceptualizing Our Approach to Fraud

As the above discussion demonstrates, the current federal approach to health care fraud rests on an untenable combination of regulatory inertia, a proliferation of informal non-binding guidance, and an increasing amount of public and private litigation. Yet while deep dissatisfaction within the provider community is a legitimate concern, we cannot simply foreclose the litigation route—neither for government officials, nor for the private relators who both revitalize and complicate the enforcement process. How, then, can we increase fairness in health care fraud enforcement, while not sacrificing efficiency?

First and foremost, it is important to clarify key regulatory

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392 See, e.g., John C. Coffee, Understanding Enron: “Its About the Gatekeepers, Stupid”, 57 BUS. LAW. 1403, 1409 (2002) (identifying the PSLRA as one reason the legal risks for auditors decreased during the 1990s).
“gray areas.” As Professor Dan Kahan has argued:

The law deters a particular form of wrongdoing most effectively when it prohibits it in clear terms. If a statute prohibits a particular form of wrongdoing only ambiguously, some individuals will engage in it either out of ignorance of the law or in the hope that courts will resolve the ambiguity in their favor. Ultimately, then, the best way to prevent the exploitation of a potential loophole is to close it.393

Recent experience has demonstrated that it is indeed possible to close regulatory loopholes in the health care context. For example, Medicare covers only those items and services that are “reasonable and necessary,” criteria that have been interpreted to preclude coverage of “experimental or investigational” drugs and devices.394 In 1986, HCFA issued instructions denying coverage for medical devices that had not been approved by the Food and Drug Administration (FDA).395 When the OIG began to investigate widespread hospital billing for unapproved devices in the mid-1990s, a group of hospitals challenged the validity of these instructions.396 Although the suit was not successful, a simultaneous lobbying effort persuaded the government to develop a mechanism for covering a limited group of non-approved devices that are designated by the FDA as “non-experimental/investigational” in nature.397 Similar clarifications in regulatory “gray areas,” as may be occurring with pharmaceutical pricing, would go a long way towards assuaging industry concerns.

Second, even in the absence of regulatory clarification,

393 Kahan, supra note 366, at 493-94.
396 Cedars-Sinai, 939 F. Supp. at 1457.
397 See 42 C.F.R. § 405.201-15 (2003). This category includes low-risk devices and newer generations of previously approved devices that present only incremental risks over their predecessors. Id.
prosecutorial discretion should be exercised so as to minimize the unfairness resulting from fraud investigations based on good faith interpretations of ambiguous provisions. For example, in the mid-1990s, the OIG undertook the nationwide PATH initiative to investigate whether hospitals had improperly billed for “physician” services that were actually rendered by interns and residents.\footnote{398} Although regulations clarified in 1995 that Medicare would pay only when the attending physician was physically present at the time services were rendered, hospitals argued that the policy prior to that time had been unclear.\footnote{399} HHS eventually admitted that the standards had “not been consistently and clearly articulated,” and limited future audits to hospitals in regions where the Medicare carrier had clearly explained the rules prior to 1993.\footnote{400} As positive as this resolution may have been, however, it suffers from a significant limitation: it does not apply to suits brought by \textit{qui tam} relators, who need not abide by the government’s prosecution decisions.\footnote{401}

Third, as the author has suggested elsewhere, it might be possible to devise a format in which the critical legal issue—a

\footnote{398} See generally, Bucy, \textit{supra} note 34 (describing the initiative). Medicare Part B pays for patient care services by attending physicians in hospitals; interns and residents are funded by general graduate medical education payments made to the hospital under Medicare Part A, and may not bill for services to individual patients. \textit{Id.} at 4.\footnote{399} See \textit{id.} at 7-13 (describing the history of HHS guidance on this issue); 42 C.F.R. § 415.172 (2003) (final regulations). The hospitals were so convinced of the unfairness of the government’s position that they brought suit against HHS to prevent further enforcement. \textit{See Assn. of Am. Med. Coll. v. United States, 217 F.3d 770 (9th Cir. 2000)} (affirming the dismissal of suit for want of jurisdiction, but without prejudice).\footnote{400} See Letter from Harriet S. Rabb, General Counsel of HHS, to Jordan J. Cohen, President of the Association of American Medical Colleges (July 11, 1997) (admitting lack of clarity and limiting future audits), \textit{available at} http://www.aamc.org/hlthcare/path/oig711.htm. The OIG later withdrew from PATH audits at sixteen facilities whose communications with carriers had been unclear. \textit{See Aussprung, supra} note 37, at 24.\footnote{401} See Kovacic, \textit{supra} note 380, at 1848 (calling for the DOJ to exercise its screening function more vigorously “to eliminate erroneous or frivolous suits” by \textit{qui tam} relators); 31 U.S.C. § 3730(c)(3) (2003) (describing the procedure if the United States elects not to intervene in the suit).
novel theory of falsity or fraud—could be tested without subjecting the defendant to the full range of FCA liability. For example, the parties might stipulate to the scope of liability, such as the number and value of claims submitted, and agree to test the legal theory in a bench trial. If the judge found the legal theory to be valid, the defendant would be subject to damages and penalties in the stipulated amounts. A ruling against the government, on the other hand, would serve as binding precedent that the defendant had not violated the FCA. If feasible, such a mechanism could provide judicial oversight of the theory of falsity, the crucial ingredient missing from current FCA enforcement. Again, however, this approach would be of limited utility if it did not apply to qui tam suits as well as government actions.

Finally, it may be time to rethink the current qui tam incentive structure, at least as it pertains to health care fraud. The number of qui tam cases filed since the 1986 amendments suggests that the drafters’ strategy is working, perhaps better than anyone anticipated. Yet the success of a private bounty system should be measured by more than just the sheer number of cases filed; rather, it should be measured by the number of filings that identify actual fraud. This in turn requires that the incentive structure be neither too remote to induce participation from insiders, nor so generous as to tempt them to file meritless suits.

Good informant tips alert an agency to clear violations of law for which a high monetary penalty can be imposed; the worst tips alert agencies to actions that appear to be violations but are not. In these latter cases, the agency invests enforcement costs, and the defendant incurs defense costs, to engage in litigation yielding no penalty. These tips are not just “noise” in the system; they cost the agency

402 See Krause, supra note 49, at 215-16.
403 A similar approach has been used to avoid litigating thousands of individual claims in FCA cases. See, e.g., United States v. Krizek, 859 F. Supp. 5 (D.D.C. 1994) (trying FCA case involving eight thousand claims on the basis of two hundred representative claims for seven representative patients).
404 See FCA Statistics, supra note 61 (stating that in 1998, approximately two-thirds of qui tam suits involved the federal health care programs).
scarce enforcement resources, driving down the bounty scheme’s overall efficiency. More troubling, such tips lead to unwarranted enforcement actions that give rise to the most well-grounded political objections to bounty schemes as a whole. 405

Commentators suggest that the ideal bounty system is one that combines a relatively small bounty (such as 3 percent of the recovery) with a relatively high degree of certainty that the bounty will be paid. 406 While a full discussion of the FCA *qui tam* incentive structure is beyond the scope of this article, it is worth noting that the current system appears to do much the opposite: it offers extraordinarily high recoveries for a few successful relators, but leaves the majority with nothing. 407 Whether a more targeted bounty system might relieve provider anxiety without sacrificing truth and efficiency remains to be seen.

CONCLUSION

Clearly, health care fraud enforcement is flourishing. By emphasizing that fraud is both a *quality* and an *economic* issue—as in the nursing home context—prosecutors have characterized enforcement as protecting both beneficiaries and the public fisc. 408 Similarly, in the prescription drug context, alleged overpricing has been characterized as harming both the federal health care programs and the patients who are responsible for artificially high copayments. 409 This has proven to be powerful rhetoric.

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406 Id.
407 See, e.g., Press Release, Dep’t of Justice, *supra* note 3 (describing TAP relators’ recovery of $95 million); Kovacic, *supra* note 380, at 1845-46 (objecting to FCA incentives that encourage relators to wait until damages are significant before filing suit, and noting that “[i]t is unwise to tie the firefighter’s reward to the total size of the blaze extinguished”); *but see* Ferziger & Currell, *supra* note 379, at 1186 (arguing that several FCA mechanisms exist to deter “overzealous enforcement”).
408 See *supra* notes 303-309 and accompanying text.
409 See, e.g., CMS, Medicare Program: Payment Reform for Part B Drugs,
It seems unlikely that the current Administration will reverse this trend, even in light of the war against terrorism. The individuals who have taken the lead in fraud enforcement at the OIG, the DOJ, and the United States Attorneys’ Offices generally are not political appointees. At a time of looming budget deficits, when recent audits still identify $12 billion a year in improper Medicare payments, the government simply cannot afford to be “soft” on fraud. Moreover, if the new Medicare prescription drug program is ever to become a reality, a continued influx of funds from fraud recoveries (among other sources) is likely to be needed.\textsuperscript{410}

What will the future hold? This much seems clear: the pharmaceutical industry is back under scrutiny, not only for its sales and marketing activities, but also for its drug pricing methods and sponsorship of medical research.\textsuperscript{411} Similarly, the quality of care in nursing homes continues to generate a great deal of concern, which has been addressed both through traditional regulatory oversight mechanisms and, more recently, using the FCA.\textsuperscript{412} Indeed, the growing reliance on the FCA to enforce nursing home quality standards may signal the broader use of the law to address quality concerns in other health care contexts, such as hospitals and perhaps managed care organizations.\textsuperscript{413}

The conceptual model outlined above suggests that we will continue to see three separate mechanisms for reducing health care fraud: traditional notice-and-comment regulation; an ever-


\textsuperscript{413} See Joan H. Krause, Medicare Error as False Claim, 27 Am. J. L. & MED. 181 (2001) (discussing the potential applicability of the FCA to hospitals).
increasing variety of informal guidance; and a combination of private and public enforcement brought not simply against providers who engage in “raw fraud,” but also against those who act in accordance with defensible interpretations of ambiguous laws and regulations. Yet experience suggests that this may not be a feasible strategy for the industry in the long run. Instead, the hallmark of an efficient anti-fraud strategy should be clarity: clear rules to be followed by those who participate in the federal health care programs, and clear penalties for those who stray.

JUDGE JACK B. WEINSTEIN, TORT LITIGATION, AND THE PUBLIC GOOD

A ROUNDTABLE DISCUSSION TO HONOR ONE OF AMERICA’S GREAT TRIAL JUDGES ON THE OCCASION OF HIS 80TH BIRTHDAY*

PARTICIPANTS

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The Honorable Helen E. Freedman, Justice of the Supreme Court, State of New York

Professor John C.P. Goldberg, Vanderbilt University Law School

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* This article is a transcription of a program held at Brooklyn Law School on November 9, 2001.
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Professor David Rosenberg, Harvard Law School

The Honorable Shira A. Scheindlin, U.S. District Judge, United States District Court for the S.D.N.Y.

Professor Peter H. Schuck, Simeon E. Baldwin Professor of Law, Yale Law School

Professor Anthony Sebok, Brooklyn Law School, Moderator

Professor Aaron Twerski, Francis Newell DeValpine Professor of Law, Brooklyn Law School

David C. Vladeck, Director, Public Citizen Litigation Group

The Honorable Jack B. Weinstein, Senior Judge, United States District Court for the E.D.N.Y.

Barbara Wrubel, Esq., Skadden, Arps, Slate, Meagher & Flom, LLP
Moderator
Good morning, my name is Anthony Sebok and I will be the moderator for today’s round table. Our first order of business is an introduction by Dean Joan Wexler. Thank-you.

Dean Joan Wexler
Thank-you. Welcome to our round table to discuss Judge Jack Weinstein, Tort Litigation & the Public Good. I am delighted to see all of you here to help us honor this important figure in American law on his eightieth birthday.

Federal judges have always held a special place in American society. It was because of the respect and appreciation of their power that our founders hotly debated the scope of the powers of the federal courts under the Constitution. A popular view of federal judges is that they help defend the individual against the state. This is certainly one of their most important and visible tasks.

Another role federal judges play is that of helping the individual achieve justice in a world filled with large institutions, bureaucracies, and corporations. This is a task that federal judges share with their state colleagues. It is, however, one which the federal courts have taken up with increasing vigor and creativity in the past thirty-five years. Judge Weinstein’s birthday provides us with an opportunity to look at tort litigation’s new role as a tool for individual justice in the federal courts. Judge Weinstein has a unique perspective on this development, partly because of his long experience on the federal bench and partly because of his extraordinary insights into the historical changes that he has seen.

Since he was appointed to the Federal Bench by President Johnson in 1967, he has witnessed major changes in procedure, the Rules of Evidence, and substantive tort doctrine. During his tenure, there have been at least two revolutions in the law concerning federal class actions. In the 1960s a tort suit involving one hundred common plaintiffs would have been considered exceptional. Today, Judge Weinstein is presiding over a case involving every smoker in America. Similar sea changes have occurred in the law concerning expert testimony and strict liability.

Judge Weinstein has kept a watchful eye on these changes of the past decades. Sometimes, he was at the vanguard leading them.
Sometimes, he penned cautionary critiques. Throughout his career, his scholarly opinions and courtroom statements have always kept one goal in mind: to help preserve the dignity of the individual in a world of increasingly massive torts.

At today’s round table, we hope to show Judge Weinstein how much we appreciate his efforts by asking him and ourselves about where we should go next. Are the models of class action in private contingency fee litigation still practical in today’s world? Is it even sensible to try to maintain the aspiration of individual justice in an era where tort litigation is openly embraced as a substitute for legislation? Can we afford individual justice or full compensation in suits that take up increasingly larger plaintiff classes and increasing intractable theories of causation?

Although we certainly won’t be able to answer these questions today, I know that our discussants will openly and honestly address them. I am very pleased that we have such a distinguished group with us.

I now would like to turn the proceedings over to Professor Tony Sebok, who conceived the program and organized it and really worked very hard to bring all of you together. Among Tony’s many talents, he has an abiding interest in complex tort law issues. He is a well-known scholar who has even opined about a number of Jack Weinstein’s ideas. Tony.

**Moderator**

Thank-you. Thank-you, very much, Dean Wexler.

When the idea for this round table last spring was first discussed, at that point it was a law professor’s dream to be able to sit at a table with so many important figures of my living history. And in that sense, it still is a great pleasure for me to be here. And I am really grateful that you have agreed to come to Brooklyn Law School to help us honor Jack Weinstein.

But on September 11th, the questions that we are going to discuss took on a new meaning, both at a level of national but also intellectual salience. After the events of September 11th, I spoke to the judge about the planning of this round table, I turned back to certain writings. Judge Weinstein is not only a powerful figure for the people who appear before him, he is also a powerful
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intellectual figure—bridging practice and theory.

I picked Individual Justice in Mass Tort Litigation, which is a collection of law review articles published in 1995.¹ I looked at a chapter in which Jack Weinstein talks about an idea which now I think is very pressing: He talks about the need to create something called the “National Disaster Court” and why the federal government and the states should accept such an institution.

A “National Disaster Court” would be an institution designed to handle mass disastrous events in which thousands of people are injured and killed. Judge Weinstein tried to offer a characterization of the features and virtues of such a court. And I want today to remind the judge of the seven things that he recommended such a court should possess.

I believe the article, the chapter comes from an article published in 1986.² The seven criteria are: First, that there should be a concentration of decision making into the hands of one judge or a handful of judges (but I think in his mind really one judge is the best). Second, that the one judge should be in a single forum where legal and factual issues can be decided, and decided finally. Third, there should be a single substantive law. Fourth, that there should be adequate judicial support facilities, so that the judge can actually make binding factual and legal determinations. Fifth, that there should be, in his mind, a reasonable fact-finding process grounded on the adequate funding. Sixth, Judge Weinstein suggests at different points in the book either caps or limitations or elimination of pain and suffering damages and punitive damages. Seventh and finally, he recommends—and this I thought was the most interesting impression part—that there should be a single distribution plan and I quote here, “with fairly and flexible scheduled payments.”³

Now, later in the book, in a chapter called “The Future” the

³ Weinstein, supra note 1, at 4.
judge cautions the reader. However we handle mass disasters, he
maintained at that time—and these words are his words—a
“suspicion of administrative systems.”4 Now, when you put these
two chapters together, you see an approach to mass disasters at the
center of which is a strong judge. And that’s no surprise, because
Judge Weinstein is a strong judge.

I think that that is an option which this country could continue
to embrace. But in the articles that I sent out to the participants of
this Roundtable at the Judge’s urging, there is a new turn, in his
more recent pieces.5 There is an open invitation for coordination
between the judge in the courtroom with the private litigants and
government actors, either through administrative law or criminal
law.

And so I detect a subtle change in Judge Weinstein’s approach
to mass disasters, where now the role of the state is not necessarily
one which he treats with suspicion, but one in which there should
be a partnership. I think that after September 11, we have seen, in
fact, there have been attempts at a partnership between the federal
government, private attorneys, and the Southern District of New
York in dealing with the events of the World Trade Center attack.

So, I want to provoke this group into talking about the ideas
that underpin this vision of how we should handle mass disasters,
as well as asking questions about the role of mass tort law as
public law, and about how we can integrate actors outside of the
private bar into the mass torts process.

One issue I want to raise concerns the fact that whether by
design or by accident, America is viewed around the world as
having developed a certain model for handling mass delicts or
mass torts, and that includes a strong court, that is, a strong single
judge in partnership with an active plaintiffs’ bar pursuing justice.
And I wonder whether or not that model is still workable. I also
wonder whether or not the rest of the world should look at that
model as our model or whether or not we have evolved past it.

4 Id. at 169.

5 See Jack B. Weinstein, Compensation for Mass Private Delicts: Evolving
Roles of Administrative, Criminal, and Tort Law, 2001 U. ILL. L. REV. 947
When facing mass torts today, the creative strong judge and the private bar must let in other actors, and the question is whether this should be done openly and explicitly. That’s my suggestion. I know you have all come here with many other ideas.

I want to talk a little bit about the proceedings today. Today’s event is a bit of an experiment. I have not participated in too many conferences or academic activities that are not structured by people presenting papers in a static format. And I really hope that after I stop speaking, you won’t hear my voice very much again. I hope to hear all of your voices.

The way I hope to structure it is the following: Many of you have agreed in consultation with me to prepare short five minute reaction pieces to the article that I sent out. I am going to ask those of you to present them in order one after another. And that should take up, really, less than twenty-five minutes or so.

And then we have another hour for each session to talk to each other. And the only thing I ask of you is to cooperate with me, because I will need to organize people’s comments. And the way I would like to do it, with your permission, is when you want to say something, just raise your hand or finger and we will make eye contact, I will write your name down and I will call on you. I may, however, and this is the one little variation, I may exercise a bit of moderator’s privilege of asking a certain individual to speak on a certain point if I think it is especially relevant. I think with good will and cooperation this could be a lot of fun.

Finally, I would like to say thank-you to a number of people. I would to say thank-you, first of all, to Dean Wexler for supporting this idea, helping me develop it. I would like to thank Diana Nardone for helping to organize the entire round table, June Seddo for helping us make it possible today, especially the set-up and the lunch later on. My secretary, who was very, very helpful and finally my colleagues, some of whom are sitting at this table and many of whom are sitting in the audience, without whom my education in both tort law and social issues would be far less rich.

The final person I want to thank is Jack Weinstein for agreeing to do this. Thank-you, very much, Jack.

Okay, now, without further ado, I would like to begin. Sheila Birnbaum, please begin.
Ms. Birnbaum

It is a great pleasure to be here this morning with so many of my colleagues from the plaintiffs’ bar, academia, and the defense bar. I thank everyone, especially the dean for this opportunity to speak about the thoughts of Jack Weinstein, who I know we all respect greatly.

I have not read the piece in a long time that you mentioned, Tony, on the National Disaster Court. And I think I am going to go back and do that, because I think it has taken on, perhaps, new meaning and new possibilities.

I think one of the things that we have all seen in mass torts is the filing at an early stage in a litigation numerous overlapping class actions in the state and federal courts. And there has been no way to consolidate all of these cases together. Although you can multi-district the federal cases, there is no way, except through an informal cooperation between state and federal judges. Some judges may cooperate, and others will not cooperate.

And the cost and expense of this kind of mass repeating, overlapping cases, all over the country, is enormous. It is a total waste of resources and money that can be better used if there is a real problem to provide compensation to real victims and not compensation to those who are not injured.

In part, a nationalization of the kinds of occurrences like the September 11th disaster is possible, but most dispersed types of mass torts that we deal with every day, from a drug or device recall to other product cases may be better handled in a centralized location with a strong judge.

I think the issue of a single law applying to dispersed mass tort creates a very difficult issue. I believe Professor Twerski may have some comments on the issue as a conflicts expert. But the creation of a national disaster court may be an idea whose time has come.

With regard to the cooperation between administrators and the plaintiffs’ bar and the courts, I am more skeptical than maybe Judge Weinstein was many years ago. I think that when you take attorney generals who are quite political and put them in the arena of trying to affect tort law, you can create an unholy alliance that shapes tort law in a negative way.
HONORING JUDGE WEINSTEIN

I think one of the problems with attorney generals participating in the cigarette litigation was even though they may have received a great deal of money from the cigarette companies to avoid trial, all of that money has not been used to affect anti-smoking campaigns or cancer research. Just a small amount of the settlement has been used to prevent tobacco related injuries or effects.

So, I think that that attorney general litigation model is not a very good model. I think the gun litigations is an example of tort litigation that should not have been brought by the government entities. Many of those cases have already been dismissed.

So, I do have a healthy skepticism of administrative and tort law coming together.

With that, I will just let other people comment.

Moderator

Mr. Feinberg?

Mr. Feinberg

Thank-you. I noticed this morning the program, this first section, has a very benign title. I mean, class actions as a mechanism for turning torts into public law.

To really make the panel provocative, we should take out the phrase “class action” and insert Judge Weinstein. Take out “mechanism” and put “force.” Judge Weinstein as a force for turning torts into public law.

Here is the formula. Here is the menu as to how he does it, because I have worked with him.

First, he takes arcane civil procedure: jurisdiction, choice of law, the rules of evidence. And he knows it so well that he fashions an argument that breathes life into Rule 23. He is willing to construe and interpret in a way like single choice of law, national consensus law. My students ask, “Who thought it up, I mean, where did it come from?” And Judge Weinstein fashions it in a way that makes for a relatively credible convincing argument. You can agree or disagree, but it is a force to be reckoned with. That’s step one.

The second thing he does to make the tort “public” is to
publicize and widen the scope and impact of his rulings. He will hold public hearing after public hearing, inviting people from all over the nation to come and testify. He will reach out to the public and meet with individual litigants urging them to accept or not accept a proposal—but actually reach out and invite individual litigants to meet with him, to talk about the case. He will provide concepts like administrative appeals within his settlement, so that a litigant will get a second opportunity to be heard. If you don’t like the initial result there is a person available to hear your appeal. He will coordinate with Judge Freedman and others, in state and federal cases, all designed to promote a wider distribution of the meaning of his ruling than would otherwise be the case.

That is how he makes tort law public. Now, I conclude, there is a pro and a con to this. I conclude that at the end of the day, class actions as a device to make tort law public can be attributable to Judge Weinstein’s competence and his philosophy of judging.

That’s really what it comes out to. I wonder whether forty years from now, when the judge steps down, I wonder whether there will be much lasting impact in terms of some of this.

When I go around the country, and I argue in favor of this approach, the constant response I get is not criticism of Judge Weinstein. Never that. What I hear in response is, well, that’s Judge Weinstein. I mean, put an asterisk, he is sui generis. What about the other federal judges? What about state judges? Certainly you can’t expect this from anybody but Judge Weinstein. To me that is a tribute to Judge Weinstein, but there is a question mark as to what it all means in the not so long term.

**Moderator**

Thank-you. Let’s turn to a judge. Judge Freedman.

**Judge Freedman**

I guess I am again in the position of being the class representative for the entire state court judiciary. Because the penchant among law professors is to look at federal cases, among people who write to look at the federal cases, and yet, as Sheila Birnbaum alluded to the fact, that most torts, most mass torts or every other kind of torts start in state courts and for the most part
remain in state courts. Is that a fair statement? Sheila?

Ms. Birnbaum
Absolutely.

Judge Freedman
Yes. And that’s where the problem is. Because, in part, we have, we are stuck with this federalism that our founding fathers thought was important. And I guess maybe even the mothers too. And it hasn’t really changed except by force of the personality of someone like Judge Weinstein who called when we were working on asbestos cases together, and we worked together on them. And I think that’s probably why I am invited here.

But that model was followed by the other MDL judges who got the mass torts afterwards. Judge Pointer called all the state judges he could find who had breast implant cases. Judge Bechtel called all the state judges he could find who had Fen-Phen cases and told us we better follow his model or else. It didn’t work for him totally. We had Judge Ludwig now on the latex glove cases, I have them all. We have Judge Kaplan on the Rezlin cases, and these are the ones at least that I have, that I have been working with these judges.

And it is an interesting issue: how do we take the federal and state cases and bring them together. Someone like Judge Weinstein who certifies a class may be able to do it in part. But just another example that you may not know about, I have something called the Salzer hip cases. They are the hip implants that failed. I’ve got all the New York cases.

Well, just on the day after all the cases, I got the administrative order putting them all before me in the State of New York, not for class action but for coordinated management, the so-called MDL in New York State, I got a stay from Judge O’Malley who is the Northern District of Ohio Judge, MDL Judge. She had certified a class. So I said, well, we will stay the cases, it is a national class, I don’t see any reason why state class should be different despite what the plaintiff’s lawyer said, and then the Sixth Circuit vacated that class certification or stayed it. And now I am in the position, do I go ahead, or do I wait for the Sixth Circuit to make its final
decision.

Well, I have decided to at least hold off for a little bit, but there are a couple of judges in California who are pulling ahead from what I understand. And there is the fear that this all yields, that the money goes to the people in California who may get the big verdicts. That’s one of the problems we have with this kind of hybrid state-federal system that we are dealing with.

Now, the mass disaster court, I think would be an interesting way of resolving that, but when do we have a mass disaster? When do we know we have a mass disaster? Well, September 11th we know we had mass disaster. Do we have a mass disaster with the filing of the first asbestos case? Probably not. By the time the fiftieth is filed, do we have one or do we not? Is it a real mass disaster or is it a series of disasters? So these are some of the questions I would like to ask Judge Weinstein: when do we have a mass disaster?

When does coordination become beneficial and when does it become a block? For example, I may coordinate with the federal judges who are handling the cases and we try to establish a rational way of proceeding, but some judge in West Virginia is going to consolidate all the state cases in West Virginia, a huge settlement is going to take place, and there will be no money left for the New York plaintiffs. And that has happened in the asbestos litigation—one settlement consumes huge resources—and caused a number of companies to go into bankruptcy.

I have decided that there is no such thing as punitive damages in New York asbestos cases, but my Texas counterparts have not agreed with me. The federal judge has agreed and so it is now, I think, attorney malpractice to file a case in federal court for a plaintiff’s lawyer anyway. So we are running into some of these state and federal problems that seem insurmountable.

I think the conflict of the laws issues that we heard about earlier, and that always seem to be invoked as a problem are probably less significant than the local political factors that motivated our founding fathers and mothers to establish the federal system.

Just one other point, and I am kind of rambling a little but, interestingly, I think some of the administrative actions have
inadvertently been the source of some of the mass torts. For example, breast implant litigation started after David Kessler of the FDA made a big issue about them and asked companies to cease manufacture. I think that happened with Fen-Phen to some extent also. When the FDA makes a ruling, that’s when the tort lawyers jump in. So, while working together might be interesting, federal government might also be constrained in its mission because of fear of mass torts.

_Moderator_

Thank-you, very much. Mr. Rheingold.

_Mr. Rheingold_

Thanks. I have a little fable about Jack and the Beanstalk, and the beanstalk is mass torts. And I have been an observer of Jack and a participant in his court for about thirty years now.

I think the issue that many of us are raising directly or indirectly is: if mass torts is this horrible beanstalk with a giant at the top, how to handle it. And Jack we would put way out at one end, fortunately, as someone who has felt his obligation is to tame this beast, the giant, and hack down the whole stalk. That’s for good and for bad. I think we are all bringing out, something is necessary to tame this beast, but the question is how far do you go.

My book on mass tort litigation⁶ I dedicated to Jack as a proactive managerial judge. In fact, the first to really try and get into this beanstalk, this big forest and do something about controlling the cases. But at the same time, the subtitle of my book “Rough Justice.” And I recognize that any method of settling claims of one hundred thousand people expediently, whether it is one court or a few courts, results in claims of rough justice.

The question is, how far do we go in the name of trying to bring order to these cases? And what any of us might think is a greater good; Jack certainly sees the greater good. Can a federal judge overuse the powers that are inherent in the position to maybe not only kind of solve the problem but also hack down the whole beanstalk?

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So, I would say to Jack, you are the paragon of rough justice and I think there is no other solution than this. I think we are all talking about problems that exist, but there are real time problems that have to be attacked by proactive judges.

And as far as what Kenny said, I do think the judge has been and will remain a model for how to do this: as a cautionary model and, much more importantly, a positive model. Younger judges are always saying to me in federal court, well, Judge Weinstein did that. And I think it emboldens younger, less experienced mass tort judges who get assigned a case that there has got to be some way through innovation and through clever ideas to deal with, not draconian, but creative ideas. And I think Jack is a paragon of—I won’t say warping the law, but let’s say just—bending just enough to get to the point where the parties want to resolve their case. And, after all, if there is a resolution, that’s what the judge is about.

Three of Jack’s methods are: First, the state-federal coordination—and far from, I think, there being a national crisis where we’ve got to have one judge for everything or trust in one judge—just what Judge Freedman here has pointed out to all of us, works: that the state and federal judges can work together. There were hundreds of thousands of Fen-Phen diet pill cases, but they were handled with economy, and not at all the disaster people thought there would be.

The second thing that I would praise the judge for—and he has brought to our attention—is that even though you have a class of one hundred thousand or one million people, it is still composed of individuals. We as lawyers might just see numbers and disposition rates. But Jack has forced us to realize that each person is injured and he or she has her own claim. And I think Jack has gone further than anyone in bringing in these people. He brought in the DES claimant and said, what does this mean to you, what are your fears, what are your goals? And it gives these people a feeling that they had their day in court. They know they are numbers, they know they are in large ranks, but someone cares about them enough to listen to them. And the judge can stand up for their rights, especially if their lawyers don’t.

And my third and last point is one that Jack has been an
innovator on; he’s been a good scold to us in the plaintiffs’ bar because in his writings and in court, he is always pointing out that we do tend to lose track of our clients too. It is not the judge’s role; it is a plaintiff’s role. A class action counsel doesn’t have clients; but even those of us who do have individual clients, still, if you have one thousand Fen-Phen victims you’ve got to handle them by the numbers, notwithstanding what we say in our ads about, you know, each person counts individually. And Jack has been there in his writings to say that, no, you have an individual obligation, you have to communicate with your people, you have to give them a voice, empower them in their own litigation. And the aim of the plaintiffs’ bar, let’s say, to get large fees or whatever, must be moderated, as Jack counsels, by your obligations to the system and to your own clients.

So, Jack, I salute you as a good killer of the Giant in the Beanstalk.

_Moderator_

Thank-you, very much. Professor Mullenix.

_Professor Mullenix_

Thank-you, very much and I also want to thank Brooklyn Law School and the organizers for bringing me up from Texas to come participate in this. I think it is very, very exciting and also happy birthday, Judge.

We were sent two articles to read and I have dutifully done that. I have read everything that Judge Weinstein has written relating to mass torts either in articles or books or certainly the lengthy, lengthy opinions. He has been kind of both a benefit and bane of my life, having to distill those opinions down into something you can fit into a casebook for students. It is an impossible task, but it is lots of fun.

I also absolutely thoroughly enjoy reading everything that Judge Weinstein writes. I approach everything with a set of anticipation and anxiety, because I know that someplace in there, I am going to have what I call “my Judge Weinstein moment.” Which is, I am going to get really irritated. And I was reading through these two articles and it happened, and I will tell you
What I do want to talk about is Judge Weinstein’s evolving jurisprudence, because I think that for people who have followed Judge Weinstein’s career, you actually can see this. And I think by the time I got into the mid-to-the-late 1990s, it was very clear through his articles, that he had evolved jurisprudentially to the concept that mass torts in the late twentieth century basically were a version of public interest law litigation. And the model he was using, basically, was what many of us grew up with and were excited about, which was the 1960s-style public interest litigation; that is, the cases dealing with institutional reform.

He basically said, we just have the same thing except it is a tort, rather than dealing with institutional problems, to be dealt with through class action litigation. My take on that was, at least in part, the reason why Judge Weinstein wanted to envision mass tort litigation as just a reincarnation of 1960s-style public interest law was to justify the role of the activist judge. We certainly know it existed there, so you just kind of translate that and impose it on mass tort cases. And I have written extensively about this and I obviously have problems with it.

Well, in reading the two most recent articles that were sent to me, I now came to the conclusion that Judge Weinstein’s jurisprudence has evolved even further. What he has done in these two articles is basically to step back and look at an even bigger picture. He wants to look at the entire societal way in which the system deals with mass delicts.

When he steps back and he is looking at the really, really big picture, what he sees is a three-legged stool. That is his metaphor. He says, “What we have here basically is a three-legged stool.” And the three legs are the criminal law system and the way that deals with mass delicts, the administrative/regulatory system and that’s another way we deal with mass delicts, and then the civil tort law system with a focus on, obviously, class actions. In describing this three-legged stool, he basically comes to the conclusion that what we have are three unequal and kind-of wobbly legs.

And for him the strongest leg on this stool is the civil tort leg, through the class action. That’s the point in his articles in which I had my Judge Weinstein moment, when he gets to talking about
the civil tort law system and vindication of rights through the class actions. It is at this point he begins to wax very eloquent about how this really is the strongest leg because it is a bottom-up approach, the most democratic way of resolving mass torts. And he goes on and on, and has written about this elsewhere.

Where he wants to go with this model of the three-legged stool is to say that we need to have a carpenter come in and make it all work together. What we want to have is a stool where all the legs are working; we’ve got a strong structure. And I think the interesting question is, that it all sounds, very, very interesting, it is a very interesting concept. But is it feasible, can it be done, can we get it to work?

In looking at this evolved jurisprudence, I have a sense of where it is coming from and how Judge Weinstein has arrived at this point. It is a combination of two different things.

One, I think that in recent years Judge Weinstein actually has begun to study and look at how civil law systems on the continent deal with and resolve aggregate claims, either mass tort claims or environmental disasters and so on. And he has come to appreciate that in civil law systems, on a comparative law basis, they deal with these problems in very, very different ways.

I think one of the things he has come to appreciate, for example, and he uses the example of France (it is also true for Italy), that in these countries you can annex civil law claims to criminal law proceedings. He kind of likes that. He thinks that is a very intriguing idea, to serve purposes of efficiency and so on.

So, he likes that concept. The part that he rejects in civil law countries is what he calls “governmental top-down solutions.” And he says, “I don’t like those, basically because they are undemocratic.” I guess they offend American values that he appreciates. I think in particular what he is talking about are the countries that have solved mass torts through fund solutions. If you read the comparative law literature, for example, you know that in Germany they resolved the Thalidomide cases through a governmental creation of a fund that was funded by the defendants and the government.

Now I would like to put in my two cents about what to do with this evolved jurisprudence. First, in reading the articles that were
furnished to me, I continue to have a quarrel with the notion that resolution of mass torts through class actions represents “bottom-up” democracy. I absolutely reaffirm what Kenneth Feinberg is saying. My answer is, yes, you have the democratic model, but it may be sui generis to Judge Weinstein. When you talk to other lawyers and anybody who is involved in lots of class actions, one begins to worry about whether what actually goes on resolving class actions represents “bottom-up” democracy.

With regard to looking to civil law systems for possible alternative ways for resolving these cases, is to think outside the box. This has relevance for a conversation about the victim’s compensation fund. This is obviously a very intriguing and interesting idea for me because in the history of the United States, we do not have models of legislative solutions of mass disasters. This is common in the rest of the world. It is highly unusual here. I think we should give this approach a chance, because I think we are all going to kill it off in its inception. No sooner had it emerged when, I have no doubt, large numbers of people’s academic careers are going to be made over writing about the victim’s compensation funds.

Many people in the room already know that the DOJ has just put out a notice of informal rulemaking. They are seeking comments from attorneys to help structure the legislation for the fund. I think this offers an opportunity for an interesting combination of both the “top-down” and a “bottom-up” approach to deal with a mass disaster.

I hope in working through the guidelines, whatever is going to happen in that model will include provisions that are going to minimize transaction costs, particularly with regard to involvement of attorneys. I hope attorneys are involved actively in drafting the guidelines and the forms. Whatever the procedures, that attorneys should help and assist in creating a fair and simple system, and in that process not create an intricate set of rules that is going to require intensive attorney participation to accomplish compensation to victims.

In other words, I hope that attorneys aren’t involved in creating a lot of work for themselves. And in the end, and I hope I am on the same page with Judge Weinstein with regard to this, I think
whatever happens is that compensation should go back to the victims, and not be consumed into transaction costs and attorneys fees.

*Moderator*

Thank-you, very much. We have two more people to give short presentations and then we are going to open it up. The next is Judge Scheindlin and then we will have Judge Weinstein.

*Judge Scheindlin*

I want to start by thanking Judge Weinstein. First of all, he gave me the most reading. It far surpassed any briefs that I saw, any circuit opinion that I saw. It was surely the highlight of the reading week.

But, more importantly, ten years ago I was a magistrate judge in the Eastern District of New York and had the opportunity to work with Judge Weinstein on the *Agent Orange* case,\(^7\) which I think was sort of the beginning, the mother, so to speak, of all of the development that has occurred since then.

When I look back at that experience, there is one topic that I want to speak about that no one has mentioned so far, and it is very, very important. And that’s the topic of special masters. I want to speak about special masters because I speak as an ordinary judge, not a giant. So to answer what Ken Feinberg was saying, those of us who are not giants, but who are only ordinary laborers in the field of judging need a lot of help. We can’t do what the giants can do.

And so we have to have somewhere to turn. I think that the model of *Agent Orange* and the use of special masters is something that has developed enormously in the past ten years, and I want to discuss that. I was a special master in that case, in charge of discovery and other pretrial matters (the more mundane part of special mastering). But Ken Feinberg and others were appointed special masters to really hammer out the details of settlement and distribution plans, and their work there became a model for many

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mass tort cases since then.

Special masters, I believe, are essential to implement the complex compensation schemes that grow out of these mass tort cases. Ordinary judges are bound by many restrictions and often lack the necessary expertise which sadly prevents them from doing the hands-on work of developing satisfactory compensation schemes.

Examples are obvious: ex parte contact with parties or attorneys; contact with experts outside of the presence of parties or attorneys; detailed knowledge of investment vehicles or long-term insurance payouts; an understanding of the contact one would like to make with necessary government agencies, government officials or foreign governments. It is these types of roles that special masters have repeatedly played in mass tort actions, such as Agent Orange, asbestos, breast implants, Holocaust cases and many less well known cases.

I took the time yesterday to run a quick Westlaw search for recent cases supporting special masters. I think you might find it interesting if I summarize five or six ones that you don’t hear about every day, just to show you the innovative ways in which special masters are being used today.

In March of 2000, a Southern District of New York judge appointed a special master to enforce and monitor a consent decree requiring the EPA to produce a complex technical regulation dealing with industrial cooling water structures and to recommend an implementation schedule for building those plants.8

In May of ’99, a district court judge in the District of Columbia appointed a special master to supervise jurisdictional discovery of foreign defendants in a complex antitrust case.9

In February, 1999, a District of Columbia judge appointed a special master to resolve preliminary injunction requests by named plaintiffs in a class action brought under the Individuals with Disabilities Education Act, where children had been unsuccessfu

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waiting for special classroom placements for years.\textsuperscript{10} Nothing was happening while the class action was pending. So a special master was appointed to deal with the individual preliminary injunctions.

In February, 1995, a New Jersey magistrate judge appointed a special master in a prisoner class action regarding assignments to the special housing unit, meaning the punitive unit, which were being made based on race. The special master heard appeals from the prison’s decision to place defendants in what we call the SHU, Special Housing Unit. The parties agreed to be bound by the findings of the special master without the possibility of appeal. The special master’s decision would be final as to where the prisoner could be placed.

In May, 1995, a Pennsylvania judge appointed a special master in a securities class action to supervise both settlement and discovery.\textsuperscript{11} Now, that was an interesting one. The special master there recommended that the judge delay deciding class certification and whether to add additional named plaintiffs because the special master thought it would affect the settlement. In fact, the special master achieved a settlement which the court then approved.\textsuperscript{12}

The last example, in December of 1992, a Northern District of New York judge, in a voting rights case appointed a special master to prepare a redistricting plan for the entire state of New York to protect the rights of voters if the state did not timely prepare such a plan.\textsuperscript{13}

So I throw these examples out to you to illustrate the various ways in which special masters can be used as a supplement to the courts when merely ordinary judges find themselves in charge of very large mass tort. But not just mass tort, which is an important point I want to make. Special masters can be useful in any kind of large consolidations. On that note—just a short plug, the Advisory Committee on city rules of which Sheila Birnbaum and I are members, has now proposed a revision of Rule 53, which is the

\begin{footnotes}
\item[12] \textit{Id.}
\end{footnotes}
rule appointing special masters. The revision totally opens up that rule. While we don’t admit it, if you read the rule in its subtleties, it now actually quietly encourages judges to appoint more special masters with much broader functions. It moves away from the prior rule which was completely outdated and talked only about trial masters, which is the least used form of special mastering. So, I think we owe that development to Judge Weinstein and we thank you.

_Moderator_

Well, the last person to give a short presentation in this morning’s session will be Judge Weinstein and then I am going to explain how we will organize the rest of the day.

_Judge Weinstein_

Thank-you. I approach this opportunity with the greatest trepidation. One of the speakers this morning has, in effect, said in her writings of me, enough already with the ethics and the philosophy, just decide the cases and shut up. Old habits die hard. So I have written an essay, but I won’t read it to you.

It is striking to sit in this room, this beautiful high ceilinged room with people, academics and others, who have given such intellectual attention to this constantly changing problem. If you look out the window beyond the room, you will see in the near distance a state court, the most important of the state courts. That state court deals with children and families and oppressed people who we have not dealt with well, but who are now beginning to come into the federal courts. My most difficult case at the moment involves abused mothers and how the state affects their families. That’s in the near distance of this great institution.

When you look a little further, you will see the first major federal courthouse being constructed in the twenty-first century. Nobody knows what that federal court is going to say and what problems it is going to face. We do realize that the group in this room and in this institution will provide the theory that will control what the judges of that court do.

Look a little further into the far distance. You will see nothing. You will see nothing because that’s where the Twin Towers were
visible. They have been blasted out with the death of some three thousand people, who we are now thinking about. We are considering how we can deal with equivalent mass disasters—many of which creep softly into our attention, as in asbestos, rather than abruptly, as in an explosion.

Think about the problems of integrating the tort law and its kind of chaotic way of dealing with these problems, and the administrative method reflected in the Act that Congress adopted, which is not yet viable and needs a lot of changes or imaginative interpretation. Consider by comparison the European system—which is perhaps epitomized by the $10 billion Deutsche Institution now paying or trying to pay off the Nazi slave laborers;\(^\text{14}\) compare the lack of transparency of what is being done in that institution and what will be done here. That German case is temporarily in my court. The cases involving 9/11 compensation will be heard in the Southern District—a sensible consolidation.

We ponder here the effect of the different institutions available, of the enormous variety of kinds of events we deal with and of the almost anarchic way we deal with them. Nevertheless, we tend to treat these situations and the people who are hurt by them fairly effectively. We are able to utilize a bottom-up viable solution, case by case, and person by person. Our system hasn’t worked too badly. It has been flexible. It has been pragmatic. It has met some of these new problems of our strange new social and technological society that have to be met by our legal and political system.

We are utilizing a judicial institution that was developed for three million people in a rural agricultural society. We are trying to apply the rules of that archaic system to three hundred million in a multi-billion people world. There is no way that you can have a single institution in a democracy handling these problems effectively for the predictable future.

Holmes came out of the Civil War. (This part of Brooklyn here is very historical; the first major revolutionary battle was fought here in 1776 with the British; and the Civil War riots took place within sight of where we are.) Holmes came back from that Civil

\(^{14}\) See Holocaust Victim Assets Litigation (Swiss Banks), at http://www.swissbankclaims.com (last visited December 26, 2003).
War and his decisions thereafter were reflected in the fact that he remembered that the Union almost broke apart, and that one of the things the judicial system had to do was keep the Union together.

I, and many other people here, lived through a period when a terrible Nazi-Japanese-Italian set of institutions almost destroyed democracy and killed tens of millions of people. That’s in my background. I can’t escape it. What it leads to always in every one of these cases is the question: what can I do for the individual—the person who is suffering, or may not be suffering, but thinks he or she is suffering?

How can I handle that, how can I dignify that person? What can the court system do to avoid the rigidity of matrixes that treat people, not as if they were individuals, human beings, but as if they were just marked as numbers (as were so many holocaust victims)? That’s the problem for me.

The enigma for all of us is how can we use our systems so we do not lose that sense of the dignity of the individual without losing efficiency. Our legal structures must be competent, with a lot of play. No one institution, whether it is private, administrative, political, or judicial can exercise all power. That’s why, when I spoke in Geneva, I emphasized the bottom-up.

One of the great resources of our nation is the legal profession. It is entrepreneurial. It is selfish. It is sometimes stupid. And yet, it is independent, fighting for individuals against institutions. Lawyers need to be kept forceful and effective. That’s why I always end up with the tort system and entrepreneurs and why, sometimes, Professor Twerski, I ignore the principles that we learned in the first year in law school, but have not forgotten. We put them aside because we have to concentrate in this mass world, this cruel world, on the individual and what we can do for each person. We have the opportunity to either harm or help. How can we retain individual justice in a world of mass delicts?

**Moderator**

Thank-you, very much. I sense that there are two streams of ideas. One really about the present and the past, the second about the future. One is about how mass torts has developed as a practice
today with questions about special masters, state and federal coordination settlement practices, choice of law. And the second, what is going to happen post September 11th. Whether or not the new model is something that we should think about self-consciously, and if we do, whether it really captures coordination between government and private actors.

My proposal is that we focus on the first category of ideas for the moment and then after our break, we can focus on the second category of ideas. And I know some people were provoked by some of the discussions about the airline stabilization bill. But I was wondering if we could hold those questions until after the break, because I think there is a lot to talk about. So, I am going to ask someone who hasn’t spoken yet to ask a question and then I am going to let you raise your hands and I will call on you in order.

There was a discussion about the notion of top down versus bottom-up. And I raised the point that at the center of the theory of Weinstein, until this moment, is the strong judge. Professor Goldberg, do you see a contradiction here? Isn’t there a contradiction between a Weinsteinian theory that represents private mass tort litigation as a bottom-up democratic practice, but at the center, there is well, the strong judge who takes it upon himself to shape and coordinate, using all the brilliant stratagems we have heard about. Is that democracy or is that a Trojan horse?

Professor Goldberg

Well, as a former clerk to the judge I would say, of course, it is not a contradiction. But thank-you for putting me on the spot. It is a great question. Let me answer it somewhat indirectly and I will try to keep it short. The judge’s greatest quality in my mind is his refusal to believe that anything is impossible. Anything can be overcome, whether it is International Shoe or the problem of administering a million claims or thousands of claims.

Let me give you an anecdote from when I clerked, which has nothing to do with mass torts just to play this out, then I will answer the question, I promise. We had this very un-mass patent case involving two litigants, A versus B. And the supposed infringement was of a plastic fence with tubing that ran through the fence to keep the vertical slats intact. Only on Long Island, right?
The original patent had the horizontal slats shaped with a hollow rectangular shape, so if you looked at a cross-section it would look rectangular. The new product that supposedly infringed had a cylindrical shape to it. The question was whether that was an infringement. After a lengthy discussion, Judge Weinstein turned to me and said, “I think I just squared the circle.” And that, I think, is emblematic of his “can-doism.”

So, all right, I wonder if Judge Weinstein hasn’t tried to square the circle here, to pick up on your question. I wonder if life is, and our legal categories are, more intractable than he would like them to be.

The notion of bottom-up and democratic participation, it seems to me, is trying to do the following work: We are going to synthesize the best of private law and public law. We are going to take the classic notion of tort—that of a wronged individual in the agrarian society of England suing his wrong-doer. But at the same time we are going to bring the best of the regulatory state by delivering mass justice. Hence, we get individual justice in mass litigation.

The title says it all; it is the attempt to synthesize, to square the circle. And I worry that the notions that the Judge has variously expressed as “communitarian” or “bottom-up” principles do not actually achieve a synthesis, but instead subsume the traditional notion of tort law as private law into a public law, regulatory vision.

Judge Weinstein says that there is bottom-up participation, that mass tort litigation is democratic, that it is communitarian, that as Paul Rheingold said, that there is someone listening. Judge Weinstein believes that tort law can be both “mass” and “individual” because each litigant will be able to come into court and be heard. But be heard on what? The litigant will be assured in the following way: “Yes, you have been injured . . . we acknowledge your misfortune.” This is surely something. But what is missing is the central idea of tort law. When tort law “listens,” it says: “Yes, you have been injured, and yes, there is someone else responsible for what has happened to you, and therefore you are entitled to go against that person.”

When Judge Weinstein held fairness hearings in the Agent
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HONORING JUDGE WEINSTEIN

Orange litigation, they were not about Dow Chemical behaving in an irresponsible way that—creating a defective product—so as to cause injury. We don’t think Dow and other companies actually caused any injury. So, what were the hearings about? They were about the government’s execution of the Vietnam War. The idea of people coming into court and telling their stories and being heard, while a very powerful idea, doesn’t work as a true reflection of the private law idea that there are other people who ought to be held responsible for the bad fates that have befallen them.

Moderator
I am taking names now, so if you want to speak raise your finger. Aaron?

Professor Twerski
I was involved in the Agent Orange litigation, believe it or not, on the plaintiff’s side. And Judge Weinstein was responsible for one very severe migraine headache that I had after appearing in his courtroom, where he worked me over pretty well.

But I agree with what John has just said. Agent Orange is an example of where the judge as philosopher-king fashioned something out of nothing. Causation was nowhere near proved then and still hasn’t.

What was proven was that there were some bad actors. And that Dow Chemical and Diamond Shamrock had some meetings where they wanted to withhold some information about the dangers of Agent Orange from the government. And I think that this idea of going after bad actors who may not have had causal responsibility for what took place, is a theme that is running right through a good number of the class action cases. And yes, I am troubled when an issue such as causation is given short shrift. It makes me very, very uncomfortable.

One other aspect: national consensus in law. It is a really interesting concept; it worked for us in Agent Orange. But, you know, it just ain’t so. Just look at the decision in Wisconsin a couple of months ago in the latex glove cases, where Wisconsin said that whether or not the manufacturer of latex gloves knew or should have known about the dangers of latex, or whether the
dangers were scientifically knowable at the time the gloves were marketed, doesn’t make a difference.\textsuperscript{15} Wisconsin is out of sync with the law in forty some other jurisdictions. That is a real problem. There is just no way to paper over it.

California, in a decision that came down a week later addressed the issue of scientific knowability of risk in a latex injury cases and said you cannot impose strict liability or a consumer expectation test with regard to latex injury cases.\textsuperscript{16} Now, I know on which side of that debate I come down on. But regardless of what I think is right or wrong, the fact of the matter is that we have nothing like national consensus. In reading case law when drafting the Products Liability Restatement, I would have liked it to reflect national consensus. But that’s not the way the world is. We have state courts out there doing very, very different things. Sub-classing is not an easy solution to this problem. If varying state laws have to be presented to a single jury, the great likelihood is that the trial will be unmanageable.

So, if judges are to behave as philosopher-kings, unrestrained by law to work out solutions as they see fit, that may work—but it isn’t law being applied to a controversy. Perhaps the fault is mine. My Talmudic training has imbedded in me a very, very deep respect for law and for precedent. Seat of the pants justice no matter how noble and well-meaning frightens me to death.

\textit{Judge Weinstein}

Let’s take the Agent Orange and the asbestos cases, because in some respects they represent the same kinds of problems. In \textit{Agent Orange}, there was no direct proof in a tort sense that somebody was injured by a particular act under tort law.

There were poisons, however, that were put into the atmosphere through carelessness by producers. How many people were injured? Which particular people were injured? How much of the atmosphere was denigrated? Nobody could tell with respect to a particular person. But that there was an injury in a sense to the community, not attributable or provable in traditional terms to an

\textsuperscript{15} Green v. Smith & Nephew AHP, Inc., 629 N.W. 2d 727 (Wis. 2001).

individual plaintiff, seems to me to have been clear. Payment should have been made under those circumstances, money utilized in some community care (and I know you don’t like that) way that would permit those who might have been injured to benefit.

Asbestos is a disaster which crept up on us. We are now in *Manville* paying only 5 percent of the amount of damages that we know was suffered.\(^\text{17}\) Asbestos is scattered throughout our country. It is a substance that causes, in the community enormous amounts of damage. That should be paid for, not necessarily to each one of the people that has a few spots on his or her lungs. How it should be distributed in this kind of mass case is a problem different from that in individual tort law. The same thing is largely true, I think, of the slave labor cases and the methods of distribution of the funds available there.

Punitive damages need to be distributed on a communal basis in many of these cases because it is the community that suffered. And it is a community that isn’t being paid for the harm that is being, or has been, done.

Now, the old tort law fails in these cases and the solution has to lie in the use of some kind of administrative agency—sometimes a quasi-administrative agency of the court, which is often unsatisfactory. Use of such agencies is not what we are appointed for; it is not what we are trained for. A true administrative agency will find increasing utility as in the tire cases.\(^\text{18}\) In many other cases the problem will be addressed by the criminal law or privately in arbitration.

All of these institutions for dealing with this kind of problem, it seems to me, have to cooperate because the tort law falls short in dealing with this kind of case. And the courts are not themselves capable, except on an ad hoc basis, of setting up an administrative, democratically-selected agency. Now, that’s beginning to change. The United States Securities and Exchange Commission, the


Federal Trade Commission, the various administrative agencies are making their mark using huge fines after and before the harm becomes apparent. We are seeing parallel changes in the criminal law system through restitution.

We have to recognize that given the different kinds of cases, different kinds of institutions have to handle them. And where the other institutions are not yet available, then I think we have no alternative, except, as in an Agent Orange case, to do something that corrects, temporarily at least, the defect that we face as a community and as individuals.

Moderator
The question that I wanted to keep us focused on at this half is, until the new world is developed, how do we feel about the strong judge doing it on the fly. That is what is happening, and it by necessity involves many doctrinal and technical decisions and choices that have been attacked and criticized in the law reviews and in the mandamus petitions.

And the second question, which you are raising now, is something which I think is very important, which I hope we can get to. I see that Margaret Berger had her hand up.

Professor Berger
Yes, in part, what I was going to say the judge has said. I really think that what—and Aaron’s remarks pick up on this—is that advocating that you apply to mass torts the principles that apply in a totally different context does not work.

I think there is a disconnect between the individual horse and buggy case and the mass tort. And insisting that the same theories of causation apply and then lead to the same remedies that traditionally apply in tort law, just is insurmountable. Because I think we are talking about such totally different risk and such totally different injuries and such a different involvement on the part of society with regard to these mass incidents as compared to the individual defendant, that I don’t think the system works. And I think that the class action, at least, gives one a vehicle for saying we can somehow manage to distribute over a group of people, which takes away some of the problems.
And when you have a strong judge who perhaps can get state courts to coordinate with him, you alleviate somewhat what Judge Freedman was talking about. That you are going to run out of money in one place before you get to the other. And certainly I think the asbestos cases, with their enormous transaction costs, really demonstrate that something is very awry in the way in which all of this works. We need to think through what responsibility should mean at this point in time. I know Tony doesn’t want to speak yet about the future.

But I think that we have seen that unless one somehow keeps the lid on the tort system and its inflexibility with regard to these issues, one really can’t do any kind of justice. And rough justice, I think is far better than no justice at all.

*Moderator*

Peter Schuck?

*Peter Schuck*

Well, as I listened to your manifesto to Aaron, I was reminded of two words uttered by my late colleague Arthur Leff, which is, “Sez You.”

In many of these cases, it seems to me you are something of a benevolent despot. Now if we are going to have a despot, I would just as soon he or she be benevolent, and you certainly are. But it is a despotism nonetheless. Now, that’s a heavy statement and I have been very depressed just listening to all the references this morning to 9/11 and to the chaos in our society and slave labor and so forth. While Tony was introducing the panel, I thought that I would introduce a bit of levity by writing an ode to Judge Weinstein. Tony thought that I was scribbling notes very carefully attending to what he was saying, but actually I was engaged in the creative process.

So let me read this. And then when I have done that and perhaps won a little bit of goodwill from the judge, I have a couple of comments on his Illinois paper.19 The last line of this poem has some words in a foreign language, but as I look around this table, I

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19 *See Weinstein, supra note 5.*
don’t think there will be any translation difficulty.

Oh, hail to judicious Judge Jack,
Whose judgments new laws never lack.
Towards claimant he’ll mass, his actions have class,
For plaintiffs’ insurance he’ll stack.
Oh, hail to Weinstein, Jack B.,
Whose work product shames you and me.
Strong trial lawyers cower before his robed power,
Especially when he cuts their fee.
Oh, hail to his corpus so weighty,
After all, the judge just turned eighty.
Yet the freight train named Jack,
Still roars down the track,
While above beam his Bubba and Zady.

Does anybody in the audience need a translation?
Okay, I did have some comments on the lecture, which is, of course, very provocative and makes some very good points and I think calls attention to possibilities for a forum that we really ought to take very seriously. I just want to make three very brief structural observations in the spirit of skepticism or refinement, as you like.

First, it is an amazing coincidence that each element of Judge Weinstein’s proposal has the likely effect of increasing the power of the judge. I don’t know how this happens, but it is amazing how this pattern emerges. The theme of this is coordination and cooperation. And who will the coordinator be? It is almost certainly going to be the judge.

Now, cooperation and coordination are very important elements of governance, but one person’s coordination and cooperation is another person’s power grab. So the question is: who is going to be the coordinator? Which incentives will animate that coordinator? Somebody is going to be exercising power over others, unless this cooperation is to be entirely voluntary. And Judge Weinstein has provided us with some examples in which apparently cooperative coordination of the three systems—he says that actually there is a fourth system, ADR—seems to have made some progress.

Another point is that in a decentralized system like ours,
is a lot to be said for mixed institutions, for redundancy, for independent sources of initiative and decision. Even though mixed institutions will almost inevitably create what seem like chaos, inefficiency, and to some degree, lack of coordination.

In a system like ours, and given the political values that this society cherishes, that is a good thing. This doesn’t mean that it is the optimal thing and it certainly doesn’t mean that the mix, the precise mix of power and influence and institutional weight that characterizes the existing system of cooperation is the right one. I think that Judge Weinstein has made an excellent case that it isn’t. But I don’t doubt for a moment that we need a certain degree of institutional competition, lack of coordination and independent initiative even at the price of some chaos and inefficiency.

Moderator
Thank-you. Now, Deborah, you are the next speaker. I wanted to ask you a question related to this, which is, given what Professor Twerski said, do you think, based on your experience in studying class action settlements, what we have is, in fact, the best approximation of what people should have gotten had we had infinite resources and they were able to prove causation and liability? Or is it just that we are basically taking money from a nice big pocket and giving it to victims of misfortune?

Ms. Hensler
Thanks for that question. I think based on the research that I and others have done about settlements and class actions, one would have to say that the outcomes are tremendously diverse. Sometimes the outcomes provide considerable benefits for the class, one could argue. Sometimes they also provide social benefits to consumers and others beyond that.

Other times it is hard to see what benefits have been created for the class or society that are commensurate with fees that have been obtained by plaintiffs’ attorneys. And consistent with the discussion that has been going on, I think that the outcomes of class actions depend very critically on the actions of the judge. According to my research, a strong judge that takes his or her responsibility under Rule 23 seriously and scrutinizes settlements,
provides for true hearings on the fairness of the settlements, and allows for objectors to come in a proper fashion is more likely to obtain a good settlement for the class.

A judge who, instead, is focused on simply settling a case and getting the case off the calendar, is likely to see a very different outcome. And that brings me back to the more general issue that Tony had raised for all. With regard to strong judges the question is, of course, a strong judge for what? A strong judge can be focused primarily on settling a case without regard to the merits of the settlement. Judges do have substantial powers to press those settlements and particularly in mass litigation with all the conflicts that Judge Weinstein has written about and spoken about this morning, there are great pressures to settle and to go along with that judge. So, I think when we speak of the “strong judge” piece of this paradigm of governance through private litigation, we have to raise questions about this despotic judge, as Peter called him, and what purpose the judge is serving.

I also want to raise one other point that hasn’t been raised so far. And that is democracy incorporates notions of representation and notions of accountability. And as one of the first commentators pointed out (it may have been Ken), the model we are really talking about here is a model of strong judges and attorneys working together with that strong judge. If those attorneys don’t truly represent the interests of their clients, if instead, they represent primarily their own interests, and if neither the judge nor the law require those attorneys to be accountable to those whom they are supposed to be serving, then there is a very important dimension missing from this notion of bottom-up democracy through the tort system.

**Moderator**

Well, by happy accident, the next two people I have in my list are, in fact, David Vladeck from Public Citizen and Professor Burt Neuborne, who both I think have something to say about that.

**Mr. Vladeck**

Thank-you. I agree very much with Professor Hensler. The question is not how to strengthen the role of the judge in
overseeing class action cases; judges have ample power already. Rather, the question is how to ensure that judges are invested in just outcomes. We have seen far too many class action settlements that do not achieve justice pushed through and approved by strong judges.\footnote{To give an example, the settlement in Ortiz v. Fibreboard, 527 U.S. 815 (1999), was devised by and sheparded through the litigation process by a strong judge. But as the Supreme Court ultimately concluded, the settlement impaired the due process rights of class members and absent future claimants. Id.} To be sure, settlements are effectuated, dockets cleared, class counsel collect their fees, class members get coupons or some other trinket that passes as value, and defendants purchase the res judicata they seek.\footnote{See In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig., 55 F.3d 768 (3d Cir. 1995), cert. denied sub nom. General Motors Corp. v. French, 516 U.S. 824 (1995) (rejecting coupon settlement in case challenging safety of certain GM pick-up trucks).} But I doubt that settlements of that kind advance the ends of justice or instill faith in our judicial process.\footnote{See Class Action Fairness Act of 2003, H.R. 1115, 108th Cong. (2003); S. 274, 108th Cong. (2003). To the contrary, cynicism about class action settlements has sparked a serious backlash against the use of class actions that has taken many forms, including proposed legislation to permit the removal to federal court of many class action cases brought in state court. Id. See generally David Vladeck, Trust the Judicial System to Do Its Job, L.A. TIMES, Apr. 30, 1995, at M5.}

It seems to me that when we discuss the future of mass torts, the hard question is—compared to what? Is there any alternative but to try to perfect this imperfect system? I submit that the answer is no. No one can convincingly argue that we should go back to trial by jury of each individual claim. That is not an option. We would never finish trying asbestos cases, let alone the Fen-Phen cases, or even the Sulzer hip replacement cases, which now involve some six thousand class members. No one wants to try six thousand individual cases involving the same product and the same claims of injury.

But we cannot lose sight of the fact that today’s system is seriously flawed, especially when measured from the perspective of the individual claimant. One minor but telling illustration is the vocabulary we use to describe the mass tort litigation process. We speak about “inventories,” not about people. Judge Weinstein
started today’s discussion by emphasizing the need to ensure that every individual plaintiff feels that he or she is getting justice. Too little attention is given to that imperative. Indeed, lawyers talk about mass tort cases in ways that abnegate the interests of the individual tort plaintiff whose claim has been aggregated, commodified, and often homogenized (at the expense of the plaintiff who has a superior claim) as part of an inventory or class action settlement. The way we speak about these cases reflects the way we as lawyers and judges feel about them.

So, in my view, the question that we must explore today is what can we do to make the mass tort system we are stuck with more fair and more just to all concerned. And to do so, we must be careful to hold paramount the interests of each individual claimant, even if it means sacrificing a measure of efficiency.

_Moderator_

Mr. Neuborne.

_Mr. Neuborne_

Thank-you. I am just going to confine my remarks in the first half, to retrospective issues. We will talk about the future later.

I want to say five things. That is the law professor in me. First, having just lived through five years of intense work on class actions with Mike Hausfeld (Mike was the invaluable person with whom I worked on the Holocaust cases), I want to announce an empirical fact. Every time I did any research, every time I confronted a problem, every time we thought about how to structure, what to do, what the problems were, the parameters of both the law and the problems were set in Judge Weinstein’s remarkable corpus of work. So, when we talk about the future, we talk about where we go from the plateau that Judge Weinstein has built for us.

Second, I wanted to say something about heroic judging. You know, Ronnie Dworkin’s work on human rights assumes the existence of Hercules as the judge.23 I know he was thinking of Judge Weinstein when he wrote that. I mean, Judge Weinstein is

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23 See RONALD DWORKIN, LAW’S EMPIRE (1986).
the model of the Herculean judge; a judge who is able to move mountains.

But that doesn’t mean that only he can do it. I want you to think about the model of the founding generation. The founding generation was a generation of giants. If we had the choice today, we would be governed by Jefferson, we would be governed by Adams, and we would be governed by Washington. The “devolution” from the founding generation to the existing generation of political leaders is the strongest argument I know against Darwin.

But that doesn’t mean that only the founders could practice democracy. We have learned an immense amount from the work of a heroic, Herculean judge. What we must do, as Shira Scheindlin points out, is learn from it, move forward, do the best we can, but certainly not say that this is a jurisprudence that only Jack Weinstein could carry out, because he was so uniquely positioned to help us learn about it.

Third, what does it mean to be a “democratic institution”? What does the judge mean, I think, when he says that we have “democracy” here? We want to avoid a confusion between democracy with majoritarianism or majority rule. The judge is not talking about majority rule; he is talking about democracy, as a metaphor for the fact that American institutions, when they work best, work because they don’t simply involve resolutions by the political majority about what is efficient, expedient and a good idea.

In the American model there are always going to be individual voices saying, “But what about me? What about my individual stake?” This solution may be fine for society in general, but “what about me?” Or, this solution may be fine for large corporations, but “what about me?” What makes the system so democratic is that there is essentially a portal through the good offices of a lawyer, for the individual voice of “what about me?” And I think that makes the system work much better. In the second hour we will talk about how that individual voice gets joined with other voices.

Fourth, there is Peter’s suggestion that the judge is a benevolent despot. Let’s not lose track of the fact that the vast bulk of what the judge has done over his career is to foster settlement.
Judge Weinstein builds stages on which people can’t escape from his courtroom, so that they have to discuss resolutions. I mean, that was DES, that was Agent Orange.

If they don’t like what he does, if you can fight through the interlocutory appeals rules, which, by the way have been changed I think in large part because of him. You can get up to the circuit and escape from this man who won’t let you out of the room until you sit down and talk to the other person about whether this can be resolved in a just way. Now, that’s a very narrow category of despotism. He does not impose his own solution on you. What he does is he imposes on you the obligation of sitting down around a table and seeing if a solution can be resolved. If that is despotism I think we need some more of it.

And then finally, let me respond to Aaron Twerski’s provocative and very thoughtful notion. Just before Jack was appointed to the bench, Aristotle wrote, Nicomachean Ethics. I have written about Jack in the Columbia Law Review that of almost anybody I know he balances the three demands of Nicomachean Ethics: the good, the just, and the formal. In Nicomachean Ethics, Aristotle wrote that all of us have the challenge of balancing the good, the just, and the formal. The “good” being the best for the society; the “just” being the right of every individual to be treated in accordance with his just deserts; and the “formal” being a scrupulous adherence to the rules. A great judge keeps all three balls in the air. A great judge knows that there is the requirement of the greater good for the society, the individual right of each person, and an obligation to be scrupulously loyal to the system of law.

There is a tendency among all of us to get sidetracked on one of those ideas. Some of us become obsessed about the primacy of doing justice to every individual regardless of the effect on the society. Some of us say that whatever the society’s needs are has to take precedence, regardless of the effect on the individual; and some of us say it is not my job to make those judgments, I will just follow the rules laid down by someone else. You show me a rule, I

will apply it, and I don’t care whether it is good or just, as long as it is formal.

Our greatest judges do a balancing act throughout their careers of keeping all three balls in the air. That is inevitably unruly. It is unruly because somebody who goes at it from only one of those three ideas will always say the judge is ignoring that ball, and advantages the other two. But a great judge respects all three ideas, even at the expense of consistency.

The reason we feel as we do about Judge Weinstein, is that more than any other American trial judge of his generation, and with an intellectual capacity that forces us all to take cognizance of it, he has kept those three balls in the air. And what he is doing on his eightieth birthday, quite remarkably, is tossing those balls to us and saying, “You keep them in the air too. Let’s talk about how we do it in the future.” That’s why I think this is such a wonderful, wonderful opportunity to say thank-you.

_Moderator_

I feel like I am balancing the good, the break and the lunch. Now I think that we should go to about 11:15, because I have a lot of people who want to speak. And then we will break, and then we will meet again for the second half. Next to speak is Mr. Rheingold.

_Mr. Rheingold_

I am really glad to hear that the more recent speakers don’t think we have a broken system that needs radical repair, notwithstanding what Shira has said about abusive and duplicative class actions, she can’t name one in mass tort.

_Ms. Scheindlin_

How can you say that with a straight face?

_Mr. Rheingold_

We don’t even have class actions in mass torts according to the Supreme Court.\(^{25}\) And the system works well. And they just fear

that fifty state courts are all going to do the same discovery of the defendant that the federal court and MDL is doing. It just doesn’t happen. It is a bugaboo that the opponents of the current system would like to bring forward to us. But I think that with Judge Weinstein’s approach and what many judges have done in following Jack’s work, they’ve come to realize that through coordination and cooperation these problems can be solved. So, I am glad to see at least a whole lot of people are not for a radical solution to a non-problem.

Moderator
Mr. Hausfeld.

Mr. Hausfeld
I think, picking up on what Burt has just said, in order to judge the viability of what has occurred in the past as well as what is ongoing in the present, we have to look somewhat towards the future and David asks the question best, what is the future of mass torts? And putting aside the legal aspects, I think the future that there will be mass torts is great. And now what is our responsiveness really to that challenge?

It was said before that Judge Weinstein is a strong judge actually crafting his solution and his approaches on the fly. I disagree with that, totally. I think the genius of Judge Weinstein is that he has taken fundamental principles literally of natural law, I think the terms were ethics and philosophy, and applied them pragmatically to situations where there is a responsible actor and injury to a mass number of individuals, but a difficulty is in arriving at what the just solution is.

He also said something this morning that I think we all tend to overlook. Not only are we trying to apply principles that were developed hundreds, if not thousands of years ago, in an agrarian society but to a society which has grown to the point where individual actions don’t affect only small numbers of individuals but huge numbers of individuals. So as society has evolved, is there not an equal responsibility on the part of the law to evolve to correspond the responsiveness of the law to the difference in society?
And Professor Twerski, what I get from the issue of causation is one which I think we are faced today with almost a paradox. When we first put forth the proposition that the Swiss banks, for example, were involved in a mass tort, it was laughed at because no one could make the connection, at least at the time, between the financing of a war of aggression and the victims of that war. And now we see today what the government is the major proponent of and the world is focused on, is tracing the financing for acts of terrorism. Not because those who provide the financing are the perpetrators of the terrorism, but they do provide the causal link.

So, how do you respond to the situation where you do have a mass victim and a responsible entity, if you don’t have a system which is going to allow the victim to hold that responsible entity accountable?

Again, in some of the Holocaust cases we saw what we thought was a very perplexing attitude on the part of some of the perpetrators. And that was, look, let’s put this into the political arena, let’s have an international arbitration, let’s discuss this in the legislatures, but whatever you do, whatever you do, don’t raise this question in a court of law. Why not? Between the three branches of choices that we have, the political, the administrative, and the judicial, would we really want to trust our individual rights on fundamental issues that affect not only our freedom, our liberty, but our well-being to just the political and the administrative?

So, the issue as I see it from the perspective that we were talking about is, is the judiciary an appropriate forum in which to air these issues and which to attempt to resolve them? And I find that the principles that Judge Weinstein has applied are the principles that I feel most comfortable with. And as opposed to seeing him as a lone dissenter at this point or the lone frontiersman, I would suggest that what we need are more giants.

*Moderator*

Thank-you, Sheila.

*Ms. Birnbaum*

I am going to pass my time to Barbara Wrubel, who hasn’t had a chance to speak and I know her views will be similar to my
views.

_Moderator_

Well she’s the next one on the list.

_Ms. Wrubel_

Words in praise of the tort system. I don’t want to make retrograde arguments, but I think strict rules of proof, of causation, of admissibility of expert testimony lie at the heart of what we are all easily calling mass torts.

Mass torts are massive wrongs. It is not just mass numbers of people who claim they may be injured. In many of these mass torts, we don’t know if people are injured. If they can establish their injury, they ought to be able to do that. They ought to be able to come forward with competent medical testimony to establish a causal nexus between their injury and some wrongdoing on the part of the defendant. Not just that the defendant made a product, a drug, for example, but that the defendant wrongfully failed to disclose the risks associated with the drug. I don’t understand why we need to relinquish the zeal with which we demand proof of causation, proof of injury linked to a wrong on the part of the defendant.

_Judge Weinstein_

General or specific?

_Ms. Wrubel_

I say both kinds of causation. If you have a system where you say, well, we can sort of prove general causation, but the individual can’t prove it in the individual case, then I say, good, let’s go to an administrative system. If there is going to be a shortfall in proof, why don’t we have an administrative system that allocates the money in a fair way amongst all of the people that claim to be injured. That you ought not have the ability to concentrate massive litigation in one place. You ought not have a shortfall in the proofs, while giving a free ride for all on a claim for damages.

We all know, for example, that punitive damages are a wild card. I enjoyed so much your article, because I kept dreaming of a
day when we would take punitive liability and have it resolved outside the tort system. These kinds of damages are designed to vindicate society’s interest in deterring bad conduct. The bounty shouldn’t go to plaintiff number one or plaintiff number two or plaintiff number twenty. It should go in some way to society. We should punish defendants that do bad things but put the issue into an administrative or criminal proceeding and not keep it in the tort system, which makes massive litigation concentrated in one place too enticing to the plaintiffs’ bar. There is too much money to be made, and it’s too coercive on the defendant.

After all, in all these mass torts, somebody is paying for this. In *Agent Orange*, it may be that the chemical companies did bad things. But it has been impossible to link those bad things to Dioxin. If that’s the case, why is there this need to compensate people? They should have been compensated by the federal government. These were soldiers, the federal government should have done it. Private industry? I don’t think so.

Look what happened in breast implants. That litigation bankrupted a wonderful chemical company.26 Hundreds of millions of dollars were spent before a rule 706 panel concluded a failure of a causal nexus.27

Look at diet drug litigation. Does the science as we now know it support a multibillion dollar liability? American Home Products just reported a $13 billion reserve for the litigation. When you can agglomerate all of these claims in one place without requiring proof that this individual was caused an injury by a wrong of the defendant, then I think it is a highly wasteful and inefficient system.

Judge Weinstein, what I found so provocative about your article is that there may be a way to share responsibility for compensating people that are truly injured and there may be a way

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to do it partly through the tort system and partly through these other systems.

Those are my comments.

*Moderator*

Thank-you. Now we have four people and we should break soon. I have Professor Mullenix, Judge Scheindlin, Professor Rosenberg, and Judge Freedman. I think we can get through at least two of you. Professor Rosenberg, you will get the last word and then we will start with Judge Scheindlin and Judge Freedman in the next session.

Ms. Mullenix, you are next.

*Professor Mullenix*

I have just been sitting here and I absolutely cannot contain myself at some of the outrageous statements I have heard.

I will say one or two things about what people have said, but I do want to come back to the core question as you framed it, which was, I thought, very interesting. What are we to think about the phenomenon of the strong judge dealing with these problems on the fly? There are one or two things that people haven’t said that I think are worth thinking about. Which is, why do we have this phenomenon, and how does it come about? I think that there is at least a kind of overarching systemic failure that nobody has talked about.

Peter Schuck focused in and said we are talking about this role of the activist or strong judge. A lot of this has to do with the need for coordination. And this dovetails into what Sheila recognized about this problem, of duplicative and overlapping class actions. There are a lot of people in the room who, a week ago, were in Chicago and attended the meeting of the Advisory Committee on Civil Rules, where the proposed amendments to Rule 23 are underway. There were a series of proposals to deal with this problem of duplicative and overlapping class actions, and there were proposed amendments or changes to the rules that are designed to deal with precisely these problems. One was a model rule that would adopt or codify preclusion doctrines. Then there was a separate proposal that, by rule, would give injunctive power
to the federal courts.

We were asked by the Advisory Committee about these proposals. Five law professors including me—and I am a person who thinks that the Advisory Committee has the most expansive powers imaginable—came to the conclusion that those proposals for dealing with duplicative litigation would violate the Rules Enabling Act and could not be done by rulemaking. I told the Advisory Committee that even I do not think you can do this by rulemaking. But I think it needs to be done by statute.

So here is where I think the nub of the problem is. We are very, very good at identifying the problems. We’ve written about these problems to death. We have had conferences about these problems. We know what the problems are. The question is, how do you solve them? We have come to the conclusion that you can’t solve them by rulemaking. The way that you need to approach solving these problems is by statutory solutions, which means that Congress has to do something.

Where does that leave us? We all know very well that Congress has not been solving these problems. The multi-party, multi-forum jurisdiction act has been reintroduced every year since 1988. The various kinds of statutory proposals that have been introduced to deal with these problems never go anywhere. So we don’t have a rule solution, we don’t have a political solution. We have activist judges because the other mechanisms by which we might do something basically have not worked. We have to ask ourselves, what are we thinking or what are we doing about that?

I just want to comment on Burt’s democratic model of class actions. I was absolutely amused when he said, in describing this democratic model, it might work so well that the system of entrepreneurial plaintiff lawyers encourages democratic voices to come forward to speak. They are the ones who come forward to ask the question, “what about me?” But we are hearing different things when we hear the question, “what about me?” When Burt hears “what about me?” it is the lawyers saying “what about me?”

for the claimants. When I hear “what about me?” it is the lawyer saying, “what about me?” for the lawyers. That’s my problem.

This model of participatory democracies from the bottom up is basically a kind of the worst form of banana republics, with autocrats running around cutting corrupt deals, absconding with the loot for themselves, and then convincing the poor and impoverished citizens that something has been done for their benefit. And that I have obviously spent too much time in Texas, Alabama, and Louisiana. I just have a different vision of what you are all taking about.

Moderator
Okay, this is what I propose: the last person I want to call on is Judge Scheindlin. Well, you can defer.

Judge Scheindlin
I do.

Moderator
Okay, Professor Rosenberg, you will get the last word and then we will start with Judge Scheindlin and Judge Freedman in the next session.

Professor Rosenberg
I don’t think it helpful in seeking solutions to social problems to start from a priori postulates of the “good,” come-what-may. We’ve been told that litigation is a form of “democracy” and that’s good; that some class action settlements “commodify” individual loss as well as breach “principles of tort law” and both are bad to do; that mandatory class actions deny the “right to a day in court” and that’s bad too; that congressional tort and related procedural reform would destroy “states’ rights” and “federalism” and that could be bad or good depending on whether you like the status quo. Even if I knew the meaning (and I haven’t heard clear definitions) of “democracy,” “commodification,” “day in court,” “plaintiffs’ rights,” “loss,” and “federalism,” to list a few terms being tossed around here, I would reject the notion that these or any concepts should command obesiance from law makers,
honoring judge weinstein

including courts. They don’t even exist as actual things—they’re inventions of our minds that we constantly modify as required in ordering (in multiple senses) the world.

What I think we should start with is what the law should be aiming to do and that’s a “should” and normative statement. And I think we might even agree on it and that is, the law ought to aim to improve the welfare of individuals. Now, how is the welfare of individuals improved by the law in connection with mass torts? Well, we have a good deal of evidence about what people want a legal system to provide when it is dealing with accident risk. It wants effective control of the risk. In tort law we call that deterrence. I’ll put aside the question of whether judicial sanctions are of any practical use in deterring homicidal barbarians from perpetrating the holocaust, the 9/11 attack on the United States, et cetera.

When people are injured and have suffered major loss as a result of an accident risk, what do they want? We have trillions of dollars of evidence of what they want. It is called insurance. Now, tort could supply insurance but it is notoriously poor at doing it. And, in addition, most people already have it. So, what tort does when it compensates is pay people extra money, in addition to the insurance they already have. Now, if they wanted more insurance, they could have bought more insurance from a commercial supplier, or they could have gotten it from the government by paying higher taxes they evidently didn’t want to. Why would they want tort to supplement the insurance they, themselves have chosen not to augment? Of course, we never even asked them.

We mandate it. For example, products liability rules generally preclude consumers from contracting out of “tort insurance” so they won’t have to pay its “premium” in higher product prices. The same is true for the “tort insurance” mandated by the tort liability regimes governing workplace, medical, and many environmental risks. Tort insurance is notoriously much more costly and risky than commercially and governmentally supplied accident insurance that covers virtually everyone in the United States. Moreover, in products liability and many other contexts, tort insurance charges a distributionally regressive premium—“insureds” pay the same amounts in higher prices and lower wages and employment
benefits for coverage against the same types of accidents, but they receive differential payouts depending on their relative income and earning capacity (with social status and similar extra-loss factors also influencing damage awards). Of course, some people can’t afford commercial insurance and must rely on what the government provides. However, this only means that they certainly can’t afford the higher costs and risks of tort insurance. The fact that we mandate it doesn’t matter that it makes people better off.

And this whole conference, so far, has been turning on the notion of compensation. How do we compensate? How do we individualize this and that? People don’t want that from the tort system if it comes at extra expense and if it in fact isn’t very good insurance. We don’t see them buying it. Tort insurance is a total waste of scarce social revenues. If tort law usefully promotes the social objective of cost-effectively reducing accident risk, then damages should be assessed as a “fine” for deterrence purposes. After paying the lawyers for their effort, the remainder of the fine should be devoted to increasing the coverage provided by commercial and government insurance—for the specific plaintiffs or, better still, for everyone. People are better off with better coverage for the general risk of death or disability they face from all sources—non-tort (above 90 percent of total) and tort (below 10 percent of total)—than the alternative we presently impose: providing better coverage for the tort risk of death or disability than for the non-tort risk.

Judge Weinstein

If you look behind you, you will see where a million and a half people live who are just about making it to their morning breakfast. They are not buying insurance or anything else because they can’t even afford their next meal.

Professor Rosenberg

Judge Weinstein, you forced them to buy insurance when your legal system said we are not going to pay attention to the contracts that you might write with a product manufacturer that says, we won’t pay your compensation, we will reduce the price of the product, you force them to buy insurance which you have just
admitted they can’t afford. Why did you do that?

Judge Weinstein

You are assuming a rationality and a middle class capacity that simply doesn’t exist for two miles out.

Professor Rosenberg

Judge, I am assuming at this point that you are running the world. I do want you to run the world and I am asking you to run it according to the best understanding of what makes people best off.

Let me switch for one second and say something positive. What people probably do want from the tort system, although I am quite skeptical of its capacity to supply it, is deterrence. Effective deterrence. That tells us we don’t want this causal individualization. It also tells us it doesn’t even make any sense because in mass tort cases the mass production process that produced the risk in the first place never had any sort of individualized relationship with the prospective victims. Causal individualization is an incoherent idea in these cases because they all arise from mass production risks, which have no scientifically determinable relationship to any specific individual in the exposed population. There isn’t any one-to-one relationship that can be coherently adjudicated. It is a waste of time, because we can do deterrence without it, and is almost intellectually barren as a thought.

Moderator

Let’s reconvene, I would say twenty minutes break, that’s what I say. Thank-you, very much.

(Recess taken).

I would like to say that I am speechless with appreciation and with pleasure. This has been really a lot of fun for me. Truly it is, as I said in the beginning, the law professor’s fantasy.

As I promised, there are a number of people who wanted to speak on the last topic before we move on to the second topic, and I promised that they could speak. So, the list I have is Judge Scheindlin and Judge Freedman and I believe Ms. Birnbaum.

And then we will stop. I am going to ask people to present
these five minute thought pieces and then we will go back to the discussion. Judge Scheindlin?

Judge Scheindlin
Well, I have been listening hard and we have used the word democracy. I have been thinking about that. Clearly a judge acting as a legislator is not a democratic concept and we really must recognize that. The democracy that we live in has a tripartite system, and we are supposed to have the legislature pass legislation. And the problem is that they haven’t. And as you said, Professor Mullenix, if they haven’t, we have a cap. But the question is, is the judiciary qualified to fill that gap if they have not been elected to make the laws?

So, I just think of models where there are laws and where we can do some of the same techniques because the law allows us. For example, in the securities area, we don’t have the problems of having choice-of-law and national consensus law and overlapping state and federal jurisdiction. We just have the cases, and they are an interesting model.

In my court is the recent IPO cases, where we have 950 class actions filed in one court. We have all the potential chaos—yes, but the chaos that could come from allowing 950 class actions to reside with forty judges and inconsistent rulings and no coordination of discovery would be unbearable. Instead we use techniques to bring them before one judge and consolidate them.

But it is easy, we don’t have the mass tort issues that we have all alluded to here. And so my only point was if we were really thinking democratically, we would have to be looking toward more of a legislative approach, which I think is a segue to your second topic. Congress has a responsibility and I know they have been ducking it. I understand that.

But as we move forward to the second topic, we’ve got to go there. We’ve got to have that legitimacy and not become legislators ourselves.

Moderator
Judge Freedman.
Judge Freedman

Some of us were elected. Or at least one of us. But that doesn’t mean that being a judge is democratic. However, I would like to say a few things, just responsive. There is no question that what Judge Scheindlin said before about special masters has been critical—in the way at least I functioned—in all of the mass torts that I have in New York. And that is clearly based on the house that Jack built.

Without Jack, I would not have been so inspired. I would not have understood the role of special masters, nor would I have had the moxie to appoint them in New York State Court, where there is no provision for special masters.

I just did it by fiat. I did it in part because everyone knew Judge Weinstein did it because the model was so good, and somehow the lawyers have gone along with it and have agreed to pay for the special masters. They are absolutely essential because it is before the special master that the individual litigant really has his or her day in court—the opportunity to tell his or her story. And I think that that’s essential because we talk about the opportunity for individuals to tell stories and that being the fair and just way of doing things.

That’s a myth. There are no cases that get tried. What is it? 5 percent of the civil cases get tried—3 percent now. And that doesn’t mean that those people come into court. Most lawyers have large inventories of cases. They may be pedestrian knockdowns or intersection collisions, but they work with them. The lawyer who appears in court is not the lawyer who has anything to do with, has ever met the client, or who knows the client. The lawyer who settles the case is not somebody who has any personal relationship with the client at all. That’s the reality of tort law in the United States now. It has nothing to do with individuals getting their particular days in court.

So that the massing and the allocation and the way it is done by special masters—wonderful special masters like Ken Feinberg—is essential to achieving that individual justice that we talk about. Just a couple of other points.

Causation has been addressed now I think by the Daubert
hearings. And although Daubert does not apply in the state courts, most—I think—of the state judges are now following, for example, the 706 findings of the federal court. And the 706 panel was instigated by Judge Weinstein. We wouldn’t have had it without him, yet the whole breast implant litigation changed as a result of that.

So, I think that fear that you all, that Professor Twerski and Barbara Wrubel and Sheila raised concerning lack of causation is no longer such a fear. I think with a 706 panel perhaps Agent Orange might have gone differently, but that was then and this is now. Daubert has brought a tremendous change.

At the same time, our Supreme Court, while wanting to take away from the jury in Daubert has gone berserk—I think, if you will forgive me—in Amchem and Ortiz by not allowing for national class actions. So we are not only dealing with legislative lethargy, we are dealing with a Supreme Court that maybe just not understand what the real problems out there are. And I don’t know if you professors can make them understand it. I don’t know if anybody can, with the exception of Judge Breyer. I think the elephantine mass of asbestos cases, that cries out for legislative solution, is just not going to get legislature redress. The Supreme Court should understand this.

**Moderator**

Well the last two people on this subject will be, I believe, Ms. Birnbaum and then Professor Twerski. Hold on—Peter, do you want to jump in on this topic? Or do you want to speak on the second half?

*Professor Schuck*

On this topic.

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Moderator
Okay, then we have three. Ms. Birnbaum, Professor Twerski, and then Professor Schuck.

Ms. Birnbaum
I would like to talk about several myths. My problem with mass torts today is that there are large numbers of people who are bringing suit, either in a class action or otherwise, who have no injuries.

We are paying millions and sometimes billions of dollars that could be used more productively, for example, for research and development of new drugs and new products, rather than for paying people who are not injured. And let us assume that in the diet drug litigation, that there were several people, hundreds of people who may have been injured by the drug in some way. I think everyone will have to admit the vast majority of people who were involved in the class action settlement had no injury. They just took the drug. Some of my friends who took Fen-Phen are members of the class and are receiving money, small amounts of money, but money that adds up to millions and millions and hundreds of millions of dollars. They have sustained no injury and should receive no compensation.

We have an asbestos litigation crisis in our courts because we permit hundreds of thousands of people to come into the courts and sue without an injury, or any functional impairment.

Asbestos litigation is now in its fourth generation with hundreds and thousands of new companies being sued in the litigation who were never sued before. We have forty-five companies in bankruptcy because of payments to thousands of people who have no injury or impairment. They are uninjured in the traditional tort sense.

Why do these cases get settled? Well, when eight thousand cases are instituted at the same time in places like West Virginia, Texas, Louisiana, Mississippi, where some of us spend a great deal of our time, if you don’t settle these cases the jury verdicts are usually substantial. The company can be adversely affected in a substantial way.
The economic coercion on American corporations is significant. We have wasted hundreds of millions and billions of dollars in a system that has become irresponsible because of the aggregation of huge numbers of cases that are impossible to try.

I am all for paying injured victims. For example, if there are people with mesothelioma, who have suffered a substantial injury, they should be recompensed.

The problem is not so much transaction costs, which are substantial. There have not been huge transaction costs in asbestos for five years, because there have been mass settlements. But the presence of hundreds of thousands of cases that are in our courts that should not be in the system, is causing a crisis. This mass of litigations is creating all kinds of problems for the judicial system and forcing corporations into bankruptcy.

Moderator
Well, this segues us into a causation question. Aaron?

Professor Twerski
I wanted to respond, basically, because I have been under attack. Number one, in Agent Orange, I don’t think we got close to generic causation. And that may be true about breast implants as well.

David made the point that causation is not a problem because these cases are never tried. Well, that’s the point. They are never tried because no defendant can afford to try causation in a class action setting.

Judge Posner said it well in Rhone-Polunc: if you are trying individual cases and you win ten out of twelve or thirteen out of fourteen and you are forced to roll the dice on the entire company based on one case in a class action, the risk is simply too high.

Now, I would really like to align myself with Margaret. I am

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34 In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995).
not arguing for the 1840 model role of causation. But I think that there is a causation question that has to be thought through, and I don’t think we have thought it through yet. And it has to be tied to issues of fault. It has to be tied to issues of knowledge. If we are going to try mass torts, we are going to have to rethink what kind of causation model we want to have.

So, I do not want to align myself with the Neanderthals on this issue. But it is absolutely imperative that we seek out a new model for causation.

Some courts have fussed a little bit with the issue of proportional causation, but that doesn’t fully answer the problem. What ought the causation rules be for defendants who seek to remain ignorant about the causal connection between their products and future injuries? That may have been taking place in the breast implant cases. What does compensation look like in a world where causation cannot now and may not ever be determined? That is an important question that has to be faced. And it doesn’t get faced right now. We profess allegiance to the traditional causation rules and they are not working. As a result we confront huge settlements which may or may not have any integrity.

So, I think we are going to really have to rethink the whole world of causation in terms of corporate conduct and what kind of compensation system we want in a world where we do not know and may never know the answer to the causation question.

**Moderator**

The last person on this subject is Professor Schuck and then we will move on to the next question.

**Professor Schuck**

I want to mention two logical errors that I see in this conversation and outside it. The first was exemplified for me by Judge Scheindlin’s comment but other people have made it as well, and Judge Weinstein certainly affirms this constantly. We observe

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that Congress has not devised a legislative solution to a problem, and the inference is then drawn that Congress is irresponsible. Congress is immoral. Congress has been captured. Any sensible and democratically legitimate institution would craft the legislative solution.

I think that inference is illogical. It is illogical because there are lots of reasons why legislative solutions are not developed, some of which have to do with the fact that it is an incredibly complex problem. And because it is an incredibly complex problem, the solutions that lend themselves to legislative prescription may be worse than the status quo. It may also be the case that there is no political consensus on a solution. That is not capture. That is not irresponsibility. That’s the way democratic societies work. We require a consensus on a solution—on how a problem ought to be defined and remedied in a particular way—before we legislate.

It may be that the background institutions are thought to be adequate to handle this, as messy as it may be. Which brings me in part to David Rosenberg’s comment, which is that one of our background institutions is the insurance contract. Perhaps legislators think that this is a better way to address this problem because as he suggested—and I think his logic is irrefutable about this—poor people and victims are going to pay for the insurance one way or the other. They can get insurance through a voluntary contract arrangement, or they can get insurance through the mandated tort system. The insurance through the tort system, however, is not an insurance contract that any rational person ex ante would want to buy. After the accident, of course, it is a very different story.

So, there are lots of reasons why legislative solutions are not adopted, and I think it is wrong and in some ways rhetorically irresponsible to suggest that the fact that no legislation was enacted means that there is a void out there that the courts have to fill.

The second logical error relates to Aaron’s point. In the Agent Orange case, you established as clearly as your judicial rhetoric could that generic causation had not been demonstrated, and you subsequently told me that the scientific evidence that has emerged
since then has fortified your judgment or causation.\textsuperscript{36} I think you are absolutely right.

Why, then, did you feel that it was appropriate for you to castigate and excoriate the government for not compensating people whom you said have not been injured in the fashion that was alleged? The government has veterans programs, medical benefits, and so forth that were supposed to cover these injuries, but you are suggesting that the government had an obligation to go beyond that, even as you insisted that no causation has been established. I don’t understand that; it seems illogical to me.

\textit{Judge Weinstein}

Well, you’ve got to talk about a political issue as you do, compared to a private issue vis-à-vis the corporations.

As far as the corporations were concerned, it isn’t true that there was no causality shown. There were the rudiments of a demonstration of possible general causality. Certainly not enough to show—

\textit{Moderator}

National consensus causality.

\textit{Judge Weinstein}

Certainly not enough to show that any particular person had been injured by this stuff.

\textit{Professor Twerski}

Even epidemiologically, that was your point, that epidemiologically—

\textit{Judge Weinstein}

Epidemiologically the case was not clear. Epidemiology is a science, as you know, that has much more pressure put on it than it can actually absorb.

The epidemiological studies then available and still available in most cases, do not show individual causation—except in the most

\textsuperscript{36} \textit{In re Agent Orange}, 597 F. Supp. 2d 740, 775-99 (E.D.N.Y. 1984).
rudimentary kind of situations, as in certain types of cancers, mesothelioma from asbestos, certain types of lung cancer from smoking, and certain vaginal cancer from DES. In the main there is no epidemiology available that could show with sufficient clarity individual causation from Agent Orange.

But there was at least at that point a hint of possible general causality. We knew that poison was being put in the atmosphere that could have been avoided. And with the skin tests of mice and some of the other tests, there was the possibility of some form of general harm caused by dioxin from Agent Orange.

As far as the industry was concerned, so long as you didn’t have to make a finding of direct causality to the person claiming injury, you could within limits say that it’s probable you did this and this much general damage. Pay the damage and we will distribute it in a reasonable way. Whether that was right or wrong I am not sure.

But the political problem is different. The political problem, as it was right after World War I, was to assess certain causality on a basis requiring far less scientifically proved statistical relationships. Right from World War I, some diseases were considered as presumptively caused by combat. And in World War II, and now in the Gulf War, we are making the same kinds of decisions.

These are political decisions that I think are properly made in favor of certain categories of soldiers, air personnel, and sailors. You know, the people who are benefiting from the statutory changes include the deep sea sailors who never had any Agent Orange exposure, but there was some kind of a relationship between the diseases and their service.

Professor Twerski
But they had veterans’ benefits.

Judge Weinstein
No, they didn’t. They had general veterans’ benefits. They didn’t have veterans’ benefits for those illnesses because they couldn’t show that they were caused by their service in the Armed Forces.
The benefit system is different. There were no benefits at all for the families. Now, they are beginning, for the first time, to provide some benefits for the families.

The political decisions which gave greater benefits than pure statistical analysis would justify, seem to me appropriate. That’s a decision that is democratic. It says this group of people suffered more because—maybe because they were injured—but at least because they were heroes and they think they were hurt and they might be right; and we are going to give them more. I don’t see anything wrong with that.

_Moderator_

That’s a really interesting place for us to transition, because in your pieces that you sent out to us, you explicitly call for partnering between the government and private attorneys as opposed to what happened in _Agent Orange_, where the government in some sense was an absent and unwilling participant, and we essentially had to use a lawsuit against the manufacturers to force them to accept responsibility.

In this second half I have a few people who have offered to give short reaction pieces on that theme, and then we are going to open it up again to the conversation we have been having.

The people who I have here are Mr. Hausfeld, Professor Hensler, Professor Neuborne, and Mr. Vladeck. So, Mr. Hausfeld.

_Mr. Hausfeld_

Cooperation implies an element of voluntariness, and sometimes it is difficult to achieve that voluntariness particularly with government attorneys, both by reason, let’s say, of the nature of the assignment they have and of the type of case that they may be prosecuting.

Let’s do the criminal case first. Many instances of mass torts arise out of situations where the government may act with a criminal indictment, and then there is a private civil case or mass tort cases filed after.

The difficulty that you have during the government investigation is that the government attorneys are normally consumed by, let’s say, a grand jury process or an information
gathering process for which they are precluded by law from sharing that information with you.

Then, even after, there may be an indictment or a criminal case brought. There is a difficulty in them matching their obligations to pursue the criminal case with, let’s say, a natural coalition with private litigants to exchange information.

There are witnesses who may want to go into a government immunity program or some amnesty program that they would not otherwise do if they felt that they were then being thrown to the private bar as an additional stop between the cooperation between the government and the private attorneys.

The concept of cooperation also now involves exchanges on an international level. In the antitrust area, which most people don’t consider is mass torts but, you know, an antitrust violation is a tort. And there are such things now called global cartels.

What happens when there is a global cartel that operates, for example, out of Europe which has international repercussions that are only pursued in the United States? Can you get cooperation of international agencies to exchange or release information that they may have been gathering in the course of their investigations? Can you basically bypass Hague rules and get information without having to respond to the intricacies of Swiss privacy law or German privacy law without, in essence, putting the person who may have cooperated with an international government agency at risk of prosecution within his own state for releasing information which is then used in civil litigation in the United States?

You’ve got the Justice Department Antitrust Division in the United States and you have the European Commission, basically situated in Brussels, looking at the same types of global cartels. Can you get cooperation between the European Commission and the private plaintiffs that have not yet prosecuted their case in getting the European Commission to share with you the evidence that they might have? That transcends as well, not just the mass tort antitrust aspects but mass tort aspects generally. Baycol\textsuperscript{37} is

\textsuperscript{37} In re Baycol Products Liab. Litig., 180 F. Supp. 2d 1378 (J.P.M.L. 2001) (ordering thirty-six actions “concerning the safety of Baycol, a prescription drug used in the treatment of high cholesterol,” to be centralized in the District of
another recent example of how there might be cooperation between government investigators in Europe and United States civil cases.

I think the frustration in getting that cooperation and the benefits that you could receive in that cooperation are somewhat highlighted by a present case that we have, where there is both a government component and a private civil component. The government has filed its lawsuit against the tobacco companies, essentially piggybacking some of the concepts that were brought by the states but also invoking a RICO claim.38

The public health aspects were dismissed but the RICO claim was maintained.39 And the theory in the RICO claim was that there should be a disgorgement because there was a fraud perpetrated on smokers—that the smokers paid for cigarettes that they otherwise obviously maybe would not have otherwise purchased. And the cigarette companies or the tobacco companies should disgorge their ill-gotten gains.

We filed a case on behalf of the smokers, and the government said to us, “What are you doing in this case?” and we said, “Well, we represent the smokers.” And basically, they said, “Well, no matter what happens, if we recover, you are going to want a piece of what we recover.” And we came to them and said, “Well, you are basically acting as parens patriae for all the smokers, but you haven’t brought the cases parens patriae and you can’t. So, what gives you the right to recover the ill-gotten gains that were paid for by smokers, when there are smokers who can recover in their own right?”

Putting that aside, we said to them, “Look, the cases are in the same court and they involve many of the same issues. Don’t you think we should coordinate so that we could minimize duplication and maximize efficiency and strengthen the unity in presenting a single case.” They absolutely refused.

So, the government is now proceeding at its own pace, in its own litigation style and mode, while we are proceeding on our

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39 See id. at 135 (denying a motion to dismiss the government’s RICO claim but dismissing the government’s public health claims).
pace which now as we presented before the judge is actually quicker than the government’s pace, so that we can be ready for trial before the government can.

And then what happens? Many of the motions that we now have pending will decide issues that the government has to face.

Would it not have been better to coordinate the resolution of those issues, as opposed to either one trying it without the benefit of the other?

These are the practical problems, I think, that are facing coordination and one in which there should be more of. But I do not have a solution on how to make that occur.

**Moderator**

Thank-you. Professor Hensler.

**Professor Hensler**

I wanted to talk just for a few minutes about the implications of the compensation program for the victims of the September 11th attacks.

As you know, Congress passed legislation authorizing such a program very shortly after the attacks, and the Department of Justice is currently drafting rules. There has already been some public debate about what the rules might look like. There has been controversy in particular about whether charitable contributions ought to be offset against federally provided compensation.

And this week there has been some discussion about how benefit determinations are to be made—whether they are going to be made according to some kind of matrix or schedule of damages or on an individualized case by case basis.

To me, the program is important for many different reasons. Many people see it as a potential model for mass compensation in other circumstances. But it is also an interesting program because, at least as drafted by Congress, it appears very much as if the model for this federal compensation program was the tort system.

And it seems to me, that both the passage of the program and the debate that is arising with regard to it do raise questions, not just about what is appropriate for the September 11th victims, but also what is appropriate in other mass tort situations.
And I just want to very briefly run through the questions, many of which echo some of the other concerns that people have expressed about other mass torts.

The first one is how do we decide who is responsible for dealing with the consequences of situations in which bad, disastrous things happen to people through no fault of their own? As we know in the U.S., if an individual becomes ill or dies of natural causes, it can have huge disastrous consequences for their family.

We seem, as a society, to be generally comfortable leaving that to that family to deal with. But if we can link the illness to a product or a substance on deterrence grounds and maybe on corrective justice grounds as well, we think the corporation that manufactured the product should pay. And clearly in the case of September 11th, Congress decided that we should all pay to help the victims of the terrorist attacks, and I don’t think there has been any public dissent on that action to date.

So this seems that this division among different sorts of disasters—not caused by anybody whom we can determine, caused by some corporate wrongdoer, and caused by some terrorists who are criminal—seems very tidy, until you look at it very closely.

And I think what we have been doing this morning is taking a look at that. And we see in practice in mass tort litigation, litigation in which there is considerable question as to whether the tort claimants who recover are actually ill, whether their illness can be linked reliably to a certain product, whether it can be linked in the case of new asbestos cases to the negligence of the new defendants.

And there are also mass torts, as we know, where there are causation questions for some plaintiffs and not for others. And yet, we pay those claimants about whom we have great question about the legal claim, and thereby, inevitably leave less money to pay the claims that are stronger on the law and the facts.

And we also clearly have mass torts where the government took actions on our behalf that contributed significantly to the harm. That was certainly true for those who were initially injured by asbestos.

We could also think of situations in which, in fact, it is the
government’s fault that a device wasn’t properly regulated, but there has been no government contribution to compensate those who were harmed.

In cases where there is a large mismatch between causation and harm and the wrongdoer’s behavior, notwithstanding David Rosenberg, I think most deterrent theorists say it is very hard to make an argument that the tort system is, in fact, an effective deterrent system. But perhaps, there are other reasons why we want to hold these corporations responsible.

It seems to me that the Congressional action—which is really not unique—since we do have other federal compensation programs, but nothing quite like this, should encourage us to think about under what circumstances are different parties—the government, corporations, individuals—responsible for harm.

Secondly, when we provide compensation for injury and death through the tort system, the goal is to make the victim whole, presumably, because that serves deterrent objectives and corrective justice. But the consequence is to sustain the sharp differences in income that exist in our society.

In the current debate about the rules for the victims compensation scheme there is the notion that we should insist on a plan that replicates tort and all the inequities in terms of real social justice that flow from the operations of the tort system. That is seen somehow, as an appropriate expression of a program that represents the society’s and citizens’ desire to take care of victims of these events. It seems to me to be questionable.

I think we need to think much harder in mass torts generally about what our objectives ought to be with regard to compensation. We ought to think about issues of whether there are situations in which the appropriate objective would be to provide insurance or even the possibility—I know it is not popular in this country—that we might give more to those who need it, rather than more to those who had the most to begin with.

Third, there is the issue that, when Congress chose to pass this legislation, it clearly made some decisions about whom to provide for. The act is rather narrowly drawn. We know in this city, as elsewhere in the country and really the world, there are many people who have suffered economic losses. They are not eligible
under this program.

In mass disasters, where many people have small injuries and few losses but others have significant injuries, our norm is to allocate funds to all those who come forward without regard to severity of injury, even though, as I said, that dilutes the resources available for others.

Is that even the policy that victims themselves would choose, if they were asked freely to express their opinions? Again, I think we ought to think harder about that when we compensate people, regardless of who pays for the compensation. Who ought to be eligible for that compensation?

And, finally, there is the critical question that Jack Weinstein has talked about—what the procedures ought to be for determining who is eligible for compensation and how much they should obtain. This week we have seen discussion about that issue in the press. Some lawyers have equated administrative allocation schemes with schemes that provide small, inadequate and unfair compensation, and by inference, they have equated adjudicated determinations with larger and fairer compensation.

The empirical evidence doesn’t seem to me to support this contrast in mass tort litigation. And I think that brings home to me the need for us to work harder to design administrative systems that can meld bureaucratic efficiency and fair process.

**Moderator**

Thank-you. We have already a growing list of people that want to speak afterwards. So, I am going to ask the next few speakers to be brief, and we will then move on to the open discussion.

**Professor Neuborne**

Sure. I want to respond very briefly to the Illinois piece that Judge Weinstein wrote, which I found extremely interesting, and very, very provocative.40

At the risk of attributing more grandiosity to it then it bears, it strikes me that at this point in his jurisprudence, Judge Weinstein is starting to think about a unified theory of mass tort compensation.

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40 Weinstein, *supra* note 5.
In other words, how you bring together in some single theory the various institutional strains of efforts to deal with aspects of a mass tort or a past event that has caused very dramatic injury to large numbers of people?

In thinking about where we go in the future, I found the Illinois piece got me focusing on why the system is essentially disorganized, with groups operating separately, and why that is not an optimum model. And that may tell us a little bit about what the future ought to look like.

I come at it this way: As I was reading the Illinois piece, I began to think to myself, what is it that we try to do when we try to do justice in these mass settings—ranging from the extraordinary experiment of the Holocaust cases, which may not be really court cases at all but simply an opportunity to provide a judicial matrix within which there is a political settlement, ranging to more traditional litigations.

We are trying to do three things, I think. We are trying to engage in disgorgement, where we feel that there has been morally inappropriate behavior by someone that has resulted in someone obtaining money that they shouldn’t have. We have this sense—there is a sense of justice—which requires that they disgorge their ill-gotten gains. We also want restitution in some sense. Let those ill-gotten gains be shifted to the people who actually deserve them and from whom the money was taken.

And then, third, a more generalized idea of compensation, that is unrelated really to disgorgement or to restitution, but some sense that the victim population be left whole.

Deborah, one of the reasons why the September 11th Act may be interesting but not terribly helpful in mass tort, is that disgorgement and restitution are simply not present. That is a model of attempting to find compensation for a horrible event, but not attempting to lay elements of moral determination that underlie both disgorgement and restitution.

But it is clear, I think, in the cases that we do think about now, we try to do all three. And I found myself during the Holocaust

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cases constantly thinking to myself—is this a disgorgement strategy I am following, is this a restitution strategy I am following, is this a compensation strategy I am following, and what institution is best suited and what galaxy of forces are best created to achieve the particular end of the litigation?

We don’t often segregate out in our own minds whether it is disgorgement, restitution, or compensation that we are trying to achieve, and that’s one reason why the current system acts in an untidy way.

I am also going to suggest that the current system acts in an untidy way in two systemic ways. Two systemic breakdowns—that’s what is really driving the Illinois piece—the systemic breakdowns of the existing system.

The system breaks down, as Aaron Twerski brilliantly put it in the first hour—the system breaks down on error deflection. We may not want the same error deflection rules when we are thinking about a disgorgement remedy, a restitution remedy, or a compensation remedy.

When we don’t know; or we can’t know, and we have to decide, how do we tilt it? What are the burden of proof rules?

I think, de facto, if I did a piece on Judge Weinstein’s jurisprudence, I could argue that, de facto, over the years, what he has done is dissolve some aspects of the error deflection mechanism into a much more sophisticated system, where if there is a sort of general determination—call it generic causation, I don’t care, but call it some general determination of fault that would justify a disgorgement remedy or justify a restitution remedy or justify some sanction based on moral fault—at that point, he shifts the error deflection rules and says essentially, “Prove that it didn’t cause it.” And morally, that may be exactly right. It may be exactly what we should do, but it is being done in a way that I think sometimes has not surfaced, and we don’t debate it enough.

And so, I suspect that the future systems and the systems he is predicting will think much more closely about how you want to set up error deflection along those three different streams—disgorgement, restitution, and compensation. And it may well be that certain institutions operating in this area will shift the error deflection mechanism.
If you have a government program, then you prove why the person shouldn’t get it, rather than why the person should get it. And we can set those things up in a very, very subtle way to achieve exactly the end we want.

The second systemic breakdown, this is written about in the academic literature, but lawyers don’t talk about it very much, is an unholy alliance between defendants’ counsel and plaintiffs’ counsel, which may prevent the system from working as well as it does.

I know, as a human being, working in the Holocaust cases, I couldn’t put out of my mind what the consequences to me were of certain actions. I tried very hard to do it, but human beings can’t do it. There is no way 100 percent you can put that out of your mind. And there is a common ground between defendant’s lawyers that want broad releases, and plaintiffs’ lawyers who can deliver those broad releases and who owe a duty to the plaintiff class but also are human beings and understand the economic consequences of delivering the broad release.

That leaves us with a lingering sense that the institution isn’t functioning as well as it could. And as we go into the future, is it possible to work out constellations of institutions, working on the same problem that will both minimize the error deflection issue and minimize the potential for conflict of interest.

As has happened so much in the past, the Illinois piece points the way to do that—by collaborative action, by various institutions that can check each other in areas where the existing system breaks down.

I will just close by saying, if the Holocaust litigation has any interest for the bar generally—and it may not, because it really may be sui generis—but it if it does have interest for the bar, I think it is going to be the fact that Michael and I are running a controlled experiment here. We are running a controlled experiment with two systems: a Swiss settlement, a settlement that is operating under very traditional Rule 23 standards, brilliantly supervised by Chief Judge Korman. And while the negotiations were a coordinated government-plaintiff bar operation, the actual administration of the fund is a classic lawyer-driven, judge-supervised Rule 23 operation.
The German Foundation is a whole different way of thinking about dealing with the issue. It is a non-judicial fund set up with essentially political and diplomatic efforts to run it in a non-judicial way. I have just emerged, myself, with two interesting personal perceptions that are obviously not empirical because they can’t be generalized, but my sense is that the class action mechanism yields more money and yields more transparency and yields more, at least, intense preoccupation with individuals. Whereas the non-judicial mechanism—this mixed mechanism, where lawyers, diplomats, all got together to make a deal—yields less money, less concern with individuals, but much greater speed and much more potential for lower transaction costs, lower individualized transaction costs.

And we are going to wind up having to make choices in the future in building these inter-systemic mechanisms to give us the best possible resolution.

Moderator

I am gathering names to call upon after David speaks.

Mr. Vladeck

I would like to take as my starting point Judge Weinstein’s Illinois law review article, which focuses on the interaction among the three major disciplines on the marketplace that, at least in theory, deter tortious conduct: criminal law, regulatory law, and the tort system itself.\textsuperscript{42} One of the insights that comes through in Judge Weinstein’s article, but which is largely undeveloped in the academic literature, is the nature of the interaction among these three legs of what Judge Weinstein has dubbed “our wobbly stood of civil justice.”

The point I want to begin with is descriptive: namely, that it is wrong, given the current state of affairs, to place too much stock in either of two legs of the stool—criminal and regulatory law—and that to the extent the civil justice system rises or falls, it will be as a result of refinements in the tort system. Neither the criminal law nor the actions of our regulatory agencies provide effective

\textsuperscript{42} Weinstein, \textit{supra} note 5.
discipline on today’s marketplace.

Let’s begin with criminal law and ask whether criminal law effectively deters corporate misconduct in the field of health and safety. The answer is plainly no. The major federal workplace safety law, the Occupational Safety and Health Act, provides for criminal sanctions where workers are killed on the job through an employer’s willful misconduct or where an employer deliberately falsifies records accident records.43 Thousands of American workers die each year in industrial mishaps.44 Many of these deaths are not accidents. In one high-profile case, a fifty-nine year old illegal immigrant from Poland, who worked for a year stirring tanks of sodium cyanide at the Film Recovery Services plant in Elk Grove, Illinois, became dizzy from the cyanide fumes, went into convulsions, and died of acute cyanide poisoning. OSHA inspected the plant after the worker’s death and fined the company $4,855 for twenty safety violations, but later halved the penalty when the company objected. OSHA did not seek criminal sanctions against Film Recovery.45 Unfortunately, OSHA’s handling of the Film Recovery case was not aberrational. Although the criminal provisions of the OSH Act have been on the books for over thirty years, they have barely been used, and no one could plausibly

The story is no different under the Food and Drug Act, which also contains criminal provisions. The Food and Drug Administration, which administers the Act but is represented in court by the Department of Justice, invokes its criminal authority only sparingly. Part of the reason may be the reluctance of the DOJ to bring criminal cases against corporations. Most notorious is the DOJ’s decision, over the heated objection of FDA counsel, not to proceed with an indictment of a company that had manufactured and sold defective baby formula, placing the babies being given the formula at risk of long-term neurological damage and death. Even when the agency succeeds in persuading the DOJ to bring criminal cases it has had difficulty obtaining convictions. The most notable illustration is the agency’s prosecution in Judge Weinstein’s home court of senior officials of the Beech-Nut corporation, which knowingly sold apple juice for babies that was in fact, not “juice” at all, but was simply water with sugar, corn syrup, and food coloring in it. Although two high-ranking company officials were convicted after a full trial, the Second Circuit reversed their convictions and the officials were never retried.

46 See People v. Pymm, 563 N.E.2d 1 (1990) (noting OSHA’s inaction in a case involving industrial workers gravely injured as a result of exposure to high levels of mercury in the manufacture of thermometers); see also Lynn K. Rhinehart, Would Workers Be Better Protected if They were Declared an Endangered Species?: A Comparison of Criminal Enforcement Under the Federal Workplace Safety and Environmental Protection Laws, 31 AM. CRIM. L. REV. 351 (1994). “OSHA has rarely used its criminal prosecution authority and has even more rarely been successful.” Id. at 359; S. Douglas Jones, State Prosecutions for Safety-Related Crimes in the Workplace: Can D.A.’s Succeed Where OSHA Failed?, KY. L.J. 139 (1991) (decrying the “abysmal performance of OSHA” in prosecuting workplace crimes).


49 U.S. v. Beech-Nut Nutrition Corp., 871 F.2d 1181 (2d Cir. 1989) (reversing the convictions of two high ranking Beech-Nut officers on all but one conspiracy count); see Leonard Buder, Ex-Beech-Nut Chief Seeks Probation, N.Y. TIMES, June 7, 1998, at D2 (noting the jury’s decision in Beech-Nut case);
The inability of these and other agencies to effectively use the
criminal laws to punish and deter misconduct should come as no
surprise. Enforcing criminal laws against corporations is
problematic because layers of responsibility and lines of authority
are often blurred and diffused. Finding the one or two individuals
responsible for misdeeds taken in the corporation’s name is hard
enough, proving that they should be held criminally liable for those
misdeeds is often impossible. And so, at least in the health and
safety context that gives rise to mass torts, the criminal law cannot
be seen as an effective deterrent.

As Judge Weinstein pointed out earlier, regulatory agencies
hold enormous promise in terms of placing effective disciplines on
the marketplace. Certainly as a matter of theory, Judge Weinstein
is right. After all, the main function of regulatory agencies is to set
and enforce rules of prospective application to prevent injuries
from occurring.

But it is evident that this promise is unmet. Much of what we
see today in court as mass tort cases—tires with treads that
separate; drugs and medical devices that do more harm than good;
and high levels of toxic substances in the workplace—are the
product of the systemic failure of our administrative state. And
there is no mystery why our regulatory agencies are ineffective in
preventing mass torts.

First, since the early days of the Reagan administration, there
have been sharp declines in the funding of regulatory agencies,
measured either by absolute numbers or as a percentage of Gross
Domestic Product.\(^{50}\) As a result, the size of our health and safety
regulatory agencies has shrunk, not grown, even though the
economy has exploded and the responsibilities entrusted to the
agencies have increased. Today’s regulatory agencies are ill-
equipped to carry out their statutory functions.

Consider the National Highway Traffic Safety Administration
(NHTSA), which is responsible for regulating the automobile

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Rifka Rosenwein, *Beech-Nut Appeal Based on Excluded Evidence*, MANHATTAN

\(^{50}\) See David Vladeck & Thomas O. McGarity, *Paralysis by Analysis: How
industry and all that it makes—including, among other things, occupant crash protection, airbags, fuel system safety, tire design, and fuel economy. According to its 2003 Budget, NHTSA has a total of 659 employees for all of its tasks, regulatory and enforcement.\(^{51}\)

Not surprisingly, the agency cannot possibly keep up with technological advances in automobile design, let alone set standards that would force automakers to install new, safer technology. For example, there have recently been many high-profile cases involving car accidents with ruptured fuel systems, leading to fires.\(^{52}\) Many people have been killed or seriously injured. Judge Weinstein might ask, why hasn’t effective regulation reduced the incidence of these horrific accidents? The answer is hardly satisfying: NHTSA’s fuel safety standards are woefully out of date and are unlikely to be modified any time soon. The fuel systems in today’s cars are governed by the same standards that governed government automobile purchases in 1967. NHTSA simply adopted the standards shortly after the agency was created in 1966 and has not revisited them since. NHTSA is well aware that its standards are inadequate. In 1991, it conducted a study that found that cars on the road were just as likely to sustain fuel tank ruptures as they were in 1967.\(^{53}\)

Why has NHTSA failed to act in the face of this evidence? Because it is an under-funded agency with a skeleton staff that is outmatched by the industry it is charged with regulating—an industry that historically has aggressively resisted regulation.\(^{54}\)

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\(^{54}\) Motor Vehicles Mfr. Ass’n v. State Farm Mut. Auto. Ins., 463 U.S. 29,
NHTSA picks its battles very carefully and has not chosen to fight over fuel safety systems. And even when the agency seeks to push through innovative regulation, it can be stymied by political interventions. Over the past decade or so, rulemaking has become highly political, with interventions (both subtle and overt) coming from the Office of Management and Budget and other political entities within the White House and, at times, from Congress. 55 It was interventions like these that delayed in the installation of airbags for over a decade. 56

Consider another example. The Food and Drug Administration regulates 25 percent of our nation’s economy. It is entrusted with safeguarding our nation’s food supply, including imported foods. All drugs, biological, medical devices, and radiologic products are regulated by the FDA, as are blood products, veterinary medicines, cosmetics and dietary supplements. To accomplish this enormous task, nationwide the agency has only 9,000 employees. 57 That is it—9,000 employees. It is no wonder that problem products, like Fen-Phen and the Sulzer hip replacement medical device, sometimes slip through the cracks.

The Occupational Safety and Health Administration is no better off. It is charged with the responsibility of regulating virtually every worksite in the nation, as well as setting standards to protect workers from toxic substances and harmful physical agents. According to OSHA, it protects 111 million workers at 7 million sites. 58 Yet OSHA has a staff of barely 2,300 employees, 1,123 of whom are inspectors. 59 With a staff of this size, most

49 (1983) (noting that “[f]or nearly a decade, the automobile industry waged the regulatory equivalent of war against the airbag”).
56 See Motor Vehicles, 463 U.S. 29.
58 See Occupational Safety and Health Administration, supra note 44.
59 Id.
employers will never see an OSHA inspector, and even the most deadly workplace hazards go unregulated. For example, in 1993 the agency promised to regulate hexavalent chromium—a widely used metal that is a recognized human carcinogen—calling this the agency’s highest priority. A decade later, the agency has yet to publish even a proposed rule and admitted in court that, absent court compulsion, “OSHA might not promulgate a rule for another ten or twenty years, if at all.” Even were the Court to direct it to issue a standard, the agency doubts that it will be able to complete rule-making until 2007 at the earliest.

The point of this very brief overview is simple: These agencies do not have the wherewithal to do their jobs effectively, and there are significant limitations apart from resources. Most of these agencies do not have subpoena authority. OSHA does not have general subpoena authority. Neither does the FDA nor the NHTSA. And even when an agency musters the resources to take protective measures, it still must run the political gauntlet through OMB, the White House and Congress.

I agree with Judge Weinstein’s intuition that we would get substantial returns on our investment were we to reinvigorate our administrative agencies. We might avoid many of the mass torts that are plaguing our courts. But that day is a long way off. Until agencies have the personnel, technical data, and other resources to deal with emerging hazards; until they issue regulations swiftly when faced with a problem requiring a solution; and until agencies can make decisions insulated from political pressures from inside the executive branch, from congressional committees, and from powerful industry lobbyists, they will not fulfill their promise of

60 See Pub. Citizen Health Research v. Chao, 314 F.3d 143, 145 (3d Cir. 2002) (condemning the agency’s delay and ordering it to expedite the rule-making in the fact of grave risk to exposed workers).
61 Id.
63 OMB’s interference pursuant to Executive Order 12,866 (as amended by Executive Order 13,258) may delay or derail rule-making, and through the Congressional Review Act, 5 U.S.C. § 801, Congress has reserved to itself the right to overturn major regulations—a right Congress exercised in overturning OSHA’s ergonomics rule.
providing an effective discipline on the market. Because the rejuvenation of these two wobbly legs Judge Weinstein has discussed appears unlikely, we have no choice but to rely on our tort system to both deter mass torts and to compensate those injured by them, and for that reason, the tort system must remain as robust as possible.

So we return to the question of how to strengthen our tort system to provide, insofar as we can, individualized justice in mass tort settings. I share Linda Mullenix’s concerns about the procedures currently used, which are principally aimed at enhancing the efficiency of the system. My point is that we need to find ways to modify the mass tort system to deliver individualized justice, even if that means accepting less efficiency.

Moderator
Thank-you. Mr. Feinberg.

Mr. Feinberg
The Judge asked me if I would be prepared today to give just some summary thoughts about the September 11th fund. And having read the statutes and the regs, as many of you have, I think that if the fund does not work properly, it won’t be tried again. And if it does work properly, it won’t be tried again.

Everybody around this table understands that Congress occasionally intercedes with a polio vaccine statute or a Price-Anderson statute or a downwind-rancher statute or a uranium-miner statute or a black lung statute or a September 11th statute. One shouldn’t read too much into these statutes in terms of long term impact. I don’t think they are a substitute, in my experience, for anything other than, importantly, a response to a specific unique situation.

Or to put it another way, I haven’t, in the last thirty years at least, seen any indication that De Tocqueville was wrong when he wrote in 1840 that sooner or later every public law issue of any importance ends up in a courtroom in the United States. And I think that is probably still the case, for good or for ill.

So, the academic, you know, Linda will write some fabulous articles about this, and Deborah will do some fabulous research,
but I am dubious about the long term implications of a response to a horrific unprecedented event.

Also, you know, it is very interesting when you read this statute. In a way, the problem of implementing the statute is much easier than some of the mass torts that we all are familiar with. It is a mass claim, but it is not the type of mass claim I am used to, with hundreds of thousands or millions of claimants.

The way the statute is drafted, it is relatively cabinized as to how many people will claim.

Secondly, it is in large part—everything is relative—it is a traumatic disaster. You are not going to have the toxic tort Agent Orange causation problem that bedevils the system. That’s a plus in terms of trying to figure out a meaningful way to implement it.

I think the problem will be the emotionalism surrounding the whole event and the statute, and the politicization that goes with it. So you are going to have to come up with a plan that deals with that problem of visible emotion and the political fall-out of the statute.

In terms of some of the substantive issues—we have to have offsets; we can’t have offsets; charity should be offset; charity should not be offset. Let’s run the numbers and see if with offsets somebody gets zero. I suggest that there is going to be a limitation on offsets. If without offsets somebody is going to get $72 million in economic loss through an administrative system, I suggest to you that there is going to be some adjustment.

Judge Weinstein

Machiavelli, not Freud. What intrigues me about this statute and experience with Agent Orange and also with asbestos is the temporal flexibility that is required, and isn’t available generally in the law.

In Agent Orange, there was a temporal problem. We got out a little money in order to permit the government ultimately to step in and do what the government had to do that was right, whether it was technically sound or not. They did the right political thing and picked up the ball. And so the court order was just a stop gap to permit something good to happen on the political field.

In asbestos, we have allowed a system to develop that is utterly
debilitating to everyone. We are now in the position where in the Manville bankruptcy, which I revised some years ago because it was being abused, we are paying 5 percent of the value of claims of people with mesothelioma diseases and also 5 percent of claims of people who are just marched through these trailers and find a little spot here and there; they are not suffering from anything.\(^{64}\)

Query: Can the court system, as a court of equity, respond flexibly so that when it appears that the system set up is breaking down, it can intervene on an equitable basis and say, “The system we set up at first is not working. There was a final judgment, but we are a court of equity, and we are going to take another fresh look at it and revise it.” Can we do that? Can we put such an escape valve in the original settlement or judgment? Both sides might balk.

And that’s true in a number of other cases where we don’t have the epidemiology, or we do have it, and new information is made available, or we think we will have it. How can we deal with finality?

Now, in the case of this 9/11 act, you have the possibility of doing that to some extent. We know we have about three thousand people dead and probably about ten thousand or so who have been injured in some way. It is quite possible for the special master to say, look, we are not going to look at the New York statute—death statute—where the guy or gal on the 105th floor who was going to make $100 million probably and leave it to a spouse, we are not going to give them 100 million times more than the Guatemalan immigrant who will probably not be able leave a penny to a spouse. Zip for one and $100 million for the other? Forget about the New York tort law. It is not going to work.

We can say immediately we will give everybody in the family

of the person who died $100 thousand. Come in. Fill out the form. Here is your check. If you had this injury, you get this. So, that’s payment one.

We don’t know what your final payment is going to be because society hasn’t decided how we are going to handle this thing—what the appropriate equities are. So, we are going to appoint commissions or a special master, and in a year or two, we are going to be able to make a second payment—whatever it will be—based on as a new rationale.

That seems to me to make some sense in many mass tort cases. It would take care of the changes in not only evidence, but also in sensitivity with respect to what the compensation should be.

That can be done in asbestos. That’s the advantage of an administrative agency—even a quasi administrative court supervised agency—which can change the rules over the years.

Why do we have to be fixed in our judgment, which is one of the characteristics of the tort system? You get your judgment. Everybody is bound and you go on.

But that doesn’t apply in many mass torts where you have such a general changing community interest, as well as, a lot of individual interests, and when you have changing targets with respect to the science, with respect to how people feel about these things, with respect to the availability of the principle and how it should be applied.

Can we build that flexibility into our mass tort system?

Moderator
David Rosenberg.

Mr. Rosenberg
The question I have is whether this legislation is a useful substitute for a mass tort class action. The short answer is it’s not; it doesn’t promote deterrence or insurance objectives—it’s a waste of money that surely could be allocated to more important social uses. It is buying out these tort claims, much as the Price Anderson Act was read by the Supreme Court to buy out the tort system.65

And so we ask ourselves, is this a good substitute for mass tort class action?

And then, we have to ask ourselves what would we want the tort system to do? And again, I come back to the starting point, because people have made such a big point of it, do we want the tort system to deliver compensation to redress people’s loss?

And I think we are going to find out a good deal about what people lose in these kinds of situations because there is elimination of collateral source—of the standard collateral source rule in this legislation. We are going to find out just how much insurance people actually had because coverage like life insurance will be subtracted from recoveries they get under the 9/11 fund.

We know that most people, that 84 or 85 percent of the people have first party insurance from commercial suppliers and the rest of the people are covered by various forms, and the first group, too, are covered by various forms of government insurance for catastrophic losses, my statement is that the 9/11 fund is a waste of money.

There is no need for compensation. People have been injured terribly, but their injuries do not have any different effects on families of victims from the effects of the injuries that take place on the Major Degan Highway every day. Death is death and disability is disability—and the resulting turmoil, suffering, and disruptions to lives and livelihood are generic consequences of these awful events. We are and should be concerned that dependents have insurance to replace catastrophic losses regardless of the cause. From a compensation point of view—putting aside the rationale of buying out tort claims—when people have adequate insurance they should not receive any special payout because of the cause of loss, 9/11 or otherwise. If we think people don’t have adequate insurance, then it’s inadequate in general, not just for 9/11 or any specific risk. Apparently, judging from the estimated total payout under the 9/11 fund, Congress has $5 or $6 billion extra that could be devoted to catastrophic loss coverage. Everyone would have been far better off had Congress allocated that sum to increase coverage under social security and other

government insurance programs, including FEMA.

And so, again, I come back to the fact that the tort system shouldn’t do it, and this substitute for it shouldn’t do it.

What would we want? Again, I come back to the idea that the tort system’s basic rationale would be deterrence. If we are going to substitute the tort system, then we want effective deterrents. How would that be achieved? Well, it won’t be achieved if the money is going to come out of the public treasury, which is what is going to happen here. We are not charging the airlines. We are not charging the security agencies. We are not charging the architects. We are not charging the owner of the buildings about the design and so forth that might have created the risks. We aren’t charging New York City for allowing 110 story buildings that could be a security risk.

Oh, you say, well, wait a minute, it is a foregone conclusion that we would want 110 stories. Maybe it is—if people are willing to pay for it. The only way you can find out whether they are willing to pay for those risks is to impose the costs on the people who are constructing the risky enterprise. It is a harsh hard way of thinking, but if you want a sensibly run society, you will have to think that way.

And for the government to bail out potential tort defendants, which is what this is doing, you are running the risk that our society is not controlling the risks we most desperately want to control.

Now let me just extend this further point. Deterrence is the only rational social objective for the tort system, but I don’t think that all of us involved in the system—judges, lawyers, jurors, academics—have adequate training and resources to do the kind of hard analysis required for effectively thinking through and solving the problems of how best to control risk. Special masters and other experts can be hired to assist the lawyers, judges, and other decision makers, but if they truly have uncommon knowledge and skills, then how will the inexpert assess their expert advice? We’ll have to hire experts to do the assessments, and then to monitor this work, we’ll have to hire another set of experts.

We are in desperate, near intellectually bankrupt situation.

So, when I talk about deterrence it is with a big qualification.
The legal system as presently constituted can’t do the work of devising and implementing effective means of managing accident risks in a socially responsible fashion. I agree with the point Peter Shuck made: courts and the tort system are primarily justified as a check and balance against the power and potential for slacking, self-dealing and perfidy in other social as well as governmental institutions. Inevitably, we will pay a high price for having this mixed system. The cost can be reduced substantially, however, by devoting the resources to training those who oversee the tort system in the theories and methods of effective social problem solving and policymaking, in particular, in controlling accident risk. It’s a task for the law schools, which so far have failed society abysmally.

Judge Weinstein

Deterrence, deterrence. It is a shibboleth. I see it every day in my criminal court. I see it in the civil court. There is no indication of any deterrent. The deterrents, with respect to September 11th in searching baggage, was nonexistent. Every one of the baggage searchers continued to do exactly what they did. Deterrence isn’t going to do it.

If the government steps in and says the system didn’t work, we will do it now in a different way, that may work. But deterrence? I would like to see studies of the deterrence in the criminal or civil systems.

Every ten years, I get the same group of new people who were just let out of jail, who are committing the same crimes with respect to housing here and abusing federal funds. And I don’t think anybody has suggested that the tort law has any deterrent effect. Have there been such studies, Professor Hensler?

Professor Hensler

There is no good evidence that the tort system deters bad behavior, and there is lots of good reason to think that it would not because of all of the characteristics that we have discussed here.

The deterrence theory is based on a set of assumptions about the link between a decision and its outcomes. And if that link doesn’t exist, why you would expect to get deterrence is beyond
HONORING JUDGE WEINSTEIN

Moderator
Well, because we are going to have to break for lunch at 1:15, I’ve got a group of people here I know have asked to speak and Sheila is the next one.

Ms. Birnbaum
Let me just say, Judge, I think that if we had a system—you can go back to the Manville bankruptcy, perhaps—I think, in your equitable powers and redistribute the money that is left.

Moderator
The money that is left in the trust now?

Ms. Birnbaum
Yes, I think you can do that. Well, we can talk about that. But the answer is that wouldn’t really solve any problem except in the Manville Bankruptcy.

The fact is that unless there is some legislation, what you do only affects one defendant who is already in bankruptcy and doesn’t affect all the other thousands of cases, hundreds of thousands of cases in all kinds of state courts because no one sues in a federal court for asbestos anymore, in which they are not going to follow Judge Weinstein, even if he has the right approach because they will do what Helen Freedman was just talking about. They will make sure the people in West Virginia, are going to get as much as they can as soon as they can and the hell with people in the rest of the country.

So unless there is some nationalization, unless there is some real dramatic change as a result of legislation, we will not resolve these issues.

I think Ken is absolutely right that this is a one time situation, based on a horrendous act that no one was really responsible for in the end.

I would like to just raise one other issue. I am pessimistic that we will see real reform. We will likely make changes around the edges. For example, we will create more transparency in class
action settlements.
The problem is that we have created through the mass tort system what I would call institutionalized victimization. Everybody has become a victim. Everybody who ever took a product that has been recalled becomes a victim. And, in fact, the problem is that people really believe they are victims because their lawyers and others tell them they are victims.
I am not talking about the cases that present political issues such as the litigation involving the Swiss banks and the Holocaust, I am talking about the every day mass torts that arise when a product is recalled especially drugs and devices. That’s where most of the mass tort litigation have occurred and continue to occur. Every recall has the potential to become a mass tort.
So, Judge, I wish some of your ideas could catch on. I think in fact, in the state courts, few of these ideas are being implemented.
But this is a tort litigation system that needs a great deal of fixing and I don’t think the fix is going to come very soon.

Moderator
Mr. Hausfeld.

Mr. Hausfeld
I hear you, Professor, when you talk about deterrents, and whether or not the bar and judiciary are the appropriate mechanisms to impose or at least even oversee risk management. But I say to you from a practical experience, there are a group of people out there who feel they are perfectly capable to exercise risk management and have. And that is the corporations. They will sit there and they will make the determination as to whether or not with the foreknowledge that there is a risk involved, to take that risk.
I remember in the congressional hearings when they were asking the chairman of Exxon whether or not they foresaw the possibility that there would be a disaster of the magnitude of the Exxon Valdez and he said, yes, and we determined to take the risk.
Well, that’s very nice, except the people that paid for that risk weren’t asked if they were willing to assume that risk.
Also, these same companies will then measure what the
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economic loss is. They take that risk as opposed to proceeding on an individual basis through separate litigation to literally protract the ability of each individual victim to receive justice, as opposed to right now saying, “Okay, I made a mistake. I am going to offer restitution or disgorgement or compensation to those that I hurt en masse because there was a mass wrong.”

They will make that determination if we don’t. So rather than deterrents in risk management, I look at this as a matter of accountability. If we permit companies or individuals to assume the right to basically take the risk or avoid the risk—a risk that they don’t pay unless they are held accountable—if we don’t impose through the judicial system the concept of accountability, then what do we do other than foster lawlessness?

People then can act the way they want, take whatever risk they want to impose on others, and then have no liability other than through a political system which is set up to hear conflicting interests of special groups or an administrative body which is principally set up to establish sets of minimum standards or sets of rules of minimum behavior.

Are you really saying that because you don’t like the quality of the justice that’s available through the judicial system then there should be no system?

Moderator
Deborah?

Professor Hensler

The September 11th program is clearly not a substitute for mass tort litigation generally. The reason the model is important is that if the program is judged to work well, then it leaves open the possibility when there is a consensus that the tort system is not doing the best job in a mass injury case, that we could consider another option.

Moderator

Where we are now is that we have about ten minutes left and then we have lunch. And I have Professor Schuck, Professor Berger, Mr. Goldberg and Mr. Vladeck. I really want to give Jack
Professor Schuck

I will try and be brief. I want to make two points that may seem incompatible, and then explain why I think they are perfectly compatible and then make an institutional point.

The first point is that Deborah Hensler is absolutely right. Everything we know about the tort system suggests that we really don’t know how much deterrence the tort system produces.

In some areas it may be relatively significant, maybe in products liability. In other areas, it is probably minimal or non-existent, such as in automobile accidents. But we don’t really know. She is absolutely right about that.

The second observation is that there is enormous deterrence out there. Take 9/11. There have been more than thirty years of terrorism without a single incident like this. You can’t simply look at 9/11 and say, “Well, the system broke down and, therefore, there is no deterrence.” You can’t just look at the criminal justice system and say as Judge Weinstein just did, “All these people come before me as recidivists and they have committed crimes, so there is no deterrence.”

There are lots of deterrents out there but tort law is not probably a major one. Criminal law, I suspect, is a major deterrent, as is the regulatory system and market incentives and other incentives in the case of 9/11. These deterrents help explain why for thirty years there has been terrorism, but there have been no incidents like this.

Now, to the institutional point, one of the reasons why I don’t want judges, even judges as brilliant and as just as you, making broad public policy is that you see a very, very narrow part of the world from the bench. You see the criminals that come before you and infer that they are representative of the larger world. You don’t see the people who are deterred by the criminal law and don’t commit crimes. You see the people who are brought before you.

Similarly, you see the accidents that occur, and you don’t see the non-accidents that were deterred by the legal system and other deterrents. You see a very small part of the world and you do your job as well as it could possibly be done, but your perception is
systematically and institutionally distorted. Everybody around the table agrees that you do it as well as it can be done. But you still have an institutionalized narrow view of the world, and public policy ought not to be made that way.

Moderator
Professor Berger.

Professor Berger
I wanted to return for a moment to the articles on combining administrative, criminal, and tort law and relate them to two of the real issues with tort law that we haven’t quite dwelled on, and that is the compensation scheme that exists under tort law and the attorneys’ fees that exist under tort law, both of which we’ve been tangentially referring to.

I think the value of looking at the criminal and the administrative schemes, though there are lots of other problems that come up, is that maybe it would cause us to rethink a little what compensation ought to be in these tort cases. We perhaps need a much narrower, narrower scheme, and we need to think it through, as well as the attorney’s role in producing these awards.

Another problem is that we have a shift in the heads of administrative agencies every time we have a new election, and we have a politicized administrative scheme and a department of justice that is more politicized than what we see in the judiciary. And I see that as adding a new layer of problems, that one has shifts in policy, that are far greater than what happens in the court system.

But I think that for other reasons we really should take a stronger look as to whether there are things one could get out of these other systems in terms of remedies and allocation of resources that we need to pay attention to.

Moderator
Professor Goldberg.

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Weinstein, supra note 5.
Professor Goldberg

One way to think about the intersection of these areas of law is as a three-legged stool. Or, better, the question is whether we believe the stool really has or should have three legs, whether there’s a distinct role for criminal, regulatory, and tort law to play.

What I haven’t heard yet from the judge is why tort law is different from administrative law or criminal law. In his view, tort looks like the third leg of the stool, the bigger leg, the stronger leg, because it is not just tort law in the conventional sense of identifying a responsible wrongdoer but also administrative law and criminal law already rolled into it as a kind of super leg.

And so I think we need to think harder about or distinguish two sets of questions. One is what do you want tort law to do as a distinctive institution, if anything? And once we have isolated that question, then there is an entirely separate set of questions, which is should there be other institutions besides tort law, because tort law doesn’t do a very good job of certain things?

If we conceive of tort law as an institution for redressing wrongs or whatever you want to call it, it may be that it actually does that pretty well. It also may be that it needs modification to do it well with respect to modern torts. It may be that we need to rethink not just causation but what the definition of a wrong is. For example, it may be a corporate wrong not to disclose information, as Margaret Berger, has suggested, in which case the wrong is complete upon the nondisclosure.

But that’s still within the conception of tort law as redressing a wrong. Now, that system may be terrible at deterring. It may be terrible at compensating people systematically and equally, but that doesn’t mean we should take tort law and make it into something else, which has been the instinct of every academic that has studied tort law in the twentieth century. Rather, it may suggest that we ought to let tort law do what it does well, and then develop other modes of law, regulatory, whatever, which can do the jobs that we want the law to do, not tort law, but the law.

Moderator

Mr. Vladeck you have the last comment and then Judge Weinstein you wrap up for us.
Mr. Vladeck

I will be brief. I just want to respond to the implication that has been raised on a number of occasions—namely that the rise of “no injury” mass tort cases is the responsibility of the plaintiffs’ bar. That suggestion is myth, not fact. And to understand why, it is important to distinguish between cases involving cognizable injuries, like asbestosis, and those cases seeking “medical monitoring” or other forms of relief, not because the plaintiffs are currently suffering injury, but instead because the plaintiffs have been exposed to a dangerous substance and therefore are at risk of developing serious illness.67

I agree that it is the plaintiffs’ bar that has pressed asbestosis cases, but those are cases in which the worker is suffering injury, albeit in many cases the injury is slight. And I recognize that those cases are problematic where insurance-poor or thinly capitalized defendants end up depleting their assets to pay off these claims rather than claims from workers suffering from mesothelioma, lung cancer or severe asbestosis.

But I disagree with the idea that it was the plaintiffs’ bar that pushed the exposure-only cases. Insofar as I know, exposure-only cases were the invention of the defense bar and that the plaintiffs’ bar, at least initially, had to be bludgeoned into taking them on.68 After all, resolving exposure-only cases benefits defendants at least as much as, if not more, than plaintiffs’ lawyers. What defendants seek in mass tort cases is to purchase as much res judicata as they can at the lowest price possible. Exposure-only settlements often permit the defendant to substitute what is invariably an inexpensive insurance policy for the tort system. That is what triggered the phenomena of exposure-only cases. Fortunately, the


68 See Ortiz v. Fibreboard, 527 U.S. 815, 824-25 (1999) (detailing the history of the Fibreboard settlement and the fact that defendants, not plaintiffs, pressed for the inclusion of the exposure-only plaintiffs).
Supreme Court’s rulings in *AmChem* and *Ortiz* have dampened the enthusiasm for exposure-only settlements. But I believe it is revisionist history to blame them on the plaintiff’s bar.

*Moderator*

Judge Weinstein, I would like to let you close.

*Judge Weinstein*

I will need another eighty years to reflect on what you, my learned and dear colleagues, have said today. Thank-you.

My closing for now is the same as the opening with respect to at least tort law. The big advantage of tort law, as I see it, is that in general you have an attorney who holds the hand of the person who feels injured. And that aspect of law seems to be particularly important in the kind of world we are getting into, where people feel disassociated—cut off from the mainstream—where you have so many people and where much of the political system finds itself incapable of dealing with these problems.

To know that you have somebody competent who will fight for you and treat you with the dignity you feel you need under the circumstances of your hurt, seems to me a critical aspect of the work of the legal profession.

Attorneys have begun to solve these problems even in these mass cases. In *DES*, they had TV cassettes that they send out. There are organized plaintiffs’ committees. There are e-mails. There are meetings with the court and with others. There are attorney hotlines.

I am skeptical about deterrence. I am skeptical about compensation. I am even skeptical about reliance on rules of evidence or procedure.

But I do believe that the American lawyer serves a vital function as learned friend of all of these millions of people out here who are bereft of any possibility of protecting themselves and finding some solace on their own in the law and in our present

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Moderator

Well, that’s a very, very fitting way to end today. I want to thank you and all of the participants for a wonderful session. I really think we had a great conversation. Thank-you.
A PROBLEM OF “VIRTUAL” PROPORTIONS: 
THE DIFFICULTIES INHERENT IN 
TAILORING VIRTUAL CHILD 
PORNOGRAPHY LAWS TO MEET
CONSTITUTIONAL STANDARDS

Jasmin J. Farhangian*

The right to think is the beginning of freedom, and speech must be 
protected from the government because speech is the beginning of 
thought.

—Justice Anthony Kennedy

It is only through computer systems and the mail that child 
pornography exists today.

—Alabama Senator Jeff Sessions

The author is grateful to her family and friends for their invaluable 
encouragement and support. She owes a special thank you to her parents for 
serving as a constant source of inspiration.

danger posed to the First Amendment when the Government “seeks to control 
thought or to justify its laws for that impermissible end”).

2 United States Senator Jeff Sessions Press Release, (Sept. 16, 2002), 
available at http://sessions.senate.gov/headlines/child.htm (stating Alabama 
Senator Jeff Sessions’ support for the 2002 anti-child pornography bill). 
Sessions states that child pornography laws to date have been hugely successful 
in eliminating child pornography from bookstores. Id. He alludes to the fact that 
efforts should be focused on enacting legislation to serve as the basis for 
prosecuting individuals who perpetuate child pornography on the Internet. See 
id.
INTRODUCTION

A defendant stands before the court to challenge his conviction for possession of child pornography. The government points to images of child pornography found on the defendant’s computer hard drive. The defendant asserts that this evidence should not form the basis for a conviction since the images do not depict real children at all. Rather, he asserts that the images are computer generated. Furthermore, he insists that the government prove beyond a reasonable doubt that the images are real.

Concern by the United States Government over the realization of this exact scenario helped form the basis for proposed legislation titled the Child Obscenity and Pornography Prevention Act of 2002 (COPPA of 2002) and the Child Obscenity and Pornography Prevention Act of 2003 (COPPA of 2003). The COPPA of 2002 and 2003 were never enacted into law but the Senate ultimately incorporated the virtual child pornography prohibitions contained in the COPPA of 2002 and 2003 into the Prosecutorial Remedies and Other Tools to End the Exploitation of

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3 See infra note 51 (citing numerous state statutes which criminalize child pornography). See also New York v. Ferber, 458 U.S. 747, 773 (1982) (finding that New York state statute prohibiting the dissemination of child pornography was not substantially overbroad and did not violate the First Amendment).


5 H.R. 1161, 108th Cong. (2003). The 2003 bill retains the same title as the COPPA of 2002, namely, “An act to prevent trafficking in child pornography and obscenity, to proscribe pandering and solicitation relating to visual depictions of minors engaging in sexually explicit conduct, to prevent the use of child pornography and obscenity to facilitate crimes against children, and for other purposes.” Id.
Children Today Act (PROTECT Act),\(^6\) which was signed into law by President Bush on April 30, 2003.\(^7\)

The COPPA of 2002 and 2003 and the PROTECT Act were a direct response to the Supreme Court’s decision in *Ashcroft v. Free Speech Coalition*,\(^8\) in which the Court held unconstitutional two provisions of the Child Pornography Prevention Act of 1996 (CPPA), one of which placed a ban on “virtual” child pornography.\(^9\) The legislation, proposed by Attorney General John Ashcroft, attempted to rectify the problems with the CPPA by tailoring virtual child pornography laws to meet constitutional standards.\(^10\) Congressman Lamar Smith of Texas, the bill’s sponsor, stated that Congress tried to respond to the specific objections voiced by the individual Supreme Court justices in *Ashcroft* and that he was confident that the COPPA of 2002 would

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\(^8\) 535 U.S. 234 (2002).


- any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where: (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

*Id.* The second provision, which all nine justices agreed violates the First Amendment, proscribes visual depictions which “convey the impression” that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 257-88 (2002).

pass constitutional muster.\textsuperscript{11} Congressman Smith felt equally strong about the constitutionality of the COPPA of 2003, which he also sponsored.\textsuperscript{12}

This note addresses the constitutionality of the recent attempts to proscribe virtual child pornography, particularly as they face first amendment challenges the CPPA failed to survive. Part I describes virtual child pornography and discusses the development of virtual child pornography law. Part II discusses the Supreme Court’s decision in \textit{Ashcroft}, focusing on the government’s reasons for asserting the necessity of a ban on virtual child pornography. Part III explores the ways in which legislation proscribing virtual child pornography responds to the government’s concerns and introduces the newly-passed ban on virtual child pornography in the PROTECT Act. Part IV argues that any attempt to ban virtual child pornography will prove unsuccessful against a First Amendment challenge. Part V proposes that the government focus its resources on prosecuting offenders of child pornography who utilize technology to create computer-generated images of children rather than on attempting to pass constitutionally faulty legislation.

I. \textbf{THE ORIGINS AND DEVELOPMENT OF CHILD PORNOGRAPHY LAW}

It is well established that the First Amendment does not protect pornography that involves real children.\textsuperscript{13} Because child


\textsuperscript{13} See U.S. CONST. Amend. I. The First Amendment states, in pertinent part, “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .” \textit{Id}. Although the First Amendment was originally construed to protect political and social speech, the Court has consistently held that the First Amendment also protects artistic and other types of speech, even if of a sexual nature. See \textit{Schad v. Borough of Mount Ephraim}, 452 U.S. 61, 66 (1981) (holding that nude dancing, as a form of expression, is within the purview of protected free speech); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02
pornography is not entitled to constitutional protection, legislation that proscribes its creation, possession and distribution is permissible. Virtual child pornography, however, creates a unique problem in that it involves the creation of pornography without the use of actual, live children. Computers have transformed the creation of child pornography into a realm not covered by existing law.

A technique known as “morphing” allows a non-obscene image, such as a photograph of a real child scanned into a computer, to be transformed into an image of a child engaging in sexually explicit conduct. Morphing, short for “metamorphosing,” is a technique through which a computer fills in the blanks between dissimilar objects to create a combined image. For example, through graphics software, an individual can combine the image of a child’s face with that of an adult’s body, erase pubic hair and reduce breast or genital size to create a portrait

(1952) (holding that motion pictures, despite being made for commercial motives, are protected by the First Amendment); Winters v. New York, 333 U.S. 507, 510 (1948) (holding that the distinction between informative speech and speech for entertainment purposes is “too elusive” to deny entertaining expression constitutional protection); see also Osborne v. Ohio, 495 U.S. 103, 109-10 (1990) (allowing states to penalize persons possessing and viewing child pornography); New York v. Ferber, 458 U.S. 747, 756 (1982) (providing that child pornography is not entitled to First Amendment protection so long as the prohibited conduct is adequately defined by state law).

14 See Ferber, 458 U.S. at 761 (holding that the state has an interest in prohibiting images that are the product of child sexual abuse, regardless of their content).


17 Id. at 440-41.

18 Id. at 440 n.5. See Jeff Prosise, Morphing: Magic on Your PC, PC MAG., June 14, 1994, at 325 (explaining morphing technology).
of child pornography that appears genuine.\textsuperscript{19} In fact, this technology allows an individual to create a computer-generated child from adult pornography images.\textsuperscript{20} The image of a Playboy centerfold can be scanned into a computer at very little expense and then altered through the use of morphing technology to create a visual depiction that appears to be of a nude child.\textsuperscript{21}

Virtual child pornography falls outside the parameters of existing child pornography law because it functions through the use of artistic and computer skills to create animated depictions \textit{resembling} real children.\textsuperscript{22} The law with respect to child pornography has undergone many changes to meet the continuing challenges of child pornography itself.\textsuperscript{23} In reviewing real child pornography laws, the Supreme Court has clearly stated that real child pornography does not warrant First Amendment protection.\textsuperscript{24} The Court recently had the opportunity to address the constitutionality of prohibitions on virtual child pornography and, despite its declaration that such prohibitions violate the First Amendment, the legislature continues to enact proscriptions against virtual child pornography.\textsuperscript{25}

\section*{A. The Supreme Court}

From the early 1970s the Supreme Court has struggled with

\begin{itemize}
  \item \textsuperscript{19} Burke, \textit{supra} note 16, at 472 n.8.
  \item \textsuperscript{20} \textit{Id.} at 440.
  \item \textsuperscript{21} \textit{Id.}
  \item \textsuperscript{22} See \textit{New York v. Ferber}, 458 U.S. 747, 765 (1982) (stating that materials or depictions of sexual conduct “which do not involve live performance or photographic or other visual reproduction of live performances,” retain First Amendment protection); \textit{Free Speech Coalition v. Reno}, 198 F.3d 1083, 1092-93 (9th Cir. 1999) (explaining that virtually-created child pornography cannot be suppressed simply because it involves “foul figments of creative technology” that do not involve actual children).
  \item \textsuperscript{23} See \textit{supra} Part I.B (discussing early legislation and amendments to deal with the widespread problem of child pornography).
  \item \textsuperscript{24} See \textit{supra} Part I.A (detailing the Supreme Court’s holdings when analyzing real child pornography laws).
\end{itemize}
defining permissible limitations on pornography. In *Miller v. California*, the Supreme Court provided examples of visual images that states may incorporate into statutes when defining obscenity. For example, a state could regulate “patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated, or patently offensive representations or descriptions of masturbation, excretory functions, or lewd exhibition of genitals.”

Almost ten years later, in *New York v. Ferber*, the Supreme Court expanded the scope of the states’ freedom to suppress material portraying sexual acts or lewd displays of genitalia of children. The *Ferber* Court ultimately held that the First Amendment does not extend protection to persons who sell,
advertise or otherwise disseminate child pornography. The *Ferber* Court rejected the First Amendment challenge, holding that “[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis.*”31 In the first sentence of the *Ferber* decision, the Court observed that “[i]n recent years, the exploitative use of children in the production of pornography has become a serious national problem.”32 The Court, in so expressing its concern over the children harmed in the production of child pornography, indicated that regulation of child pornography warranted different treatment than regulation of adult pornography.33 A noteworthy result of *Ferber* was the Court’s holding that all child pornography that depicted actual children may be prohibited, regardless of whether it was “obscene.”34

Subsequently, in *Osborne v. Ohio*, the Court addressed the issue of whether an individual may possess child pornography privately in his home.35 The Court applied the standards from *Ferber* to determine whether Osborne’s possession of child pornography constituted a violation of thestate statute.

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30 *Ferber*, 458 U.S. at 762.
31 *Id.* at 759.
32 *Id.* at 749. *See also* S. REP. 95-438, at 43 (1977). Legislative findings in 1977 revealed that, “because of the vast potential profits involved, it would appear that [the child pornography] enterprise is growing at a rapid rate.” *Id.*

One researcher . . . has documented the existence of over 260 different magazines which depict children engaging in sexually explicit conduct. Such magazines depict children, some as young as three to five years of age, in couplings with their peers of the same or opposite sex, or with adult men and women. The activities featured range from lewd poses to intercourse, fellatio, cunnilingus, masturbation, rape, incest and sadomasochism. Such magazines . . . are only one of the forms of child pornography that are currently available in the United States. Other forms include ten to twelve minute films known as ‘loops,’ still photographs, slides, playing cards and video cassettes. *Id.*

33 *See Ferber*, 458 U.S. at 756.
34 *Id.* at 764-65. *See supra* note 29 (discussing the facts and holding of the *Ferber* opinion).
35 495 U.S. 103 (1990). In *Osborne*, Ohio police found photographs in Osborne’s home, each of which depicted a nude male adolescent posed in a sexually explicit position. *Id.* Osborne was convicted of violating a state statute.
Ferber, reasoning that the First Amendment similarly does not extend protection to the private possession of child pornography. According to the Osborne Court, the state could prohibit the possession and viewing of these materials because doing so would further the state’s compelling interest in “protecting the physical and psychological well-being of minors and in destroying the market for the exploitative use of children.”

Ashcroft v. Free Speech Coalition, decided nearly three decades after the Supreme Court first addressed obscenity in Miller, provided the Court with its first opportunity to address legislation prohibiting virtual child pornography. The Free Speech Coalition and others originally challenged the CPPA of 1996 in the United States District Court for the Northern District of California prohibiting a person from possessing or viewing any material or performance showing a minor (who was not his child or ward) in a state of nudity, unless the material was presented for a bona fide purpose by or to a person having a proper interest in such materials, or the possessor knew that the minor’s parents or guardian has consented in writing to the photographing or use of the minor. Osborne contended that the First Amendment prohibited the States from proscribing the private possession of child pornography. Id.

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California, asserting that certain provisions of the statute were overbroad and vague, “chilling them from producing works protected by the First Amendment.”\textsuperscript{40} The District Court disagreed, granting summary judgment to the Government.\textsuperscript{41} The Court applied a strict scrutiny standard and held the CPPA did not burden any more speech than necessary to further “important and compelling government interests” advanced by the legislation.\textsuperscript{42} The Court of Appeals for the Ninth Circuit reversed in \textit{Free Speech Coalition v. Reno},\textsuperscript{43} agreeing with respondents that the CPPA was overbroad because it banned material that was neither obscene under \textit{Miller v. California}, nor produced by the exploitation of real children as in \textit{New York v. Ferber}.\textsuperscript{44}

According to the Ninth Circuit, the CPPA was unconstitutional on its face.\textsuperscript{45} On the other hand, four other Circuit Courts of Appeals sustained the CPPA.\textsuperscript{46} These courts, while agreeing that

\textsuperscript{40} \textit{Id.} at 243. Plaintiffs in this action consisted of The Free Speech Coalition, a trade association that defends First Amendment rights against censorship, the publisher of a book “dedicated to the education and expression of the ideals and philosophy associated with nudism,” and individual artists whose work include nude and erotic photographs and paintings. \textit{Id.} at 234. Plaintiffs filed a pre-enforcement challenge to the constitutionality of certain provisions of the CPPA, alleging that they are vague, overbroad, and constitute impermissible content-specific regulations and prior restraints on free speech. \textit{Id.}

\textsuperscript{41} \textit{Id.}

\textsuperscript{42} \textit{Free Speech Coalition v. Reno}, 1997 WL 487758 at *4 (N.D. Cal. 1997) (noting that among the government’s stated interests is the protection of children from sexual exploitation). The District Court further stated that any ambiguity in determining whether an individual depicted in an image “appears to be a minor” could be “resolved by examining whether the work was marketed and advertised as child pornography.” \textit{Id.} According to a strict scrutiny analysis, a challenged Act must be narrowly tailored to further compelling governmental interests. \textit{United States v. Fox}, 248 F.3d 394, 400 (5th Cir. 2001).

\textsuperscript{43} 198 F.3d 1083 (1999).

\textsuperscript{44} \textit{Id.} at 1092-97.

\textsuperscript{45} \textit{Id.} at 1096. “On its face, the CPPA prohibits material that has been accorded First Amendment protection. That is, non-obscene sexual expression that does not involve actual children is protected expression under the First Amendment.” \textit{Id.}

\textsuperscript{46} \textit{See United States v. Fox}, 248 F.3d 394 (5th Cir. 2001); \textit{United States v.
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the CPPA was a “content-based regulation,” found the Act survived strict scrutiny because it was narrowly tailored to meet the government’s compelling interest in protecting children from child pornography offenders and was not unconstitutionally overbroad or vague. In Ashcroft v. Free Speech Coalition, the Supreme Court granted certiorari and ultimately agreed with the Ninth Circuit that the CPPA was overbroad and thus violated the First Amendment.

B. Early Legislation and Amendments

While the Supreme Court has struggled with addressing which prohibitions on child pornography the First Amendment allows, the legislature has sought to deal with the widespread problem of


[T]he First Circuit found that the Act at issue was content-based because it expressly aims to curb a particular category of expression, child pornography, by singling out the type of expression based on its content and then banning it. The Hilton court’s determination that blanket suppression of an entire type of speech is a content-discriminating act is a legal conclusion with which we agree. The child pornography law is at its essence founded upon content-based classification of speech.

See Fox, 248 F.3d at 406. The Court stated that, “[n]otwithstanding the general rule that ‘[c]ontent-based regulations are presumptively invalid’ because of the intolerable ‘risk of suppressing protected expression,’ the Supreme Court has made clear that in regulating child pornography, Congress is entitled to ‘greater leeway.’” Id. at 400 (citing New York v. Ferber).

See Ashcroft v. Free Speech Coalition, 535 U.S. 234, 256 (2002) (holding “[t]he provision abridges the freedom to engage in a substantial amount of lawful speech. For this reason, it is overbroad and unconstitutional”). The Court stated that, “[e]ven if a film contains no sexually explicit scenes involving minors, it could be treated as child pornography if the title and trailers convey the impression that the scenes would be found in the movie. The determination turns on how the speech is presented, not on what is depicted.” Id. at 257.
child pornography itself.\textsuperscript{49} “Child pornography is a social concern that has evaded repeated attempts to stamp it out.”\textsuperscript{50} Congress and state legislatures have vehemently attempted to enact laws that would provide support for the prosecution of individuals “involved in the creation, distribution, and possession of sexually explicit materials made by or through the exploitation of children.”\textsuperscript{51}

In 1977, the Protection of Children Against Sexual Exploitation Act (1977 Act) was enacted as the first federal law to specifically prohibit the sexual exploitation of children.\textsuperscript{52} The law made it illegal to use a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.\textsuperscript{53} The creation of the 1977 Act was propelled by

\textsuperscript{49} See supra Part I.A (discussing the Supreme Court’s analysis of various pornography laws).

\textsuperscript{50} Free Speech Coalition v. Reno, 198 F.3d 1083, 1087 (1999).


\textsuperscript{53} 18 U.S.C. § 2251. The Act provides, in pertinent part, that:

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of
congressional findings that child pornography had become a highly organized multi-million dollar industry in which many children were exploited through the production of pornography. The legislation was flawed, however, in that federal law enforcement officials were unable to make practical use of it in prosecuting offenders.

The Attorney General’s Commission on Pornography found that producers of virtual child pornography primarily employed models that looked like minors. Producers of pornography, in order to cater to the child pornography market, often used very “young-looking performers” and models to give viewers the impression that they were actually looking at minors. As a result, distributors and producers were able to avoid prosecution simply by producing any visual or print medium depicting such conduct, shall be punished as provided under subsection (c), if such person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed, or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed. (b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct shall be punished as provided under subsection (c) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed. (c) Any person who violates this section shall be fined not more than $10,000, or imprisoned not more than 10 years, or both, but, if such person has a prior conviction under this section, such person shall be fined not more than $15,000, or imprisoned not less than two years nor more than 15 years, or both.


See U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S COMMISSION ON PORNOGRAPHY: FINAL REPORT 596-98 (1986) [hereinafter COMMISSION REPORT] (detailing findings that child pornography has been used “to lure children to engage in sexual activity”).

Id. at 618.

Id.
by claiming ignorance or deception by the performers regarding their true age.\textsuperscript{58} This made it impossible, except in the most obvious cases, to be certain whether the performers really were under the age of eighteen, resulting in the hindrance of prosecutions of child pornography offenders.\textsuperscript{59} Consequently, the law has been amended several times since it was first enacted.\textsuperscript{60}

As a result of the deficiencies of the 1977 Act and the \textit{Ferber} ruling, Congress enacted the Child Protection Act of 1984 (1984 Act),\textsuperscript{61} which incorporated a key phrase from \textit{Ferber}, stating with respect to the limits on the classification of child pornography, the “nature of the harm to be combated requires that the state offense be limited to works that visually depict sexual conduct.”\textsuperscript{62} The statute, as amended, prohibits knowingly mailing or receiving in the mail any visual depiction of a minor engaged in sexually

\textsuperscript{58} American Library Ass’n v. Reno, 33 F.3d 78, 89 (D.C. Cir. 1994) (citing to \textit{COMMISSION REPORT} finding that ambiguity regarding a performer’s true age “provided an excuse to those in the distribution chain, who could profess ignorance that they were actually dealing in sexual materials involving children”).

\textsuperscript{59} \textit{Id.} at 89.

\textsuperscript{60} \textit{See} Free Speech Coalition v. Reno, 198 F.3d 1083, 1087 (1999) (discussing deficiencies in the Protection of Children Against Sexual Exploitation Act). Only one person was convicted under the Act’s prohibition against producing pornography. \textit{Id.} at 1087. In addition, the Protection of Children Against Sexual Exploitation Act made it a crime for a person to engage in the distribution for sale of any obscene materials depicting minors engaging in sexually explicit conduct. Pub. L. No. 95-225, § 2(a), 92 Stat. 7, 8 (1978). The Act defined “minor” as any person under the age of sixteen. \textit{Id.} After the Supreme Court’s decision in \textit{Ferber}, an individual could be proscribed from producing or distributing pornographic materials regardless of whether they were obscene or of value. New York v. Ferber, 458 U.S. 747, 753-80 (1982). Thus, the legislature sought to expand the law’s prohibitions by passing the Child Protection Act of 1984, which prohibited the distribution of material depicting sexual activities by children regardless of whether the visual depiction was “obscene.” \textit{See} Maria Markova, Comment, Ashcroft v. Free Speech Coalition: \textit{The Constitutionality of Congressional Efforts to Ban Computer-Generated Pornography}, 24 WHITTIER L. REV. 985 (2003); \textit{See also} 18 U.S.C. § 2251 (2003).


\textsuperscript{62} \textit{Ferber}, 458 U.S. at 764.
explicit conduct.\textsuperscript{63}

Unlike the 1977 Act, the 1984 Act did not require that the trafficking, receipt, and mailing of child pornography be for the purposes of sale or distribution for sale.\textsuperscript{64} By eliminating the requirement that the production or distribution of child pornography be for the purpose of sale, the 1984 Act recognized that a great deal of trafficking in child pornography was not-for-profit.\textsuperscript{65} Further, the 1984 Act did not require that material be considered obscene under the \textit{Miller} obscenity standard before an individual could be criminally prosecuted for producing, disseminating or receiving such material.\textsuperscript{66} The 1984 Act increased

\begin{itemize}
  \item \textsuperscript{63} 18 U.S.C. § 2252 (2003). The amended statute provides, in pertinent part, that an individual is subject to punishment if he or she:
    \begin{itemize}
      \item (1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—
        \begin{itemize}
          \item (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
          \item (B) such visual depiction is of such conduct;
        \end{itemize}
      \item (2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if—
        \begin{itemize}
          \item (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
          \item (B) such visual depiction is of such conduct.
        \end{itemize}
    \end{itemize}
\end{itemize}

\textit{Id.}

\textsuperscript{64} \textit{Id.}

\textsuperscript{65} See United States v. Andersson, 803 F.2d 903, 905-06 (7th Cir. 1986) (finding that Congress intended to extend coverage of the Act to those individuals who distributed prohibited materials without commercial motive).

\textsuperscript{66} Miller v. California, 413 U.S. 15 (1973). \textit{Miller} defined obscenity not protected by the First Amendment as:

\begin{itemize}
  \item (a) whether the ‘average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest [in sex];
  \item (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
  \item (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
\end{itemize}

the maximum fines for violation tenfold and stated that child pornography consisted of visual depictions of children under the age of eighteen whereas the previous legislation protected children under the age of sixteen.67

Federal prosecutions “increased dramatically” as a result of the amended law,68 but the House Judiciary Committee concluded that the seriousness of child pornography further called for a need to ban advertisements related to the sexual exploitation of children as well as a need for greater enforcement of laws that “prohibit the transportation of minors for purposes of sexual exploitation.”69 As a result, in 1986, Congress amended the law once more, enacting the Child Sexual Abuse and Pornography Act of 1986, which banned the production and use of advertisements for child pornography.70

Congress passed the Child Protection and Obscenity Enforcement Act of 1988 (the 1988 Act) in its continued efforts to stop child pornography.71 The law banned the use of computers to transport, distribute or receive child pornography.72 Congress passed the law in response to evidence that computer networks played a substantial role in the exchange of child pornography.73

67 Pub. L. No. 98-292, 98 Stat. (1984). See also Jannelle E. Pretzer, United States v. United States District Court (Kantor): Protecting Children from Sexual Exploitation or Protecting the Pornography Producer?, 20 PAC. L.J. 1343, 1356-57 (1989) (“Raising the age requirement from sixteen to eighteen makes it easier to prosecute the many cases in which fourteen or fifteen-year-olds have been sexually exploited, but proof of their age was not available.”).


69 Id. at 186-87.


72 Id.

73 See generally, Computer Pornography and Child Exploitation Act: Hearings on S. 1305 Before the Subcomm. on Juvenile Justice of the Senate
“The main innovation of the 1988 Act was its recordkeeping requirement,” used to facilitate the enforcement of criminal child pornography laws. 74 Congress’ goal was to compel producers of sexually explicit images to educate themselves and others about the ages of the subjects of visual depictions. 75 In furtherance of this goal, the 1988 Act required “all persons producing material containing visual depictions made after February 6, 1978, showing actual explicit sexual activity to determine the true age of the performers, to maintain records containing this information, and to affix to each copy of the material a statement about where these records could be found.” 76 The records could not be used in criminal prosecutions. 77 Failure to comply with these recordkeeping requirements, however, gave rise to a rebuttable presumption that the performers were under the age of eighteen. 78

After the Supreme Court’s decision in Osborne, 79 holding that


74 American Library Ass’n v. Barr, 956 F.2d 1178, 1182 (1992). Associations representing producers and distributors of books, magazines and films brought action to challenge the constitutionality of the recordkeeping provision of the Child Protection and Obscenity Act of 1988. Id. The Court of Appeals held that claims attacking recordkeeping provisions were mooted by enactment of new legislation eliminating the recordkeeping provisions of the Act. Id.

75 Id.


77 Id.

78 See id. Portions of these recordkeeping provisions were later held unconstitutional because they burdened “too heavily” the right to produce material protected by the First Amendment and because they were not “narrowly tailored” to ban only child pornography. See American Library Ass’n v. Thornburgh, 713 F. Supp. 469 (D.C. Cir. 1989). The 1990 amendment incorporated recordkeeping requirements but “significantly altered” the “scope and burden” of the section’s original recordkeeping requirements. American Library Ass’n v. Reno, 33 F.3d 78 (D.C. Cir. 1994).

the First Amendment does not protect child pornography, Congress enacted the Child Protection Restoration and Penalties Enhancement Act of 1990 (the 1990 Amendment).\textsuperscript{80} The 1990 Amendment went further than the 1988 Act and banned the mere knowing possession of child pornography.\textsuperscript{81} This version of the federal child pornography law prohibited an individual from knowingly receiving or possessing three or more books or films that have been mailed between states and which contain visual depictions of a child under the age of eighteen engaging in sexually explicit conduct.\textsuperscript{82} In 1994, the 1977 federal law was again amended to prohibit the production or importation of sexually explicit depictions of minors.\textsuperscript{83} The amended law also provided for mandatory restitution for victims of child pornography.\textsuperscript{84}

\textbf{C. The Child Pornography Prevention Act of 1996}

Notwithstanding its history of amendments and alterations, child pornography law had yet to face its greatest challenge—the enactment of prohibitions on the creation and possession of virtual child pornography.\textsuperscript{85} Before the CPPA was enacted in 1996,

\begin{itemize}
\item \textsuperscript{80} Pub. L. No. 101-647, § 301, 104 Stat. 4789 (codified as amended at 18 U.S.C. § 2252(a)(4) (1990)).
\item \textsuperscript{81} Id.
\item \textsuperscript{82} Id.
\item \textsuperscript{83} Id.
\item \textsuperscript{84} 18 U.S.C. § 2259 (2003). Individuals harmed as a result of the commission of child pornography were entitled to the “full amount of the victim’s losses” including any costs incurred by the victim for: (a) medical services relating to physical, psychiatric, or psychological care; (b) physical or occupational therapy or rehabilitation; (c) necessary transportation; temporary housing; and child care expenses; (d) lost income; (e) attorney’s fees, as well as other costs incurred; and (f) any other losses suffered by the victim as a proximate result of the offense. Id.
\item \textsuperscript{85} See Free Speech Coalition v. Reno, 198 F.3d 1083, 1089 (9th Cir. 1999) (noting that, until the Child Pornography Prevention Act of 1996, Congress had yet to define the problem of child pornography in terms of animated visual depictions of children). “The actual participation and abuse of children in the production or dissemination of pornography involving minors was the "sine qua non" of the conduct prohibited by the CPPA.” Id.
\end{itemize}
Congress’ focus on eliminating the problem of child pornography was limited exclusively to prohibiting the possession or dissemination of pornography involving real minors. The development of computer-related technology, however, led Congress to expand child pornography laws to address visual depictions that appear to be of real children.

The CPPA expanded the scope of existing federal law to include “virtual child pornography,” defined as:

[A]ny visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where (a) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (b) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct; (c) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or (d) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

Because the CPPA included language banning images that “appear to be of a minor engaging in sexually explicit conduct,” the new definition of child pornography included all apparent child pornography, regardless of whether any real children were involved in its creation.

The Government, arguing that the CPPA’s ban on virtual child pornography was constitutional, asserted that its inclusion of an

non of the regulating scheme.” Id. at 1087.

See id.

See id. (discussing the development of the new law to prevent the use of technology for “evil” purposes).


Id.
affirmative defense ensured the Act could stand up to a First Amendment challenge.\textsuperscript{91} The affirmative defense allowed a defendant to avoid conviction for nonpossession offenses by showing that the materials were “produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children.”\textsuperscript{92} The Ashcroft Court did not officially rule on the affirmative defense in the Act, but did point out that the affirmative defense in the Act was incomplete as well as insufficient.\textsuperscript{93} The Court reasoned, therefore, that the affirmative defense could not save the statute from a First Amendment challenge.\textsuperscript{94} The provision was incomplete because, while it allowed a defendant charged with \textit{possession} to defend on the ground that the film depicts only adult actors, it did not allow a defendant charged with \textit{distribution} of a proscribed work to raise the same affirmative defense.\textsuperscript{95} Furthermore, the Court found the affirmative defense was insufficient because it did not protect individuals who produced speech solely through the use of technology and did not use images of adult actors who appeared to be minors.\textsuperscript{96} Consequently, a defendant remained open to prosecution even where he could demonstrate that no children were harmed in the production of the pornographic images.\textsuperscript{97}

\textsuperscript{91} Ashcroft v. Free Speech Coalition, 535 U.S. at 237 (stating that the Government’s reliance on the CPPA’s affirmative defense is misplaced). The Court allows for the possibility that an affirmative defense might in some circumstances save a statute from a First Amendment challenge. \textit{Id.} at 256. Here, the Court stated that the defense is insufficient as it does not apply to possession or to images created by computer images. \textit{Id.} As a result, a large amount of speech unrelated to the Government’s interest in prosecuting offenders who use images of real children is left unprotected. \textit{Id.} 18 U.S.C. § 2252A(c) (1996).

\textsuperscript{92} 18 U.S.C. § 2252A(c).


\textsuperscript{94} \textit{Id.}

\textsuperscript{95} \textit{Id.} at 255-56.

\textsuperscript{96} \textit{Id.}

\textsuperscript{97} \textit{Id.} The affirmative defense supplies the defendant with an opportunity to prove that his speech is lawful only where he can establish that the actors used in the production of the work were adults. \textit{Id.} The Court also noted that the CPPA’s affirmative defense was lacking because proving that speech is lawful is
II. TURNING THE FIRST AMENDMENT “UPSIDE DOWN”: ASHCROFT v. FREE SPEECH COALITION

When faced with the question whether virtual child pornography as defined in the CPPA falls outside the protection of the First Amendment, the Supreme Court in Ashcroft v. Free Speech Coalition answered with a resounding “No.” According to the Court, the CPPA is overbroad because it abridges an individual’s freedom to engage in a substantial amount of lawful speech and thus violates the First Amendment of the Constitution. “The statute proscribes the visual depiction of an idea—that of minors engaging in sexual activity—that is a fact of modern society and has been a theme in art and literature throughout the ages.” Thus, the statute prohibits speech despite its serious literary, political or scientific value.

a heavy burden and an innocent possessor would most likely have difficulty proving the age of the actors. Further, even if the defendant himself possessed the work, the producer himself may not have “preserved the records necessary to meet the burden of proof.” See infra Part IV (asserting that the affirmative defense in the PROTECT Act similarly creates an unreasonable burden on the defendant).

98 Ashcroft, 535 U.S. at 234-58. The Free Speech Coalition, a trade association of businesses involved in the production and distribution of “adult oriented materials,” and other parties, sought declaratory and injunctive relief by a pre-enforcement challenge to certain provisions of the CPPA before the United States District Court for the Northern District of California. Id. at 234. The Government moved for summary judgment, which the court granted. Plaintiffs appealed to the Court of Appeals for the Ninth Circuit in Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999), which reversed the lower court decision. Id. The Supreme Court granted certiorari. Id. Justice Kennedy delivered the opinion of the Court. Id.

99 Id. at 256-58. The First Amendment does not protect all categories of speech. Id. at 245-46. Defamation, incitement, obscenity, and pornography produced with real children may be prohibited without violating the First Amendment. Id. As the Ashcroft Court stated, though, none of these categories includes the speech prohibited by the CPPA. Id. at 246.

100 Id. at 246.

101 Id. The Court notes the literary merit of the themes of teenage sexual activity and the sexual abuse of children. Id. at 248. The Court points to the works of William Shakespeare as well as to modern Academy Award-nominated
The Government argued that the possibility of producing images through the use of computer imaging makes it very difficult to prosecute those who produce pornography using real children because experts may have difficulty determining whether the pictures were made by using real children or computer imaging.\(^{102}\) The necessary solution, the Government continued, is to prohibit both kinds of images.\(^{103}\) The Government asserted a compelling interest in ensuring that criminal prohibitions against child pornography “remain enforceable and effective.”\(^{104}\) The Court interpreted the Government to be arguing that “protected speech may be banned as a means to ban unprotected speech.”\(^{105}\) The Court refused to follow this reasoning to uphold the CPPA’s constitutionality because this analysis, said Justice Kennedy, “turns the First Amendment upside down.”\(^{106}\) In fact, First Amendment jurisprudence requires the opposite.\(^{107}\) It is preferable to permit films like Traffic and American Beauty, both of which depict underage characters engaging in sexual relations. \(^{110\text{Id.}}\) at 247-48\(\) A single graphic depiction within such works of sexual activity that “appears to” involve a minor would subject the possessor to harsh punishment “without inquiry into the work’s redeeming value”. \(^{11\text{Id.}}\) at 248. The Court stated that:

> Our society, like other cultures, has empathy and enduring fascination with the lives and destinies of the young. Art and literature express the vital interest we all have in the formative years we ourselves once knew, when wounds can be so grievous, disappointment so profound, and mistaken choices so tragic, but when moral acts and self-fulfillment are still in reach. Whether or not the films we mention violate the CPPA, they explore themes within the wide sweep of the statute’s prohibitions.

\(^{1\text{Id.}}\) at 254-55.

\(^{2\text{Id.}}\)

\(^{3\text{Id.}}\)


\(^{5\text{Ashcroft}, 535 U.S. at 255.}}\)

\(^{6\text{Id. “The Government may not suppress lawful speech as a means to suppress unlawful speech.”}}\)

\(^{7\text{Id. The Court’s analysis rests on the presumption that virtual child pornography in which no children are directly involved, is speech entitled to First Amendment protection.}}\)

\(^{8\text{Id.}}\)
VIRTUAL PORNOGRAPHY

some unprotected speech to go unpunished than to suppress speech that should be protected.\textsuperscript{108} This principle, known as the overbreadth doctrine, prohibits statutory prohibitions of speech where “a substantial amount of protected speech is prohibited or chilled in the process.”\textsuperscript{109}

Moreover, the \textit{Ashcroft} Court rejected the Government’s contention that speech prohibited by the CPPA is “virtually indistinguishable from material that may be banned under \textit{Ferber}” and therefore virtual child pornography should similarly be proscribed under the First Amendment.\textsuperscript{110} The \textit{Ferber} Court supported its decision to ban child pornography using real children based on its finding that the acts were “intrinsically related” to the sexual abuse of children.\textsuperscript{111} The \textit{Ashcroft} Court’s ruling was consistent with the holding in \textit{Ferber} in that virtual child pornography, unlike the real child pornography banned in \textit{Ferber}, is not “intrinsically related” to the sexual abuse of children.\textsuperscript{112} The Court concluded that speech prohibited by the ban on virtual child pornography in the CPPA is distinguishable from speech

\textsuperscript{108} See \textit{Broadrick v. Oklahoma}, 413 U.S. 601 (1973) (discussing application of the overbreadth doctrine). \textit{Broadrick} involved a class action brought by certain Oklahoma state employees seeking a declaration that a state statute regulating political activity by state employees was invalid since it was impermissibly vague. \textit{Id.} The Court held that the statute was not substantially overbroad and thus was not unconstitutional on its face. \textit{Id.} at 618.

\textsuperscript{109} See Note, \textit{The First Amendment Overbreadth Doctrine}, 83 HARV. L. REV. 844 (1970) (explaining the overbreadth doctrine). For example, overbreadth attacks have been sustained where the Court believed that rights of associations were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations. \textit{Broadrick v. Oklahoma}, 413 U.S. 601, 612 (1973) (citations omitted).


\textsuperscript{111} \textit{New York v. Ferber}, 458 U.S. 747, 759 (1982). First, child pornography creates a permanent record of a child’s abuse. Second, since traffic in child pornography is an economic motive for its production, “the State had an interest in closing the distribution network.” \textit{Id.}

\textsuperscript{112} \textit{Id.} The \textit{Ferber} decision, while holding that child pornography is not protected by the First Amendment, based its decision on the harm suffered by children during the production of child pornography, rather than on the idea that such depictions communicate. \textit{See Ferber}, 458 U.S. at 758.
prohibited by the ban on child pornography under *Ferber* because the CPPA prohibits speech “that records no crime and creates no victims by its production.” Virtual child pornography is not “intrinsically related” to the sexual abuse of children, according to the Supreme Court, since any causal link between virtual images and harm to real children is “contingent and indirect.”

The *Ferber* Court not only distinguished between real and virtual child pornography, it relied on this distinction to support its holding. “*Ferber* did not hold that child pornography is by definition without value. The Court recognized that some works in this category might have significant value, but relied on virtual images—the very images prohibited by the CPPA—as an alternative and permissible means of expression.” Because the *Ferber* Court relied on the distinction between real and virtual child pornography to support its holding, the *Ashcroft* Court reasoned that the holding could not be used to support the CPPA, “a statute that eliminates this distinction.”

III. TAILORING VIRTUAL CHILD PORNOGRAPHY LAWS TO MEET

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113 *Ashcroft*, 535 U.S. at 236.

114 *Id.* “The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.” *Id.* The Court disagreed with the government’s argument that virtual child pornography would result in harm to real children in the form of sexual abuse. *Id.* This argument is based on the premise that virtual child pornography “whets the appetites of pedophiles and encourages them to engage in illicit conduct.” *Id.* at 253. The Court responded that it could not ban virtual child pornography offenses merely because virtual child pornography offenses may have a tendency to encourage real child pornography offenses because this comes to close to banning thought rather than action. *Id.* See infra Part V (discussing realistic solutions to the problems associated with the advent and existence of virtual child pornography).

115 *Ferber*, 458 U.S. at 765. The Court stated that the “[d]istribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances by children retain First Amendment protection.” *Id.* at 764-65.

116 *Id.* at 761.

117 *Id.* at 763.

118 *Ashcroft*, 535 U.S. at 251.
VIRTUAL PORNOGRAPHY

CONSTITUTIONAL STANDARDS

According to the Government, the existence of computer-generated child pornography has already affected its ability to prosecute child pornography offenders.\(^\text{119}\) In 1992, federal prosecutors brought suit against 104 child pornography offenders.\(^\text{120}\) Of these prosecutions, 85 defendants pled guilty and 9 cases resulted in a guilty verdict.\(^\text{121}\) In contrast, data from 1999 shows that of 510 prosecutions, 360 defendants pled guilty and 18 cases resulted in a guilty verdict.\(^\text{122}\) These statistics show a drop in the number of guilty pleas as well as a decrease in the number of successful prosecutions.\(^\text{123}\)

Congressional findings reveal that the vast majority of child pornography prosecutions today involve images contained on the defendant’s computer hard drive, computer disk or related media.\(^\text{124}\) Congress found that child pornography offenses were pursued in only the most “clear-cut” cases in which there was substantial evidence to support the defendant’s guilt.\(^\text{125}\) To be sure,


\(^{121}\) Id. Nine of these cases were dismissed. Id.

\(^{122}\) Id. Thirty of these cases were dismissed. Id.

\(^{123}\) See id.

\(^{124}\) H.R. 4623, at § 2 (2002).

\(^{125}\) Pub. L. 108-21, Title V, § 501, Apr. 30, 2003, 117 Stat. 676. Evidence submitted to the Congress, including evidence from the National Center for Missing and Exploited Children, demonstrates that “technology already exists to disguise depictions of real children to make them unidentifiable and to make depictions of real children appear computer generated.” Id. The technology will soon exist, if it does not already, to make depictions of virtual children look real. Congress found that: “The vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disks, and/or related media,” id.; “technological advances since Ferber have led many criminal defendants to suggest that the images of child pornography they
the primary reasons reported by prosecutors for deciding not to prosecute a case involving child pornography included weak evidence (22.9 percent), lack of evidence (11.7 percent) and lack of evidence that a federal crime has been committed (11.5 percent).  

Data provided by law enforcement agents shows that when a child pornographer is arrested, he usually has in his possession a collection of child pornography either in hard copies or loaded on computer disks. Problems prosecuting offenders often arise due to the difficulty or impossibility of identifying the children who participated in the production of the pornography where technology has been used to alter images. Further, computer technology may make it impossible to identify whether an image possess are not those of real children, insisting that the government prove beyond a reasonable doubt that the images are not computer-generated,” id.; “[s]uch challenges will likely increase after the Ashcroft v. Free Speech Coalition decision,” id.; “[c]hild pornography circulating on the Internet has, by definition, been digitally uploaded or scanned into computers and has been transferred over the Internet, often in different file formats, from trafficker to trafficker,” id.; “[a]n image seized from a collector of child pornography is rarely a first-generation product, and the retransmission of images can alter the image so as to make it difficult for even an expert conclusively to opine that a particular image depicts a real child. If the original image has been scanned from a paper version into a digital format, this task can be even harder since proper forensic delineation may depend on the quality of the image scanned and the tools used to scan it,” id.; “[t]he impact on the government’s ability to prosecute child pornography offenders is already evident. The Ninth Circuit has seen a significant adverse effect on prosecutions since the 1999 Ninth Circuit Court of Appeals decision in Free Speech Coalition.” Id.

126 DEP’T OF JUSTICE REPORT, supra note 120.
128 See Lydia W. Lee, Child Pornography Prevention Act of 1996: Confronting the Challenges of Virtual Reality, 8 S. CAL. INTERDISC. L.J. 639, 676 (1999) (pointing out that enforcement of existing child pornography laws would be “nearly impossible” if virtual child pornography is left outside the scope of criminal liability because the average viewer would be unable to distinguish between real and virtual child pornography). The average viewer includes the child-victim, perpetrator, police, prosecutor, judge, and jury. Id.
of a real child was used in the creation of child pornography.\textsuperscript{129}

Development in computer technology that make virtual and real child pornography virtually indistinguishable have led to the creation of a good faith or reasonable doubt defense in the enforcement of child pornography laws.\textsuperscript{130} As a result, criminal defendants who might easily have been prosecuted in the past evade conviction by creating a reasonable doubt as to their guilt where they claim that their conduct merely involved virtual child pornography and not a real child.\textsuperscript{131} For example, in \textit{United States v. Kimbrough}, the defense introduced expert witness testimony that computers could be used to generate pictures of children that were undetectably identical to actual child pornography.\textsuperscript{132} This ability could have created a reasonable doubt in the jury’s mind about whether the pictures in the defendant’s possession were real.\textsuperscript{133}

\textsuperscript{129} \textit{Id.}
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} 69 F.3d 723 (5th Cir. 1995). Kimbrough was convicted of two counts of receipt of child pornography and two counts of possession of child pornography. \textit{Id.} at 735. His conviction was reversed in part and remanded for the trial court to vacate Kimbrough’s conviction and to resentence him within the trial court’s discretion. \textit{Id.} at 730. The court required that a jury find beyond a reasonable doubt that Kimbrough knew the images in his possession involved real children. \textit{Id.} at 733. Kimbrough was ultimately convicted. \textit{Id.} at 737. See John P. Feldmeier, \textit{Close Enough for Government Work: An Examination of Congressional Efforts to Reduce the Government’s Burden of Proof in Child Pornography Cases}, 30 N. Ky. L. Rev. 205, 220 (2003) (arguing that the “virtual child” defense has not been a successful one for defendants, contrary to the government’s assertions).

\textsuperscript{133} \textit{Id.} See \textit{United States v. Sims}, 220 F. Supp. 2d 1222 (D.N.M. 2002) (after the decision in \textit{Ashcroft v. Free Speech Coalition}, court entertained motion to reconsider previously denied motion for judgment of acquittal; judgment of acquittal was granted with respect to one set of images in which the government had no evidence other than the images themselves); \textit{United States v. Bunnell}, 2002 WL 927765 (D. Me. 2002) (after the \textit{Ashcroft} case was decided, defendant’s motion to withdraw his guilty plea granted); \textit{United States v. Reilly}, 2002 WL 31307170 (S.D.N.Y. 2002) (after \textit{Ashcroft}, defendant’s motion to withdraw guilty plea granted. The court held that the government must prove beyond a reasonable doubt that \textit{the defendant knew} that the images depicted real children).
Congressional findings suggest that prosecutors, having difficulty prosecuting offenders, are bringing cases against individuals only where they can specifically identify the child depicted or where the image originated. The Government utilized these findings as support for proposed legislation, the Child Obscenity and Pornography Prevention Acts of 2002 and 2003, as well as for the newly enacted the PROTECT Act.

The COPPA of 2002 and 2003 were the subject of criticism. See H.R. REP. No. 107-526, at 2 (2002). The National Center for Missing and Exploited Children testified at Congressional hearings that prosecutors around the country have expressed concern about whether previously indicted cases will continue to be viable. Id. They also expressed concern about whether potentially meritorious prosecutions will decline as a result of the Supreme Court’s affirmation of the Ninth Circuit’s decision in Free Speech Coalition. See id. Other Congressional findings include the following:

(1) Obscenity and child pornography are not entitled to protection under the First Amendment and thus may be prohibited; (2) The Government has a compelling state interest in protecting children and those who sexually exploit them, including both child molesters and child pornographers; (3) The Government has a compelling interest in ensuring that the criminal prohibitions against child pornography remain enforceable and effective; (4) In 1982, when the Supreme Court decided Ferber, the technology did not exist to (a) create depictions of virtual children that are indistinguishable from depictions of real children, (b) create depictions of virtual children using compositions of real children to create an unidentifiable child, or (c) disguise pictures of real children being abused by making the image look computer generated.

Id.

The proposed bills stated that child pornography exists by means of:

[any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where: Such visual depiction is a computer image or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct.


The COPPA of 2002 was passed by the House of Representatives by a 413-8 vote. See David L. Hudson, A First Amendment Focus: Reflecting on the
because, like the CPPA, they criminalized virtual child pornography offenses. Neither proposed Act was enacted into

_Virtual Child Porn Decision_, J. MARSHALL L. REV. 211, 217 (2002). Subsequently, the President called upon the Senate to pass the legislation. See Joseph J. Beard, _Virtual Kiddie Porn: A Real Crime? An Analysis of the PROTECT Act_, 21 ENT. & SPORTS LAW 3 (analyzing the PROTECT Act, Congress’ latest legislative response to the problem of child pornography). However, differences between the COPPA of 2002 and the Senate version of this bill passed in November of 2003 could not be reconciled before the conclusion of the 107th Congress and the COPPA was never enacted into law. Id

Undeterred by the failure of the 2002 Act, the House passed the COPPA of 2003 on March 27, 2003. H.R. 1161, 108th Cong. (2003). Testimony in support of the bill states that the COPPA of 2003 is “closely modeled” on the COPPA of 2002. The Child Abduction Prevention Act and the Child Obscenity and Pornography Prevention Act of 2003: Hearing on H.R. 1104 and H.R. 1161 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary, 108th Cong. (2003) (statement of Daniel P. Collins, Associate Deputy Attorney General), available at http://www.house.gov/judiciary/collins031103.htm. As such, the Act retained its proscription against virtual child pornography in its continued effort to protect the interests of child pornography victims. See H.R. 1161, 108th Cong. (2003). The COPPA of 2003 contains a revised version of § 2256(8)(B) of the CPPA. Id. The House replaced the “appears to be” language with the words “is, or is indistinguishable from.” Id. Second, the COPPA of 2003 removes § 2256(8)(D) of the CPPA, the subparagraph which contained the term “conveys the impression.” Id. By striking this provision, Congress removes the prohibition on material that “is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.” See id. Instead, the proposed Act provided that producers and distributors may not knowingly suggest that material portrays a minor engaging in sexually explicit material. Id. In effect, this incorporates a mens rea requirement into the statute in an attempt to remedy the Ashcroft Court’s concern regarding the overbreadth of this section of the CPPA. See id. In addition, the COPPA of 2003 included an affirmative defense which modifies the affirmative defense in the CPPA. Id. Under the affirmative defense provision, a defendant would be absolved of liability if he could show that the image for which he was arrested did not implicate a real child. Id. They could do this by establishing that either an adult or computer-generated image was used in the production of the alleged child pornography. Id.

law; However, Congress ultimately incorporated provisions from the COPPA of 2002 and 2003 into the PROTECT Act.\textsuperscript{139} As such, the controversy surrounding virtual child pornography continues with respect to the current law.\textsuperscript{140}

According to its supporters, the PROTECT Act addresses the difficulty prosecutors have had in the wake of the \textit{Ashcroft} decision by attempting to “[s]trengthen the laws against child pornography in ways that can survive constitutional review.”\textsuperscript{141} The PROTECT Act seeks to address the \textit{Ashcroft} Court’s concerns about the unconstitutionality of the CPPA.\textsuperscript{142} The PROTECT Act, like the COPPA, amends the CPPA in an attempt to meet the standards of the First Amendment.\textsuperscript{143}

Specifically, the law amends section 2256(8)(B) of the CPPA,\textsuperscript{144} replacing the constitutionally deficient “appears to be” language with the words “indistinguishable from.”\textsuperscript{145} Specifically, the Act bans “Obscene Child Pornography,” defined as “a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting” that depicts an actual minor or image that “appears to be of a minor” engaging in “graphic” sexual activity and “lacks serious literary, artistic, political, or scientific value.”\textsuperscript{146} This

\begin{itemize}
  \item \textsuperscript{139} Doug Isenberg, \textit{The Wrong Answer to Child Porn on the Net}, CNET News.com, May 15, 2003, \textit{available at} http://news.com.com/2010-1071_3-1001105.html (stating that the Act “has received widespread publicity for its coordination of nationwide efforts to locate missing children and their abductors, an effort that has gained momentum thanks in part to the work of Ed Smart, father of formerly missing Salt Lake City teenager Elizabeth Smart”).
  \item \textsuperscript{140} Marcy, \textit{supra} note 138, at 2153.
  \item \textsuperscript{141} DEP’T OF JUSTICE, FACT SHEET: PROTECT ACT, \textit{available at} http://www.usdoj.gov/opa/pr/2003/April/03_ag_266.htm.
  \item \textsuperscript{142} See id.\textsuperscript{143}
  \item \textsuperscript{143} See Marcy, \textit{supra} note 138, at 2152 (discussing provisions of the PROTECT Act in light of the Supreme Court’s concerns in \textit{Ashcroft}).
  \item \textsuperscript{144} 18 U.S.C. § 2256 (West 2000).
  \item \textsuperscript{145} Pub. L 108-21, April 30, 2003, 117 Stat 650; 18 U.S.C. 2256(8). The PROTECT Act expands the definition of “child pornography” to include a digital images, computer images or computer-generated images that are indistinguishable from minors engaging in sexually explicit conduct. \textit{Id.} Indistinguishable is defined as “virtually indistinguishable.” \textit{Id.}
  \item \textsuperscript{146} 18 U.S.C. § 1466A(a)(2)-(b)(2). The Act defines “graphic” images as
definition necessarily includes images which are not created with the use of real children.\textsuperscript{147}

In addition, the PROTECT Act, like the COPPA, incorporates a knowledge requirement.\textsuperscript{148} Thus, a person is in violation of the Act if he or she \textit{knowingly}

[R]eproduces any child pornography for distribution through the mails, or in interstate or foreign commerce by any means, including computer or advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains (i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or (ii) a visual depiction of an actual minor engaging in sexually explicit conduct.\textsuperscript{149}

Significantly, the PROTECT Act, like the COPPA, places the burden of proof on the defendant to prove that the images did not depict real children, rather than requiring prosecutors to prove that the images were made from images of real children.\textsuperscript{150} In those that are or appear to be of a minor “engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex.” \textit{Id.}

\textsuperscript{147} See \textit{id.}

\textsuperscript{148} § 504(a), 117 Stat. at 680-81; Marcy, \textit{supra} note 138, at 2153.

\textsuperscript{149} § 504(a), 117 Stat. at 680-81.

\textsuperscript{150} \textit{Id.} A defendant might meet the affirmative defense by establishing the identity or existence of the actors used to create the pornography. \textit{See Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary House of Representatives on H.R. 1104 and H.R. 1161, Mar. 11, 2003, available at http://commdocs.house.gov/committees/judiciary/hju85642.000/hju85642_0f.htm (citing Honorable Robert C. Scott’s position with respect to the affirmative defense in the COPPA of 2003 that the “Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not lawful”). The Honorable Robert Scott points out that:

Where the defendant is not the producer of the work, he may have no
promulgating this affirmative defense, Congress contends that the Supreme Court in Ashcroft left open the possibility that, had the existing affirmative defense been more complete, the 1996 statute might have survived a constitutional challenge, even if it was overbroad. The affirmative defense allows a defendant to show that “the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct and each such person was an adult at the time the material was produced,” or that “the alleged child pornography was not produced using any actual minor or minors.”

IV. FACING THE FIRST AMENDMENT: WHY LAWS PROSCRIBING VIRTUAL CHILD PORNOGRAPHY ARE CONSTITUTIONALLY SUSPECT

The prohibitions on virtual child pornography contained in the way of establishing the identity or even the existence of the actors, and if the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor.

Id. Under the PROTECT Act, it is an affirmative defense that:

The alleged child pornography was produced using an actual person or persons engaged in sexually explicit conduct; and each person was an adult at the time the material was produced; or the alleged child pornography was not produced using any actual minor or minors.


151 See id; see also Jason Baruch, Case Comment, Constitutional Law: Permitting Virtual Child Pornography—A First Amendment Requirement, Bad Policy, or Both?, 55 Fla. L. Rev. 1073 (2003). Baruch explains that:

Even if the Government were to prosecute parties uttering protected speech, courts generally do, on a “case-by-case analysis,” correct the misapplication of an overbroad statute. A fortiori, the CPPA provides defendants with an affirmative defense that facilitates such correction.

Id. at 1087.

152 18 U.S.C. § 2252A(c)(1)(A), (B); 18 U.S.C. § 2252A(c)(2). See also John P. Feldmeier, Close Enough for Government Work: An Examination of Congressional Efforts to Reduce the Government’s Burden of Proof in Child Pornography Cases, 30 N. Ky. L. Rev. 205 (2003). The PROTECT Act also incorporates the COPPA of 2003’s requirement that the defendant give notice to the prosecution that it will raise the affirmative defense so as to prevent “unfair surprise” at trial. See 18 U.S.C. § 2252A.
PROTECT Act are constitutionally deficient and should be struck down under the First Amendment. Actual child pornography is, without question, not constitutionally protected speech. On the other hand, sexually explicit material that does not involve actual children does not fall within the definition of “child pornography.” The Ashcroft Court struck down the CPPA on the fact that it was overbroad because it criminalized speech that was not obscene and did not involve real children. The PROTECT Act suffers from the same fatal flaw as the CPPA: The bill is similarly overbroad in that it bans innocent speech and works of literary, artistic or political merit in an effort to proscribe virtual child pornography.

To be sure, while the Act amends the CPPA, replacing the constitutionally-deficient “appears to be” language, the language inserted in its place is similarly inconsistent with the First Amendment. The PROTECT Act makes illegal the possession or distribution of computer images or computer-generated images that are, or are indistinguishable from, that of a minor engaging in sexually explicit conduct. The words “indistinguishable from” create the same problem from a constitutional standpoint as the words “appears to be” because they prohibit what the Supreme Court held could not be prohibited—the creation of virtual images that do not implicate or harm children.

As a result of the overbreadth of the statutory language, artists and filmmakers would remain vulnerable to prosecution where they create artistic works without the use of actual children. The Court in Ashcroft unambiguously held that a defendant could not

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155 See id.
156 See supra Part I (discussing the Ashcroft Court’s holding that pornography which does not involve real children could not be proscribed by the CPPA).
158 18 U.S.C. § 2252(A); Feldmeier, supra note 152, at 218.
160 See Ashcroft, 535 U.S. at 246.
161 Id. at 246-47.
be convicted for creating images that do not involve real children. The virtual child pornography provisions of the PROTECT Act will fail on the same ground as the CPPA failed in *Ashcroft*—the Act punishes a defendant where no real children are implicated or harmed.

In support of legislation banning virtual child pornography, Congress seems to assert that the *Ashcroft* Court did not consider the harm that would occur to real children when technology makes it impossible to distinguish real children from virtual children. An examination of the *Ashcroft* opinion, however, reveals that the Court did consider this issue and found that the argument nevertheless did not provide support for the prohibition against virtual child pornography. In response to the Government’s assertion that virtual images promote trafficking in works produced through the exploitation of real children, the Court stated that “[t]he hypothesis is somewhat implausible. If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice.”

Furthermore, it is unlikely the affirmative defense included in the PROTECT Act will save the PROTECT Act from a constitutional challenge because it imposes too heavy a burden on defendants. The government’s arguments in support of the

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162 See *id.* The Court in *Ashcroft* stated, “the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not ‘intrinsically related’ to the sexual abuse of children . . . .” *Id.*

163 See *supra* note 9 and accompanying text (discussing the unconstitutional provision of the COPPA which proscribed virtual child pornography).

164 See H.R. Rep. No. 107-526, at 7-13 (2002) (asserting the need for legislation proscribing virtual child pornography). “Child pornography—virtual or otherwise—is detrimental to the nation’s most precious and vulnerable asset—our children. Regardless of the method of its production, child pornography is used to promote and incite deviant and dangerous behavior in our society.” *Id.* at 12.


166 *Id.* at 254.

167 Feldmeier, *supra* note 152, at 223.
VIRTUAL PORNOGRAPHY

affirmative defense assert that requiring the state to identify whether an image is graphic or a real photograph places an unrealistic burden on prosecutors.\textsuperscript{168} But if this argument stands, and if requiring the government to identify the children in alleged pornographic materials is an impossible burden to meet, the logical conclusion is that requiring a defendant to establish the identity of the children in such images is similarly unreasonable.\textsuperscript{169} The Court in \textit{Ashcroft}, while leaving the door open to the possibility that an affirmative defense could save the CPPA, was very clear that the evidentiary burden at hand was not a “trivial” one.\textsuperscript{170} According to the Court, “if the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor.”\textsuperscript{171} The Court further stated that

\begin{quote}
[t]he Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker
\end{quote}

\begin{footnotesize}
\begin{enumerate}
\item See \textit{id.} at 242. Even some supporters of the COPPA of 2003 concede that Prosecutors’ hands are not entirely tied by the \textit{Ashcroft} decision. According to Associate Deputy General Daniel Collins:

Prosecutors have several potential avenues for proving that a child depicted in an image is real. First, prosecutors might know the identity of a particular child depicted in an image from another child sex abuse situation. Second, prosecutors might be able to establish that a given image predates the technology at issue. Third, prosecutors might be able to present expert testimony that a given image likely depicts a real child.


\item See Feldmeier, \textit{supra} note 152, at 225. “If the government, with its seemingly infinite resources, is purportedly having trouble proving that a depiction is that of a real minor, then how can criminal defendants, many of whom are indigent, be expected to do so?” \textit{id.}

\item \textit{Ashcroft}, 535 U.S. at 255.

\item \textit{id.} at 255-56.
\end{enumerate}
\end{footnotesize}
must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense.172

This burden shifting creates constitutional due process concerns.173 Due process requires that the prosecution prove each and every element of the offense beyond a reasonable doubt.174 Shifting the burden to the defendant to show that images that are indistinguishable from or appear to be actual minors do not involve real children creates a constitutionally impermissible presumption that the defendant was in possession of real child pornography images in the first place.175 The affirmative defense would allow a defendant to rebut this presumption.176 It is the presumption itself, however, that is problematic from a constitutional standpoint because it “relieves the government of its burden of proof on an essential element of the case”—namely that the images themselves depict real child pornography.177

If the PROTECT Act comes before the Supreme Court on a constitutional challenge, the Court, following the Ashcroft holding, will likely conclude that the amended Act is similarly flawed with respect to the affirmative defense.178 Congress’ attempt to remedy the affirmative defense by stipulating that it applies to possession as well as to production and distribution of child pornography fails to protect individuals who create images in which no children were harmed.179

V. WHERE CONGRESS GETS IT RIGHT: VIABLE SOLUTIONS TO THE PROBLEM OF VIRTUAL CHILD PORNOGRAPHY

Child pornography “abuses, degrades and exploits the weakest

172 Id. at 255.
173 Feldmeier, supra note 152, at 224.
174 Id.
175 Id.
176 Id.
177 Id.
178 Id.
179 See Marcy, supra note 138, at 2146.
and most vulnerable members of our society.” The harms associated with the creation and distribution of child pornography are tremendous, both in nature and in scope. The children used to create child pornography suffer direct emotional and psychological problems. Furthermore, child pornography creates a record that could potentially exist forever, thereby deepening the harm associated with the crime. Moreover, sexual abusers may use already-created visual depictions to ensure that their victims will remain quiet about the exploitation. Offenders further perpetuate the cycle of child pornography by luring other children into modeling for them by using the images of other children to work a “peer pressure” approach on their prospective victims.

In enacting the CPPA of 1996, Congress recognized that pedophiles and sexual abusers use child pornography as a way “to stimulate and whet their own sexual appetites.” Thus, the significance of the effort to ban child pornography is heightened

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181 See id. (discussing the role of child pornography in the cycle of child abuse and exploitation); Sarah Sternberg, The Child Pornography Prevention Act of 1996 and the First Amendment: Virtual Antithesis, 69 FORDHAM L. REV. 2783, 2785 (2001) (noting that the “harms associated with child pornography are as varied as they are egregious”).
182 See Sternberg, supra note 181, at 2785.
183 See New York v. Ferber, 458 U.S. 747, 759 n.10 (1982). Because child pornography creates an enduring record, it poses “an even greater threat to the child victim.” Id. “A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.” Id. In addition, “[t]he victim’s knowledge of publication of the visual material increases the emotional and psychic harm suffered by the child.” Id.
184 Sternberg, supra note 181, at 2786.
185 Id. The “peer pressure” consists of seven stages: (1) showing child pornography to a child for “educational purposes”; (2) attempting to persuade the child that sexual activity is permitted and even pleasurable; (3) convincing the child that because his peers engage in sexual activity, such activity is acceptable; (4) desensitizing the child and lowering the child’s inhibitions; (5) engaging the child in sexual activity; (6) photographing such sexual activity; and (7) using the resulting child pornography to “attract and seduce yet more child victims.” Id.
due to the stimulating effect such materials have on those who view it.\textsuperscript{187} Criminal investigations have shown that almost all pedophiles collect child pornography, which may escalate their addiction and desensitize them to its deviant nature.\textsuperscript{188}

According to the National Center for Missing and Exploited Children, child pornography prosecutions have increased an average of 10 percent per year every year since 1995.\textsuperscript{189} The government’s concern that the legality of virtual child pornography will stifle prosecutors in their effort to prosecute offenders of real child pornography laws is not without merit.\textsuperscript{190} First, there is Congress’ finding that, after the Ninth Circuit decision in \textit{Free Speech Coalition}, prosecutions are increasingly being brought only in the most clear-cut cases.\textsuperscript{191} The Ninth Circuit’s decision also resulted in the release from prison of a man who pled guilty to possessing 2,600 images of child pornography.\textsuperscript{192} He was freed after a judge ruled that the state’s law was unconstitutional because it failed to distinguish between real and virtual pornography.\textsuperscript{193}

As the history of efforts to ban real child pornography

\textsuperscript{187} See id.
\textsuperscript{188} Sternberg, supra note 181, at 2786.
\textsuperscript{189} \textsc{the national center for missing and exploited children}, available at http://www.missingkids.com (2004).
\textsuperscript{191} Id.
\textsuperscript{192} See People v. Alexander, 791 N.E.2d 506 (S.Ct. Ill. 2003). Kenneth Alexander was charged under Illinois state law with 45 counts of child pornography. \textit{Id.} He successfully challenged the law, whose definition of child pornography included virtual images, arguing that it was overbroad and thus violated the First Amendment. \textit{Id.} at 511-12. See also Jan LaRue, \textit{Supreme Court Rules First Amendment Protects “Virtual” Child Porn}, (Aug. 23, 2002), available at http://www.cwfa.org/articledisplay.asp?id=2044&department=CWA&categoryid=pornography. Kenneth Alexander was awaiting sentencing and faced up to 15 years in prison because police found close to 2,600 images of children engaging in lewd behavior with other children, adults and animals in his computer at his residence. \textit{Id.} His attorney, Donald Morrison of Waukegan, however, challenged the state law to which Alexander pled guilty to on March 28, citing the U.S. Supreme Court ruling in \textit{Ashcroft v. Free Speech Coalition}. \textit{Id.}
\textsuperscript{193} \textit{Id.}
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demonstrates, prohibitions on virtual child pornography will require continued amendments to bring the laws in harmony with the First Amendment. Un fortunately, resources and time spent by the government on passing constitutionally-suspect legislation diverts resources that can otherwise produce visible results in the fight against child pornography. Legislative attempts at proscribing virtual child pornography, instead of combating child pornography, will harm efforts to prosecute individuals who exploit real children by directing federal resources towards the constitutionally difficult task of prosecuting individuals who create or possess computer generated images. Rather than attempting to ban virtual child pornography, the government should strengthen other areas that would allow for more effective prosecution of offenders.

First, federal funds should be allocated to programs such as the FBI Innocent Images Initiative, which identifies and investigates


195 A dialogue with ACLU member Nadine Strossen about the COPPA of 2002 illustrates this dilemma:

QUESTION: Earlier this year, the United States Supreme Court struck down the Child Pornography Prevention Act, which regulated so-called virtual child pornography, as fatally overboard. Congress responded by immediately going back to the drawing board to craft a supposedly more precise version of the CPPA called the Child Obscenity and Pornography Prevention Act of 2002. Is Congress wasting its time here, and, by extension, wasting taxpayers’ dollars, in attempting to regulate fake child pornography?

RESPONSE: I admit I don’t know what the provisions of this new law are. If they are still dealing with what Justice Kennedy’s opinion correctly analogized to a thought crime, then we’re exactly in that area that I just talked about where protection is absolute. I would defend somebody’s right to look at any image that does not involve the use of an actual child no matter how realistic it is. If that’s what the new law is criminalizing, I think the Supreme Court’s rationale is going to extend to that legislation.

individuals who use the Internet to exploit children. The Initiative reports that, throughout the FBI, there was a 1,280% increase in the number of child pornography cases opened between fiscal years 1996 and 2001. The organization anticipates that the number of cases opened and the amount of resources utilized to address the crime problem will continue to rise during the next several years. Recently, in March of 2002, the Initiative undertook “Operation Candyman,” in which it invested a great deal of time and energy to investigate an “Electronic Group” (“Egroup”), a “community” of people communicating via the Internet. An undercover agent uncovered three Yahoo! Egroups involved in posting, exchanging and transmitting child pornography. One website depicted the Egroup as a group “for people who love kids.” Subpoenas were issued on Internet providers for the addresses of individuals who frequented these sites. Information on approximately 1,400 subjects was provided, and at least eighty individuals have been charged.

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197 FBI INNOCENT IMAGES INITIATIVE available at http://www.fbi.gov/pressrel/pressrel102/cm031802.htm (last visited Oct. 22, 2003). The number of child pornography cases opened increased from 113 in 1996 to 1,159 in 2001. Id.

198 Id.

199 Id.

200 Id. As of March 18, 2002, over 266 searches had been conducted. Twenty seven people had been arrested and admitted to the prior molestation of over 36 children. FEDERAL BUREAU OF INVESTIGATION PRESS RELEASE, available at http://www.fbi.gov/pressrel/pressrel/candyman/candymanhome.htm.

201 The group also stated, “You can post any type of messages you like too or any type of pics and vids you like too. P.S. IF WE ALL WORK TOGETHER WE WILL HAVE THE BEST GROUP ON THE NET.” Id.

202 Id.

203 Id.
Moreover, the Justice Department should increase funding for the Internet Crimes Against Children Task Forces, a department that assists state and local authorities in combating child sexual exploitation.\textsuperscript{204} Since 1998, the Task Forces have helped train more than 1,500 prosecutors and 1,900 investigators, and have provided direct investigative assistance in more than 3,000 cases involving individuals who allegedly use the Internet to perpetuate child pornography crimes.\textsuperscript{205} President George W. Bush has already pledged to increase efforts to expand the investigation and “vigorous prosecution of child exploitation on the Internet.”\textsuperscript{206} The executive branch seeks to increase funding in furtherance of such efforts.\textsuperscript{207} Congress should support such efforts, both financially and vocally, in order to strengthen efforts to prosecute child pornography offenders.

In addition, as designated in the Child Pornography Prevention Act of 2002, resources should be allocated to: (1) create an FBI database of images already known to be of real children, thereby facilitating the prosecution of others found to have those images; (2) encourage greater voluntary reporting of suspected child pornography found by Internet companies; and (3) strengthen enhanced penalties for repeat offenders.\textsuperscript{208}

The creation of an FBI database would answer Congress’ concerns with respect to the increased difficulties faced by the government in prosecuting child pornography offenders.\textsuperscript{209} Evidence submitted to Congress, including testimony from the National Center for Missing and Exploited Children, demonstrates that technology already exists to disguise depictions of real children to make them unidentifiable and to make depictions of


\textsuperscript{205} See id.

\textsuperscript{206} Id.

\textsuperscript{207} Id.

\textsuperscript{208} See H.R. REP. No. 107-526 (2002). In addition to banning virtual child pornography, the COPPA of 2003 would also provide for an FBI database and encourage greater voluntary reporting by Internet companies. Id.

\textsuperscript{209} Id. at 7-13.
real children appear computer-generated. The inability of prosecutors to identify the children who participate in the production of pornography allows criminal defendants who would have been easily prosecuted in the past to go free based on their claims that no real children were used in the production of the pornography.

The COPPA of 2002 included a provision for the creation of a database where images known to be of real children would be compiled. Such a database would ease prosecutions of child pornography offenders by refuting the “reasonable doubt” argument, i.e. that the images they possessed, distributed or created did not utilize real children. Images found in the possession of offenders could be matched up with those in the database to determine if any of the children’s photos match those of the “virtual” children. Efforts to create such a database are being hindered. Consequently, in a futile effort to ban virtual child pornography, Congress has impeded a portion of the Act that is likely to be of great practical use in prosecuting offenders. Rather than continuing to incorporate viable solutions within otherwise constitutionally faulty legislation, Congress should pass separate legislation that creates an FBI database and includes provisions designed to encourage greater reporting of suspected child pornography.

Congress has also begun to address concerns about the lack of reporting of child pornography offenses. Part of the problem is the fact that children who are sexually victimized—in part due to intimidation by the individuals who exploit them—are not likely to report the exploitation. The CPPA of 1996 required

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210 See id.
211 See supra Part II (discussing the Ashcroft decision as well as the government’s concerns that the decision will make it difficult, if not impossible, to prosecute child pornography offenders in the wake of virtual child pornography technology).
213 See id.
214 See id.
216 See THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN,
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communications providers to report to the National Center for Missing and Exploited Children (NCMEC) knowledge of facts or circumstances of potential sexual exploitation crimes against children.\textsuperscript{217} A provider of electronic communication services could be fined for knowingly and willfully failing to make a report.\textsuperscript{218} The NCMEC was to forward the reports to law enforcement agencies designated by the Attorney General.\textsuperscript{219}

Congress stated in its legislative findings that the COPPA of 2002 strengthens this reporting system by adding the new offenses under sections 1466A and 1466B—the sections of the Act proscribing virtual child pornography.\textsuperscript{220} Since the Act never went into effect, though, neither did the purported “stronger reporting system.” A more effective avenue to strengthen the reporting system in the 1996 Act would be to work closely with the NCMEC to encourage greater voluntary reporting of child pornography offenses by informing electronic communication service providers of their legal duty to report such offenses.\textsuperscript{221} To ensure and maximize the effectiveness and impact of such legislation, this legal duty should be addressed in a bill separate from any

\textit{available at} http://www.missingkids.com. “A major step to eliminating child pornography is to make people knowledgeable of both federal and state laws regarding the definitions and criminal implications of child pornography. In doing so, the general public can become more responsive to the issue and report violations to the appropriate officials.” \textit{Id.}

\textsuperscript{218} 18 U.S.C. § 2251.
\textsuperscript{219} \textit{Id.}
\textsuperscript{220} \textit{Id.}
\textsuperscript{221} 42 U.S.C. § 13032(b) (2003); 18 U.S.C. § 2702(b)(6) (2003). Pursuant to the Protection of Children from Sexual Predators Act of 1998, anyone engaged in providing an electronic communication service or a remote computing service to the public must report “knowledge of facts or circumstances” from which a violation of child pornography laws is apparent to the National Center for Missing and Exploited Children (NCMEC) and the FBI or U.S. Customs Service. 18 U.S.C. § 2702(b)(6). Such a report must be made “as soon as reasonably possible” after obtaining knowledge and should include “whatever information . . . that led it to conclude that a violation of federal child pornography statutes” had occurred. 42 U.S.C. § 13032(b).
legislation that seeks to criminalize virtual child pornography offenses. Therefore, if a bill prohibiting virtual child pornography is defeated as unconstitutional or held up in a battle over its constitutionality, legislation will still exist to criminalize the failure of electronic communication service providers to report child pornography offenses.

A possible method for progress in this area would be to make service providers aware of the ease by which they may report offenses to the NCMEC’s CyberTipline, launched on March 9, 1998.\textsuperscript{222} The tip line serves as a national online clearinghouse for investigative leads and tips regarding child sexual exploitation.\textsuperscript{223} The NCMEC has received and processed over 120,000 leads through the Cyber Tipline, at least half of which were reports of child pornography, resulting in hundreds of arrests and successful prosecutions.\textsuperscript{224} In light of the Cyber Tipline’s success, Congress should attempt to direct resources to assisting the NCMEC. Furthermore, in light of the limited federal resources available to investigate child pornography, Congress should expand the scope of investigators to include state and local law enforcement, provided that a proper system is implemented to facilitate the exchange of information between law enforcement on both state and federal levels.\textsuperscript{225}


\textsuperscript{223} Id. The NCMEC’s CyberTipline is linked via server to the FBI, Customs Service and Postal Inspection Service. Id. Leads are received and reviewed by NCMEC’s analysts, who visit the reported sites, examine and evaluate the content, use search tools to try to identify perpetrators, and provide all lead information to the appropriate law enforcement agency and investigator. Id. Both the FBI and Customs Service have assigned agents who work directly out of the NCMEC, and review reports. Id.


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Finally, the government should take steps to inform both parents and children about child pornography so that both are encouraged to report offenses more extensively.226 “Computer telecommunications have become one of the most prevalent techniques used by pedophiles to share illegal photographic images of minors and to lure children into illicit sexual relationships.”227 According to the National Center for Missing and Exploited Children, children who view child pornography begin to view pornographic acts as acceptable and normal.228 This acceptance may decrease the likelihood that they will report such offenses.229 If children are made more knowledgeable about what it means to be solicited on the Internet, they will more likely speak up about such incidents.230 In the same respect, if parents are made more knowledgeable about federal and state laws regarding the definitions and criminal implications of child pornography, they will more likely be responsive to the issue and report such offenses to the appropriate authorities.231

226 See infra note 230 and accompanying text.
229 Statistics have yet to be released to illustrate the decline in the number of successful prosecutions after the CPPA’s ban on virtual child pornography was overturned.
231 Id.
CONCLUSION

It is too soon to determine the extent virtual child pornography will affect the government’s ability to prosecute child pornography offenders. Unfortunately, the scenario envisioned by prosecutors, in which a defendant in possession of child pornography can escape liability by asserting that the government must prove beyond a reasonable doubt that the images they possess, create or distribute are derived from real children, is already a reality.\(^{232}\) The fact remains, however, that the Supreme Court has stated that child pornography may be proscribed only where a real child is involved and where the welfare of real children is primarily in the balance.\(^{233}\) The COPPA of 2002 and 2003 and the ban on virtual child pornography in the PROTECT ACT suffer from a fatal flaw in that their prohibitions on virtual child pornography do not solely implicate real children.\(^{234}\) As such, Congress faces the tremendous and arguably insurmountable obstacle of tailoring virtual child pornography laws to meet constitutional standards. Particularly in light of the problems in the numerous statutes enacted over the last decade, Congress should focus its resources on alternative viable solutions to the problems created by virtual child pornography in order to strengthen the case against offenders of actual child pornography.

\(^{232}\) See supra Part III (pointing to cases in which prosecutors are having difficulty prosecuting cases where defendants assert that the images they allegedly possessed or distributed did not implicate real children).

\(^{233}\) See supra Part II (discussing the Ashcroft v. Free Speech Coalition decision and its implications with respect to virtual child pornography laws).

\(^{234}\) See supra Part IV (analyzing the constitutionality of these recent legislative attempts).
THE STATUS OF SAME SEX ADOPTION IN THE KEYSTONE STATE SUBSEQUENT TO THE STATE SUPREME COURT’S DECISION IN ADOPTION OF R.B.F. AND R.C.G.

Martha Elizabeth Lieberman*

“Today a child who receives proper nutrition, adequate schooling and supportive sustaining shelter is among the fortunate, whatever the source. A child who also receives the love and nurture of even a single parent can be counted among the blessed. Here this Court finds a child who has all of the above benefits and two adults (a lesbian couple) dedicated to his welfare, secure in their loving partnership, and determined to raise him to the very best of their considerable abilities . . . .”1

INTRODUCTION

The demographic changes in the United States over the past century make it difficult to describe an average American family.2 Today, a diversity of perspectives on morality and individual

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1 Adoption of B.L.V.B., 628 A.2d 1271, 1275 (Vt. 1993) (holding that an unmarried same-sex partner could adopt her partner’s biological child).

2 See, e.g., Troxel v. Granville, 530 U.S. 57, 63 (2000) (holding that a Washington state court decision granting grandparents visitation rights to their grandchildren over the objections of the sole surviving parent—a “fit, custodial mother”—violated the mother’s substantive due process rights, and finding that a family can consist of mother and child); See also Nancy E. Walker et al., Children’s Rights in the United States 70 (1999) (discussing how the term “family” now includes households where the parents are divorced, households where grandparents act as parents, and single parent households).
freedoms has produced a spectrum of views on what constitutes a family. Families whose heads of household are gay or lesbian are just one part of that spectrum. Between one and nine million children in the United States are estimated to have at least one gay or lesbian parent. While gay or lesbian couples raise children in every state, the law, as determined by state government in Pennsylvania in particular, does not afford them the same parental rights it affords biological or adoptive parents.

Numerous gay and lesbian couples, in planning their lives together, are seeking to adopt children or undergo \textit{in vitro} fertilization.
SAME SEX ADOPTION IN THE KEYSTONE STATE

fertilization to establish families.\textsuperscript{7} For many of them, gaining recognition of legal parental status for the same-sex partner of the natural or adoptive parent has been an intense struggle.\textsuperscript{8} Alternative families, face a difficult task in becoming integrated within the confines of existing adoption laws.\textsuperscript{9} In Pennsylvania, for

removes several eggs in a procedure called a laparoscopy, and fertilizes them in a Petri dish . . . . Two or three days later, when each egg has divided a few times the doctor can transfer the eggs to the uterus of the woman providing the eggs, with the hope of producing a “test-tube” baby nine months later.

\textit{Id.}

\textsuperscript{7} See AM. ACAD. OF PEDIATRICS REPORT, supra note 4, at 2 (stating that \textit{in vitro} fertilization is an alternative insemination technique and that “[t]he woman or women may choose to become pregnant using sperm from a completely anonymous donor, from a donor who has agreed to be identifiable when the child becomes an adult, or from a fully known donor (e.g., a friend or a relative of the nonconceiving partner)).

\textsuperscript{8} See, e.g., V.C. v. M.J.B., 748 A.2d 539, 548 (N.J. 2000) (denying custody to the former same-sex partner of a lesbian mother because it would be too disruptive for the family, but granting visitation rights instead); E.N.O. v. L.M.M., 711 N.E.2d 886, 890 (Mass. 1999) (granting a former lesbian same-sex partner visitation rights after the couple separated); In re Custody of H.S.H.-K., 533 N.W.2d 419, 421 (Wis. 1995) (denying custody to the former same sex partner and remanding the issue of visitation rights to determine if it was in the best interest of the child).

\textsuperscript{9} See Melanie B. Jacobs, \textit{Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents}, 50 BUFF. L. REV. 341, 344 (2002) (arguing that the current statutory framework for recognizing lesbian second-parent adoption is too complicated and actually only ends up hurting the child and the relationship that child has with her parents). The adoption process is complicated, both legally and emotionally, because it is a lengthy course involving fulfillment of many statutory requirements and is taxing on family relationships. See \textit{infra} Part I.A-B (discussing the history and implications of adoption law on families in Pennsylvania). Common issues faced by newly forming adoptive families include attachment, family reorganization and resolution of differences in sexuality, gender, class and race. Gay and lesbian adoptive families face these issues and additionally must contend with being part of a sexual minority in an often unsympathetic, heterosexually dominant society. See Steven E. James, \textit{Clinical Themes in Gay- and Lesbian-Parented Adoptive Families}, CLINICAL CHILD PSYCHOL. & PSYCHIATRY 475, 480 (2002) (arguing that adoption by gay and lesbians deserves particular attention by the mental health community because of the
example, there is no statutory or common law prohibition against gays and lesbians adopting a child who has no legal parents. On the other hand same-sex couples that attempt to adopt in Pennsylvania are often thwarted because of a statutory provision requiring a biological or original adoptive parent to terminate his parental rights prior to approval of an adoption petition filed by his partner. It seems unreasonable to allow same-sex couples to adopt a child with no legal parents without difficulty but prohibit or set hurdles for those same couples adopting the biological child of their same-sex partner.

On August 20, 2002, however, in In re Adoption of R.B.F. and R.C.G., the Pennsylvania Supreme Court held that unmarried same-sex partners may adopt a child without meeting the statutory requirement that the legal parent first relinquish his parental rights. This groundbreaking decision was hailed as a “win for gays and lesbians across the commonwealth.” The Court held that trial courts have discretion to find cause to waive the statutory relinquishment requirement. The court remanded the unique psychological issues it raises for all involved).


11 23 PA. CONS. STAT. ANN. § 2901 (West 2001) (“Unless the court for cause shown determines otherwise, no decree of adoption shall be entered unless the natural parent or parents’ rights have been terminated . . . .”). There is a spousal exception. See 23 PA. CONS. STAT. ANN. § 2903 (West 2001) (“Whenever a parent consents to the adoption of his child by his spouse, the parent-child relationship between him and his child shall remain whether or not he is one of the petitioners in the adoption proceeding.”).


13 Id.

14 Lori Litchman, Pennsylvania High Court Oks Second-Parent Adoption, LEGAL INTELLIGENCER, Aug. 21, 2002, at B-1 (reporting on the beneficial impact of the Pennsylvania Supreme Court’s decision for gay and lesbian couples in Pennsylvania who are raising children).

15 In re Adoption of R.B.F. and R.C.F., 803 A.2d at 1197 (finding that the statute “affords the trial court discretion to determine whether, under the circumstances of a particular case, cause has been shown to demonstrate why a particular statutory requirement has not been met”). See 23 PA. CONS. STAT. ANN. § 2901 (West 2001) (“Unless the court for cause shown determines otherwise, no decree of adoption shall be entered unless the natural parent or
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consolidated cases to the trial level to determine if cause had been shown to waive the relinquishment requirement.16 On remand, the petitioners in *In re Adoption of R.B.F. and R.C.G.* will have to argue that cause exists to waive the relinquishment requirement because the child is already being raised by the same-sex couple and it would be in the best interest of the child to be legally related to both of her parents.17

This note supports the outcome in *In re Adoption of R.B.F. and R.C.G.*, 18 but disagrees with the court’s reasoning, which fails to effectuate the purpose of the Pennsylvania Adoption Act—to ensure the welfare of the child.19 This note suggests that the Pennsylvania Supreme Court should have taken the extra step of setting a clear standard for the trial courts to use upon remand and in future cases. This note also suggests that the Pennsylvania legislature should take proactive measures to protect the best interest of children by recognizing second-parent adoptions.20

parents’ rights have been terminated . . . .”). Prior to 1982, the section read: “Unless the court for cause shown determines otherwise, no decree of adoption shall be entered unless the adoptee has resided with the petitioner for at least six months prior thereto or, in lieu of such residence, the adoptee is at least 18 years of age or is related by blood or marriage to the petitioner.” See 23 PA. CONS. STAT. ANN. § 2901 (West 1981).

16 *In re Adoption of R.B.F. and R.C.F.*, 803 A.2d at 1195.

17 LESBIAN/GAY LAW NOTES, *Pennsylvania Supreme Court Opens Door to Second-Parent Adoption*, Sept. 2002 (reporting on the decision of in *In re Adoption of R.B.F. and R.C.F.*). When a same-sex partner seeks to adopt the biological or adopted child of his partner, he is seeking formal parental rights protecting his interests in the child in case of possible custody disputes should the partnership dissolve. He is seeking to be a second-parent. In addition, adoption protects the child by declaring legal parents responsible for her well-being and providing formal rights to inheritance and social security benefits should her legal parents die. See Symposium, *Re-Orienting Law and Sexuality: Second-Parent Adoption by Same-Sex Couples in Ohio: Unsettled and Unsettling Law*, 48 CLEV. ST. L. REV. 101, 116 (2000) [hereinafter Becker] (arguing for recognition of second-parent adoption in order to give families stability).

18 *In re Adoption of R.B.F. and R.C.F.*, 803 A.2d at 1195.

19 See 23 PA. CONS. STAT. ANN. § 2724 (a)-(b) (West 2001). See language of the statute supra note 5.

20 AM. ACAD. OF PEDIATRICS REPORT, *supra* note 4, at 1 (stating in second-
Part I of this note examines the development of adoption laws and second-parent adoption in Pennsylvania. Part II analyzes the factual and procedural history of R.B.F. Part III discusses the implications of R.B.F., critiques the vague standards given by the court and suggests clearer standards for use by the trial court on remand and in future proceedings. Part IV argues that the legislature should take affirmative action to protect the best interest of children of same sex couples by approving second-parent adoption.

I. OVERVIEW OF ADOPTION LAW AND HISTORY OF SECOND-PARENT ADOPTIONS

Adoption is a statutory right, unknown at common law. Although Congress has influence over the construction of adoption laws, adoption is generally a question reserved for state regulation. This section examines the development and purpose

parent adoption, “children born or adopted into families headed by partners who are of the same-sex usually have only [one] biologic or adoptive legal parent. The other partner in a parental role is called the “coparent” or “second-parent”). See also Becker, supra note 17, at 115 (supporting recognition of second-parent adoption); Jacobs, supra note 9, at 343 (proposing that the courts use a “statutory parental analytic framework, the UPA, to adjudicate maternity for lesbian coparents, thereby conferring all the rights and privileges of legal parenthood” and thus fully protecting the relationship between a child and her lesbian coparent).

21 See 23 PA. CONS. STAT. ANN. § 2301 (West 2001) (“The court of common pleas of each county shall exercise through the appropriate division original jurisdiction over voluntary relinquishment, involuntary termination and adoption proceedings.”).

22 GINA MARIE STEVENS, CONGRESSIONAL RESEARCH SERVICE, ADOPTION: PARENTAL RIGHTS AND CHILDREN’S INTERESTS, 30 (1994). Stevens explains that:

At the time the Constitution was adopted, its framers felt that states should have jurisdiction over most domestic family law questions. Article I § 8 of the Constitution, the so-called enumerated powers clause, limits congressional authority to act by specifying general subject categories where federal action is permissible. Under this clause and the Tenth Amendment, categories other than those enumerated are reserved for state action. These enumerated powers do not readily
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of adoption laws in Pennsylvania and the current process for adopting a child. This section will also analyze how statutory requirements have affected the development of second-parent adoption.

A. Statutory Adoption in Pennsylvania

In 1925, the Pennsylvania legislature codified adoption, thereby authorizing and defining the procedural parameters of adoption.23 The law generally sanctioned adoption to provide a legal heir to families without male offspring and offered a permanent family to children whose biological parents could not or would not raise them.24

For much of the twentieth century, the adoption process was so guarded it created the illusion that an adopted child was actually the adoptive parents’ biological child.25 Birth parents rarely met adoptive parents, the facts of the adoption were hidden from public view and often the adopted child was not even informed she was adopted.26 Historically, the law reflected this societal attitude by requiring the sealing of adoption records and making it difficult for adoptees to obtain information about their birth parents.27 The secretiveness of the process began to be questioned as parents started to adopt children from foreign countries, adoptive parents

encompass most family law questions, so what federal legislation there is in this area is usually based on some other federal interest, such as conditions on federal grants. Thus, Congress has little express authority to legislate in this area, and the individual states have the primary authority.

Id. at 6. See also Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) (holding that state laws govern the area of domestic relations except in rare occasions when family law comes into conflict with a federal statute).

23 127 PA. CONS. STAT. § 1 (West 1925).


25 See id. at 203 (discussing the social policy reasons for keeping adoptions secret including shame).

26 Id.

27 Id.
increasingly informed their children about their adoption at younger ages, and meetings between birth parents and adoptive parents became routine.\textsuperscript{28}

As social policy shifted during the century, the statutes were amended numerous times.\textsuperscript{29} These amendments were also propagated to codify the court’s interpretation of the laws.\textsuperscript{30} In 1970, in response to society’s changing attitude towards adoption as something more acceptable, the Pennsylvania legislature passed the Adoption Act, replacing the earlier adoption statutes.\textsuperscript{31} The Adoption Act defines who may adopt, who may be adopted, and sets forth the requirements for the contents of an adoption petition.\textsuperscript{32} While adoption law has developed in many ways, the

\textsuperscript{28} Id.


\textsuperscript{30} Symposium, Constructing Family, Constructing Change: Shifting Legal Perspectives on Same-Sex Relationships: Panel One: Family Law: Article: Binding the Family Ties: A Child Advocacy Perspective on Second-Parent Adoptions, 7 TEMP. POL. & CIV. RTS. L. REV. 255, 270 (Spring 1998) [hereinafter Glennon] (arguing that the judge’s practice of allowing step-parents to adopt forced the legislature to codify adoption in 1970). Other reasons for the amendments include clarification of the laws as well as streamlining of adoption procedure to make it simpler and faster. Id.


\textsuperscript{32} 23 PA. CONS. STAT. ANN. § 2312 (West 2001) (“Any individual may become an adopting parent.”); § 2311 (“Any individual may be adopted, regardless of his age or residence.”); § 2710 (The petition requirements include information about the adopting parent such as name, residence, marital status, age occupation, religious affiliation, racial background and their relationship to the adoptee.). Also, the petition must include copies of all section 2711 consents required by the Adoption Act relating to consents necessary to adoption or the basis upon which such consents are not required. See § 2710. Finally, a copy of the adoptee’s birth certificate must be included. See id.
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system still reflects the traditional view of adoption as a secret process, in that petitions and hearings remain closed to the public and obtaining access to adoption records remains a challenge.

Modern adoption law creates the process by which a parent-child relationship is legally formed between a child and an adult who is not the child’s biological parent. Following an adoption, the birth parent relinquishes and the adoptive parent assumes all of the biological parent’s rights and responsibilities. There are exceptional circumstances, such as stepparent adoptions, where a judicial decree will not end the legal relationship between a child and the members of her biological family. Only the courts may order adoption, and a prospective adoptive parent must seek the court’s permission to adopt by filing a petition. After the petition is filed, the court orders an investigation and report to be filed, which helps determine the child’s eligibility for adoption and the

33 See GUGGENHEIM, supra note 24, at 203 (explaining that the child is usually left unaware of the adoption in order to “shield the birth mother from the stigma of having given birth to a child out-of-wedlock and to mask the adoptive parents’ inability to conceive a child”).
34 23 PA. CONS. STAT. ANN. § 2504.1 (2003). The statute states in pertinent part:
The court shall take such steps as are reasonably necessary to assure that the identity of the adoptive parent or parents is not disclosed without their consent in any proceeding under this subchapter or Subchapter B (relating to involuntary termination). The Supreme Court may prescribe uniform rules under this section relating to such confidentiality.
Id. For a discussion on adoption proceedings and the confidentiality of the various records, see LESTER WALLMAN & LAWRENCE J. SCHWARZ, HANDBOOK OF FAMILY LAW 78 (1989) (discussing adoption proceedings and the confidentiality of the various records).
35 See WALLMAN & SCHWARZ, supra note 34, at 77 (detailing the legal process of adoption).
36 Id. at 108 (discussing the legal effects of adoption).
37 Id. at 107.
38 See 23 PA. CONS. STAT. ANN. § 2301 (West 2001) (“The court of common pleas of each county shall exercise through the appropriate division original jurisdiction over voluntary relinquishment, involuntary termination and adoption proceedings.”).
suitability of the placement. \(^{39}\) After evaluating the child’s best interest, the judge decides whether to approve the adoption. \(^{40}\) The judge makes her decision after examining the petition for adoption, obtaining all necessary consents and conducting a hearing. \(^{41}\)

\(^{39}\) 23 PA. CONS. STAT. ANN. § 2525 (West 2001) (The statute states in pertinent part:

The court shall cause an investigation to be made and a report filed by . . . an appropriate person designated by the court . . . . The investigation shall cover all pertinent information regarding the child’s eligibility for adoption and the suitability of the placement, including the physical, mental and emotional needs and welfare of the child, and the child’s and the adopting parent’s age, sex, health and racial, ethnic and religious background.

\(^{40}\) In re McQuinton’s Adoption, 86 A. 205, 269 (Pa. 1913) (finding that the Adoption Act required the court to decree adoption liberally because it gave children greater opportunities for the fullest development).

The general purpose of the act in question is unmistakable; it is the expression of the humane and benevolent sentiments of the legislature that passed it towards a dependent class of our population, many members of which, by reason of conditions for which they are not responsible, and which, because of infancy they have no power to overcome, are, if not entirely helpless in the struggle of life, so far prejudiced and handicapped by their environment that fair opportunity to develop into virtuous men and women is denied them. It therefore calls for a liberal construction to the end that it may fairly accomplish the purpose of the enactment.

\(^{41}\) See also 23 PA. CONS. STAT. ANN. § 2724(a)-(b) (West 2001) (setting forth factors taken into account in evaluating the child’s best interests). Section 2724(b) states that:

The court shall hear testimony in support of the petition and such additional testimony as it deems necessary to inform it as to the desirability of the proposed adoption . . . . In any case, the age, sex, health, social and economic status or racial, ethnic or religious background of the child or adopting parents shall not preclude an adoption but the court shall decide its desirability on the basis of the physical, mental and emotional needs and welfare of the child.
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Therefore case law provides guidance in areas that the legislature has not yet acted, such as the articulation of desirable and undesirable adoptive situations.42

B. Development of Second-Parent Adoption

In order to promote finality in adoption proceedings, most state laws include a cut-off provision prohibiting adoption by an unmarried partner unless the parental rights of the first parent are terminated.43 This provision allows the new family to develop without fear of intrusion from the biological parents.44 There is a desirability of the adoption); see also WALLMAN & SCHWARZ, supra note 34, at 78 (stating that the adoption will be approved when the court has reviewed the results of the hearing, all legal requirements have been met and the court finds it is in the best interest of the child).

42 See, e.g., Adoption of E.M.A., 409 A.2d 10 (Pa. 1979) (holding that a parent’s qualified consent to an adoption of his child by another who is not his spouse is not permissible under the law).

43 See, e.g., N.Y. DOM. REL. LAW § 117(1)(a) (McKinney 1999) (“After the making of an order of adoption the natural parents of the adoptive child . . . shall have no rights over such adoptive child or his property by descent or succession.”); MASS GEN. LAWS ANN. CH. 210, § 6 (West 1999) (“All rights, duties and other legal consequences of the natural relation of child and parent shall . . . terminate between the child so adopted and his natural parents and kindred.”); See 23 PA. CONS. STAT. ANN. § 2903 (West 2000) (“Whenever a parent consents to the adoption of his child by his spouse, the parent-child relationship between him and his child shall remain whether or not he is one of the petitioners in the adoption proceeding.”) Wisconsin has a similar provision. See WIS. STAT. ANN. § 48.92(2) (2001) (“After the order of adoption is entered the relationship of parent and child between the adopted person and the adopted person’s birth parents, unless the birth parent is the spouse of the adoptive parent, shall be completely altered and all the rights, duties and other legal consequences of the relationship shall cease to exist.”).

44 See Jane S. Schacter, Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption, 75 CHI.-KENT L. REV. 933, 937 (2000) (arguing that adoption is traditionally seen as a process where one family ends and a new one begins); see also WALLMAN & SCHWARZ, supra note 34, at 108. Wallman and Schwarz explain the legal effect of adoption:

An order of adoption terminates any rights the natural parents previously had with respect to the child and vice versa. Through the adoption process a new lineage results and a child possesses the same
statutory exception to the cut-off provision for stepparents, which allows the spouse of a birth parent or of an adoptive parent to adopt the child without terminating any initial parental rights.\footnote{23 PA. CONS. STAT. ANN. § 2903 (West 2000) (“Whenever a parent consents to the adoption of his child by his spouse, the parent-child relationship between him and his child shall remain whether or not he is one of the petitioners in the adoption proceeding.”). Wisconsin has a similar provision. See WIS. STAT. ANN. § 48.92(2) (2001) (“After the order of adoption is entered the relationship of parent and child between the adopted person and the adopted person’s birth parents, unless the birth parent is the spouse of the adoptive parent, shall be completely altered and all the rights, duties and other legal consequences of the relationship shall cease to exist.”); see also Schacter, supra note 44, at 937 (“State adoption statutes generally recognize an exception to this cut-off provision for stepparent adoptions, which, by some tallies, have come to compromise the majority of all adoptions.”).}

The rationale behind the stepparent exception derives from the custodial biological parent’s plan to raise the child with the stepparent.\footnote{See Schacter, supra note 44, at 937.} This is because the government believes that if the non-custodial biological parent approves of the adoption or is no longer a part of the child’s life there will be no animosity among the parties to disrupt finality, and it will be in the best interest of the child to have this additional step-parent adopt her.\footnote{See Mark Strasser, Courts, Legislatures, and Second-Parent Adoptions: On Judicial Deference, Specious Reasoning, and the Best Interests of The Child, 66 TENN. L. REV. 1019, 1024 (1999) (discussing the different types of adoption).}

The statutory section, however, does not apply to same-sex couples because under Pennsylvania law, same-sex couples are not permitted to marry.\footnote{23 PA. CONS. STAT. ANN. § 1704 (West 2000) (“Marriage shall be between one man and one woman . . . [and] a marriage between persons of the same-sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.”).} Thus if the custodial legal parent desires his same-sex partner to possess the legal status of parent, he cannot achieve this without superseding his own parental rights.\footnote{When a lesbian woman or gay man becomes a parent through adoption he would have had if he was born to the adoptive parents. For example, once adopted, the child has the right to be supported by the adoptive parents and the right to inherit from and through them. Id.}
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statutory cut-off provision is problematic for same-sex couples trying to adopt. The child’s legal parent does not wish to relinquish his parental rights, yet he cannot fall under the spousal exception, which would allow both parents to possess legal rights.\textsuperscript{50}

Not all courts apply cut-off provisions to forbid same-sex adoptions. In Vermont, for instance, the Supreme Court permitted adoption by a lesbian couple without requiring termination of the biological mother’s rights, finding that adoption is in the best interest of the children when the partner has been living with the biological mother since the children’s births and the wording of the statute does not expressly prohibit such an adoption.\textsuperscript{51} Similarly, in Massachusetts, the Supreme Court permitted a lesbian parent’s same-sex partner to adopt the parent’s biological child.\textsuperscript{52} The Court found it would be in the best interest of the child because the women had a stable and committed relationship, both women

or alternative insemination, the law acknowledges that person as having full and absolute parental rights. See AM. ACAD. OF PEDIATRICS REPORT, supra note 4, at 1 (explaining the process of alternative insemination); see In the Matter of the Adoption of a Child by J.M.G., 632 A.2d 550 (N.J. Super. Ct. 1993) (granting the adoption of a child by its biological mother’s lesbian partner); The lesbian or gay parent’s partner may function as a second-parent, but he or she may not have any formal legal rights with respect to the child; see, e.g., In re Adoption of B.L.P., 16 Fiduc. Rep. 2d 95, 98 (Montg. Co. Orphans’ Ct. Pa. 1998) (rejecting the application of a lesbian partner to become an adoptive parent of a child); see also Schacter, supra note 44, at 936 (stating that “there is a disturbing asymmetry between the profound emotional bonds that may link a child to a non-biological parent and the law, which, in the absence of second-parent adoption, is likely to treat that parent as a “legal stranger” to the child).

\textsuperscript{50} See, e.g., Georgina G. v. Terry M., 516 N.W.2d 678 (Wis. 1994) (holding that an adoption of the child by the biological mother’s same-sex partner would sever the biological mother’s ties with the child). The court also found that the legislature specifically exempted stepparent adoptions from cutting off parental rights, and therefore the court presumed that the legislature did not intend to exempt adoptions by non-marital partners, concluding that the cut-off provision was mandatory for non-marital partners. Id.

\textsuperscript{51} Adoptions of B.L.V.B, 628 A.2d 1271 (Vt. 1993); 15 VT. STAT. ANN. §301 (West 2002) (stating “legal rights, privileges, duties and obligations of parents [are] to be established for benefit of children”); 15 VT. STAT. ANN. § 665 (stating custody to be awarded upon the best interests of child).

\textsuperscript{52} Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993).
participated jointly in raising the child, the child viewed both women as parents, and the child would gain the practical benefits from the legal recognition of a second-parent. 53 The highest courts of New York and the District of Columbia have also approved the adoption of children by their parents’ same-sex partners. 54 In addition, lower courts in a number of other states have all approved second-parent adoption by same-sex couples. 55

Courts that have permitted such adoptions generally conclude that children are best served by having two legal parents rather than one legal parent and one de facto parent. 56 A child with two legal parents has two sources of support and inheritance rights, as well as access to an array of benefits, including health insurance, social security and other benefits provided by the parents’

53 Id; MA. STAT. 210 §1 (West 2002) (“A person of full age may petition the probate court in the county where he resides for leave to adopt as his child another person younger than himself . . . (iii) the granting of the petition is in the best interests of the child.”). Practical benefits include the child gaining access to the second-parents health insurance coverage and additional inheritance benefits. Id.

54 See, e.g., In re Dana, 660 N.E.2d 397 (N.Y. 1995) (holding that provision of adoption statute terminating biological parent’s rights toward adoptive child does not apply in situations when biological parent consents to adoption, agrees to retain parental rights, and agrees to raise child together with adopting parent). The court did not require the termination of the parental rights of biological mothers who consented to adoption of their respective children by an unmarried man and lesbian partner with whom the mothers shared long-term emotional and financial commitments. See N.Y. DOM. REL. § 117(1)(a) (“After the making of an order of adoption the birth parents of the adoptive child shall be relieved of all parental duties toward and of all responsibilities for and shall have no rights over such adoptive child or to his property by descent or succession, except as hereinafter stated.”); In re M.M.D., 662 A.2d 837 (D.C. 1995) (holding that gay and lesbian partners have standing under New York and Washington D.C. law to become adoptive parents, and the portions of the statutes purporting to terminate the biological mothers’ parental rights do not apply).

55 See GUGGENHEIM, supra note 24, at 285 (discussing the current status of second-parent adoption law in various states).

56 See Jacobs, supra note 9, at 346 (reporting on cases where courts have sanctioned second-parent adoption because of the benefits to the child). An individual becomes a de facto parent when they have assisted in the raising of a child to such a degree that it as if they are actually the child’s parent). Id.
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employers. If the adults’ relationship later ends, their status as the child’s legal parents gives them both standing to seek custody or visitation with the child. Additionally, both legal parents could be required to continue to support the child.

With adoption law currently in a state of flux because each state has different laws, the National Conference of Commissioners of Uniform State Laws (NCCUSL) approved a new Uniform Adoption Act in 1994, which has been forwarded to all fifty states with a recommendation that it be enacted by their legislatures. This model law seeks to promote the interest of children in being raised by parents, including same-sex couples, who are committed and capable of caring for them. The model law departs from the historical practice of categorically excluding whole classes of prospective adoptive parents on the basis of marital status, sexual orientation or other arbitrary factors, and seeks to protect children’s ties to the people who have actually raised them.

57 Id.
58 See GUGGENHEIM, supra note 24, at 229.

The Act aims to be a comprehensive and uniform state adoption code that: (1) is consistent with relevant federal constitutional and statutory law; (2) delineates the legal requirements and consequences of different kinds of adoption; (3) promotes the integrity and finality of adoptions while discouraging “trafficking” in minors; (4) respects the choices made by the parties to an adoption about how much confidentiality or openness they prefer in their relations with each other, subject, however, to judicial protection of the adoptee’s welfare; and (5) promotes the interest of minor children in being raised by individuals who are committed to, and capable of, caring for them.

Id.
61 Id.
62 Id. (stating that the NCCUSL wants to “encourage different kinds of people to adopt and prohibit the categorical exclusion of anyone from being considered as an adoptive parent”).
In addition the American Academy of Pediatrics recently published a study on the benefits of second-parent adoption. The study found that legal endorsement of second-parent adoption achieves greater custodial rights and responsibilities for the adoptive parent protecting the child if the biological or original adoptive parent becomes unable to take care of the child or the couple separates. Legal endorsement also ensures the child’s eligibility for health benefits, inheritance and social security survivor benefits from both parents, and provides legal grounds for either parent to offer their consent for medical care, or make educational and other important decisions on behalf of the child. The American Academy of Pediatrics therefore supports legislative and legal efforts to permit adoption of the child by the second-parent in gay and lesbian families.

The recommendations proposed neither by NCCUSL nor by the American Academy of Pediatrics have been implemented in

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63 See Am. Acad. of Pediatrics Report, supra note 4. The study evaluated evidence, gathered during several decades using diverse samples and methodologies, of the impact of gay or lesbian parents on children, and concluded that a child’s development will improve if the relationship of their homosexual parents is recognized by law because there will likely be less conflict and more stability in the home. Id.

64 See L.S.K. v. H.A.N., 813 A.2d 874 (finding that a lesbian that has the status of in loco parentis to the biological child of her former partner must pay child support); see, e.g., Jacobs, supra note 9, at 344 (discussing the implication of Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Ct. App.1991)). In this case a lesbian couple planned to have a child together, and then one of the women conceived and had the child. Id. at 219. Later the biological mother was killed in a car accident and the court found the women who did not give birth to the child was not a parent and thus could not have custody to the child, despite the planning and caring for the child. Id.

65 Am. Acad. of Pediatrics Report, supra note 4, at 2. See, e.g., Jacobs, supra note 9, at 347 (discussing the benefits of recognizing second-parent adoptions).

66 Am. Acad. of Pediatrics Report, supra note 4, at 3 (finding that when two adults raise a child, they and the child deserve the security that comes along with legal recognition because denying proper parental legal status prevents “children from enjoying the psychologic[al] and legal security that comes from having 2 willing, capable, and loving parents”).
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Pennsylvania.\(^{67}\) There is, however, no statutory or common law prohibition against gays and lesbians or unmarried couples adopting in Pennsylvania.\(^{68}\) Instead, couples are required to demonstrate why the adoption is desirable, and judicial determinations are made on a case-by-case basis.\(^{69}\)

Judicially approved adoptions, which require the court to create an exception to the Adoption Act, were not available in Pennsylvania until the decision in *In re Adoption of R.B.F. and R.C.G.*\(^{70}\) For example, in *In re Adoption of E.M.A.*, the Pennsylvania Supreme Court held that the father’s qualified consent (consenting to adoption without fully relinquishing parental rights, as seen in stepparent adoption) was not sufficient to meet the statutory requirement when a non-spouse sought to adopt.\(^{71}\) The court stated that, “our courts have no authority to

\(^{67}\) See Glennon, *supra* note 30, at 265, 276 (stating that the Pennsylvania Adoption Act has some similar wording to the model law but the model law remains unadopted. Glennon also argues that the recommendations of social scientists such as the American Academy of Pediatrics are not followed).


\(^{69}\) Id. at 1202. In states that do not expressly prohibit gays and lesbians from adopting, the judicial system determines whether the second-parent receives legal rights with respect to the adopted child. Adoption of R.B.F. and R.C.F., 762 A.2d 739, 750 (Pa. Super. Ct. 2000) (Johnson, J., dissenting) (stating “[o]ur legislature . . . has already recognized that the trial judges who are on the front lines of these adoption proceeding are best situated to determine an appropriate procedure to follow in cases where there is a void of authority in the Adoption Act.” See, e.g., V.C. v. M.J.B., 748 A.2d 539, 548 (N.J. 2000) (denying custody to the former same-sex partner of a lesbian mother because it would be too disruptive for the family but granting visitation rights); E.N.O. v. L.M.M., 711 N.E.2d 886, 890 (Mass. 1999) (granting a former lesbian same-sex partner visitation rights after the couple separated); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 421 (Wis. 1995) (denying custody to the former same sex partner and remanding the issue of visitation rights to determine if it was in the best interest of the child).


\(^{71}\) Id. Qualified consent means sanctioning the action without relinquishing your own rights which is required to effectuate the adoption petition. *Id.*
decree an adoption in the absence of the statutorily required consents. Nor may exceptions to the Adoption Act be judicially created where the Legislature did not see fit to create them." The court’s language made same-sex couples wary of their chances of success in adoption proceedings in Pennsylvania. Even with such strong language, fourteen county courts in Pennsylvania allowed for second-parent adoption. In November 2000, second-parent adoptions in Pennsylvania were suspended pending appeal of In re Adoption of C.C.G. and Z.C.G. and In re Adoption of R.B.F. and R.C.F., Pennsylvania state cases in which two gay couples’ adoption petitions were rejected. This fractured societal framework, including the complex statutory conditions, formed the background in which R.B.F. was litigated.

II. PROCEDURAL AND FACTUAL BACKGROUND OF R.B.F. ET AL.

The decision in In re Adoption of R.B.F. and R.C.G. consolidates two cases on appeal: In re Adoption of C.C.G. and Z.C.G. and In re Adoption of R.B.F. and R.C.F. This decision confirms that same-sex adoption is possible under current Pennsylvania law.

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72 Id. at 11.
73 See Glennon, supra note 30, at 277 (arguing that same-sex couple adoption precedent hurts the chances that these “families” will attempt to become legal through adoption proceedings).
77 Id. at 1199.
78 Id. The Supreme Court of Pennsylvania, however, did not answer other legal questions implicated by same-sex adoption, such as whether the constitutional concept of equal protection requires that adoption petitions of same-sex couples be granted. See Glennon, supra note 30, at 260 (discussing other arguments that gay couples may have to defend their adoption petitions.
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A. In re Adoption of C.C.G. and Z.C.G.

In In re Adoption of C.C.G. and Z.C.G., the appellants, J.C.G. and J.J.G., have been gay domestic partners in Pennsylvania since 1982. In 1991, J.J.G. legally adopted C.C.G., and in 1999, J.J.G. legally adopted his second child, Z.C.G. After the adoptions, the children and the appellants lived together as a family. In June of 1998, J.C.G., the gay partner and prospective adopting parent, legally changed his last name to that of J.J.G., the legal parent. In May of 1999, appellants, J.J.G. and J.C.G. filed a petition pursuant to the Adoption Act wherein the gay partner sought to adopt the children. The petition was required by statute to contain a consent form relinquishing the parental rights of J.J.G. The appellants intentionally omitted the language indicating permanent surrender of J.J.G.’s parental rights.

On June 18, 1999, the Erie County Common Pleas Court issued an order denying the adoption petition because the father failed to relinquish his parental rights as required under section 2711(d) of...
Pennsylvania law. Appellants filed a motion requesting the trial court withdraw its order. On June 19, 1999, the trial court affirmed its order and Appellants filed an appeal. On June 19, 2000 the Superior Court of Pennsylvania affirmed the denial of the adoption petition.

B. In re Adoption of R.B.F. and R.C.F.

In In re Adoption of R.B.F. and R.C.F., the appellants, C.H.F. and B.A.F., are a lesbian couple who have been domestic partners in Pennsylvania since 1983. In 1996, after deciding to raise a family together, C.H.F. conceived through \textit{in vitro} fertilization with an anonymous donor. B.A.F. legally changed her last name to that of appellant C.H.F. before the twins were born on March 11, 1997. On April 24, 1998, appellants filed a petition with the Court of Common Pleas of Lancaster County seeking adoption of the children by B.A.F. Similar to the companion case of In re Adoption of C.C.G. and Z.C.G., appellant C.H.F. intentionally omitted statutorily required language from the petition permanently relinquishing her parental rights.

On October 22, 1998, the trial court denied the petition based on the appellants’ failure to meet the requirements of the Adoption

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\[86\] See id. at 726; § 2711(D)(1) (“The consenting parent of an adoptee under the age of eighteen must provide a statement relinquishing parental rights to his child.”).

\[87\] See In re Adoption of C.C.G. and Z.C.G., 762 A.2d at 726.

\[88\] Id.

\[89\] Id. at 730. The denial of the adoption petition was affirmed for lacking the parental relinquishment required by statute. Id.


\[91\] Id.


\[93\] Adoption of R.B.F. and R.C.F., 762 A.2d at 740.

\[94\] Id.

\[95\] In re Adoption of R.B.F. and R.C.F., 803 A.2d at 1198.
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Act by omitting the parental rights relinquishment language. The appellants appealed to the Superior Court, which affirmed the trial court’s judgment. The appellants then filed a motion for reargument and reconsideration, which was granted. The court nonetheless affirmed the denial of the petition on June 19, 2000, the same day as the petition in *In re Adoption of C.C.G. and Z.C.G.* was denied. The Superior Court issued almost identical opinions for *In re Adoption of C.C.G. and Z.C.G.* and *In re Adoption of R.B.F. and R.C.F.*

1. **Superior Court Majority Opinion from In re Adoption of C.C.G. and Z.C.G. and In re Adoption of R.B.F. and R.C.F.**

   The majority, noting the appellants’ purposeful omissions of the relinquishment requirement from their petitions for adoptions, held that the clear and unambiguous provisions of the Adoption Act do not permit a non-spouse to adopt a child where the legal parents have not relinquished their respective parental rights. The court refused to create judicial exceptions to the requirements of the Adoption Act, stating that to do so would overstep into the authority of the legislature. The Superior Court therefore rejected the appellants’ claim that the trial court was afforded discretion to waive statutory requirements when “cause had been shown,” finding instead that the statutory requirements had not been met, and no cause had been shown why they should not be

96 Adoption of R.B.F. and R.C.F., 762 A.2d at 739.
97 Id.
98 Id. at 740.
100 *In re Adoption of C.C.G. and Z.C.G.*, 762 A.2d at 726; *In re Adoption of R.B.F. and R.C.F.*, 762 A.2d at 739. Because the opinions are nearly identical, the remainder of the discussion of case history in Part II will treat the opinions as one.
102 Id.
103 Id. at 728 (stating “it is for the legislature to decide whether to expand the Adoption Act to cover same-sex partners”).
Without fulfillment of the statutory requirements, the analysis of the best interest and general welfare of the children would be premature and therefore could not be considered. Consequently, the court denied the petitions.

2. **Judge Elliot’s Concurrence in In re Adoption of C.C.G. and Z.C.G. and In re Adoption of R.B.F. and R.C.F.**

Judge Elliot, in concurrence, contended that qualified consent is only effective in spousal situations because of the narrow interpretation of qualified consent in the binding precedent of *In re Adoption of E.M.A.* Since the appellants cannot be recognized as married, they cannot fall under the spousal exception for qualified consent. Judge Elliot focused on the holding from the Pennsylvania Supreme Court in *E.M.A.*, which insisted on strict construction of the Adoption Act and lack of judicial power to create exceptions to the Act where the legislature did not grant them. Judge Elliot suggested that, in light of the precedent and the realities of changing families petitioning for adoption, “the issue of qualified consent outside of marriage must be re-addressed by the Pennsylvania Supreme Court or returned to the Legislature for further consideration or amendment.”

3. **Dissenting Opinions in In re Adoption of C.C.G. and Z.C.G.**

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104 *Id.* at 729. See 23 PA. CONS. STAT. ANN. § 2711(2002) (requiring the consenting parent of an adoptee under the age of eighteen to provide a statement relinquishing parental rights to his child unless cause can be shown as to why such parental rights should not be relinquished).

105 *In re Adoption of C.C.G. and Z.C.G.*, 762 A.2d at 734.

106 *Id.* at 733.

107 *Id.* at 730.


110 *Id.*

111 *Id.* at 744-45.
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and In re Adoption of R.B.F. and R.C.F.\(^{112}\)

a. Judge Johnson

Judge Johnson’s dissenting opinion articulated three reasons for dissenting from the majority opinion.\(^{113}\) First, Judge Johnson argued that section 2711 of the Adoption Act,\(^{114}\) requiring the relinquishment of parental rights, should not be strictly construed because it “contravenes the mandate of the Statutory Construction Act to liberally construe state statutes,\(^{115}\) and is incongruous with the legislature’s purpose in enacting section 2711.”\(^{116}\) Judge Johnson articulated that the portion of section 2771 requiring voluntary relinquishment of parental rights served the limited purposes of protecting a parent’s fundamental liberty interest\(^{117}\) and ensuring finality by preventing the biological parent from challenging the adoption.\(^{118}\) Judge Johnson argued that neither of those purposes was served because J.J.G.’s relinquishment of his parental rights contravened the protection of his fundamental

\(^{112}\) Id. at 745.

\(^{113}\) Id. Judges Kelly and Todd joined Judge Johnson’s dissent. Id.

\(^{114}\) 23 PA. CONS. STAT. ANN. § 2711 (West 2001) (“The consenting parent of an adoptee under the age of eighteen must provide a statement relinquishing parental rights to his child.”).

\(^{115}\) See 1 PA. CONS. STAT. §§ 1501-1991; In re Adoption of R.B.F. and R.C.F., 762 A.2d 739, 741 (Pa. Super. Ct. 2000); see also 1 PA. CONS. STAT. § 1928(a) (stating the “rule that statutes in derogation of the common law are to be strictly construed, shall have no application to the statutes of this Commonwealth enacted finally after September 1, 1937”). Because the Adoption Act was enacted in 1970, the Act must be liberally construed. Id.; see also 1 PA. CONS. STAT. § 1928(c) (stating that “all other provisions of a statute shall be liberally construed to effect their objects and promote justice”).

\(^{116}\) In re Adoption of R.B.F. and R.C.F., 762 A.2d at 741 (noting that the purpose of the Adoption Act is to promote the child’s best interest).

\(^{117}\) Id. at 746 (citing Santosky v. Kramer, 455 U.S. 745 (1982)).

liberty interest. In addition, J.J.G. was a party to the petition for adoption and the only person possessing legal rights to the children. Therefore, no finality issue existed because J.J.G. would not challenge the adoption later since he was a voluntary party to the petition from its inception.

Second, Judge Johnson stated that the majority erroneously relied on cases involving involuntary termination of parental rights, while this case involved retention of parental rights. Judge Johnson argued that in failing to make the distinction, the majority overlooked the trial court’s discretion in granting adoption petitions pursuant to section 2901 of the Adoption Act. He stated that the “cause shown” language in section 2901 allows the court to determine that an adoption should be granted, and the court may do so even though a parent’s rights have not been terminated. He argued that the majority’s reading of the termination clause, which would restrict the trial court from considering reasons why the adoption should be granted without meeting the termination provisions, effectively eliminates the “cause shown” language, rendering the clause superfluous.
Johnson concluded that where petitioners are seeking to add a parent, and no fundamental parental rights are at risk, section 2901’s “cause shown language” gives the court discretion to dispense with the parental termination requirement of section 2711. He articulated that in cases where no fundamental parental rights are at risk, the court’s examination should focus on the child’s best interest rather than the termination of parental rights.

Third, Judge Johnson stated that the majority’s focus should not have been on the homosexual relationships between the petitioners, but on the parent-child relationship and the benefits that adoption would offer the children. He argued that the majority’s failure to recognize the reality of gay and lesbian couples raising children “perpetuates the fiction of family homogeneity at the expense of the children whose reality does not fit this form.” He noted that while the children’s daily lives would not be altered by the denial of the petition, they would have less legal protection available. For those reasons, Johnson concluded that the majority of the court was incorrect in denying the adoption and should have used it’s discretion to decree the adoption on the basis of the best interests of the child.

b. Judge Todd

Judges Kelly and Johnson joined Judge Todd’s dissenting
opinion which focused heavily on the child/parent relationships that were already established and deserved legal recognition in these cases. Judge Todd emphasized the impact of the majority’s decision on the children involved and argued that second-parent adoption was consistent with Pennsylvania law based on the trial court’s discretion to decree these adoptions pursuant to section 2901. He found that second-parent adoption advances the welfare of the children involved because it recognizes a “real family” where the parents have co-parented the children since birth and are trying to provide for those children by gaining the legal rights and benefits associated with adoption. These benefits “include the legal protection of the children’s existing familial bonds, their rights to financial support from two parents instead of one, rights to inheritance from each parent and rights to obtain other available dependent benefits, such as health care, insurance and Social Security benefits, from either parent.” He concluded that the majority’s failure to focus on the best interest of the child was erroneous, and further, that the trial court abused its discretion when it dismissed appellants’ petition for adoption without holding a hearing to determine whether good cause had been shown to allow the adoption.

C. State High Court Decision

The Supreme Court of Pennsylvania granted appeal in both cases and consolidated the actions. In *Adoption of R.B.F. and R.C.F.*, 762 A.2d at 751.

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132 Adoption of R.B.F. and R.C.F., 762 A.2d at 751.
133 *Id.* at 752.
134 *Id.* at 751.
135 *Id.*
136 Adoption of R.B.F. and R.C.F., 762 A.2d 739, 744 (Pa. Super. Ct. 2000). See 23 PA. CONS. STAT. ANN. § 2724(a) (West 2003) (stating that “the court shall hear testimony in support of the petition and such additional testimony as it deems necessary to inform it as to the desirability of the proposed adoption”).
137 *In re* Adoption of R.B.F. and R.C.F., 803 A.2d 1195 (Pa. 2002). The actions were consolidated because they came to the Pennsylvania Supreme Court at essentially the same time and based on the similarity of facts. *Id.*
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R.C.G., the Court decided whether the Adoption Act requires a biological or adoptive legal parent to relinquish his parental rights in cases where a same-sex partner seeks to adopt the legal parent’s child.\textsuperscript{138} On August 20, 2002, the Court unanimously vacated the orders of the Superior Court and remanded the appellants’ cases to the trial court to determine whether “cause [was] shown” for the parental relinquishment requirements to be waived.\textsuperscript{139} While the Court agreed with the lower court in the \textit{E.M.A}. case in that the judiciary could not read exceptions into statutes,\textsuperscript{140} the Court said that \textit{E.M.A}. was distinguishable because of an amendment to section 2901 passed subsequent to the \textit{E.M.A}. decision.\textsuperscript{141} The Court stated:

There is no reasonable construction of the Section 2901 “cause shown” language other than to conclude that it permits a petitioner to demonstrate why, in a particular case, he or she cannot meet the statutory requirements. Upon a showing of cause, the trial court is afforded 	extit{discretion} to determine whether the adoption petition should, nevertheless, be granted.\textsuperscript{142}

The Court further stated that in determining “cause” under section 2901, courts must consider what is the best interest of the child because otherwise there is no guarantee that children will be protected.\textsuperscript{143} An evaluation of the child’s best interest could be done prior to satisfying all of the statutory requirements.\textsuperscript{144}

The Court expanded its interpretation and definition of “cause shown” by tracking the reasoning from a prior state court decision, \textit{In Re Long}.

\textsuperscript{138} \textit{Id}.
\textsuperscript{139} \textit{Id}.
\textsuperscript{140} \textit{Id.} at 1201.
\textsuperscript{141} \textit{Id}.
\textsuperscript{143} \textit{Id}. at 1202.
\textsuperscript{144} \textit{See id}. at 1203 (stating that initially evaluating the child’s best interest would speed the review immensely).
\textsuperscript{145} \textit{Id} (quoting \textit{In re Long}, 745 A.2d 673 (Pa. Super. Ct. 2000)). \textit{In re Long} did not directly deal with section 2901 but did deal with “cause shown”
Section 2905 of the Adoption Act granted such access if requested pursuant to an order of the court finding cause shown. In interpreting In re Long, the Pennsylvania Supreme Court “described cause for disclosure as a determination, by clear and convincing evidence, that the adoptee’s need for adoption information clearly outweighed the considerations behind the statute” of keeping adoption records closed. Therefore the Court concluded that appellants should be given an opportunity at an evidentiary hearing to demonstrate that the component of section 2711(d) requiring the relinquishment of parental rights is unnecessary or is satisfied because of their individual circumstances. For example, the appellants would have to show that there would be no violation of the biological or adoptive legal parent’s rights because that parent was voluntarily a party to the adoption petition from inception.

III. ANALYSIS

In deciding In re Adoption of R.B.F. and R.C.G., the Pennsylvania Supreme Court found that the child’s best interest was served by allowing the petition to go forward without requiring the biological or adoptive legal parent to relinquish his parental rights. This decision promotes the child’s best interest because it protects the liberty interest of the legal parent while promoting security for the child by offering her the benefits of two

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146 Id.; 23 PA. CONS. STAT. ANN § 2905(a) (2002). Section 2905 provides that all adoption records “shall be kept in the files of the court as a permanent record thereof and withheld from inspection except on an order of court granted upon cause shown . . . .” Id.

147 In re Adoption of R.B.F. and R.C.F., 803 A.2d at 1204 (quoting In re Long, 745 A.2d 673 (Pa. Super. 2000); 23 PA. CONS. STAT. ANN. § 2905(a) (West 2000)).


149 Id. at 1205.

150 Id. at 1203.

151 Id.
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legally responsible adults. The child receives the legal rights and benefits associated with adoption such as financial and health care insurance benefits, inheritance rights to two parents’ estates, and legal recognition of already established bonds. The Pennsylvania Supreme Court’s decision recognizes the reality that many non-traditional families exist and offers these de facto families the legal protections of adoption.

The Pennsylvania Supreme Court’s decision, however, did not set a clear standard for when cause is shown; as a result, future litigants are left with the uncertainty that a trial judge may still determine that cause has not been met and deny a petition even when the facts are similar to those in R.B.F. The court’s failure to categorically hold that the parental termination clause of section

152 See Bruce D. Gill, Comment: Best Interest of the Child? A Critique of Judicially Sanctioned Arguments Denying Child Custody to Gays and Lesbians, 68 TENN. L. REV. 361 (2001) (concluding that denying same-sex couples legal parent status through adoption only hurts the children and is done because of judicial bias).

153 See In re Adoption of C.C.G. and Z.C.G., 762 A.2d 724, 737 (Pa. Super. Ct. 2000) (Todd, J., dissenting); In re Adoption of Tammy, 619 N.E.2d 315, 317 (Mass. 1993) (explaining that adoption would not result in any tangible change in the child’s daily life but would entitle her to inheritance, support, and insurance from non-biological mother, and would grant the non biological mother custody if the biological mother died).

154 See Glennon, supra note 30, at 282. Glennon argues that:

Adoption should depend on the demonstrated willingness and ability of an adult to provide a child with essential caretaking and nurturing. If a parent is willing to bring in another adult to share that burden and privilege, and the parent fully understands the consequences of allowing another adult to create a legal parent-child relationship with that child, the state should not refuse an adoption because of concerns about the legal status of the relationship between the adults.

155 See Michael T. Morley, Richard Albert, Jennie L. Kneedler & Chrystiane Pereira, Developments in Law and Policy: Emerging Issues in Family Law, 21 YALE L. & POL’Y REV. 169, 199 (2003) (arguing that despite many courts recognizing the ability for same-sex couples to adopt, “it still seems true that in family law cases involving a homosexual parent, the result ‘will be determined more than anything else by the state in which the person lives and the judge who hears the case’”).
2711 does not apply to second-parent adoptions when the legal parent, who is a party to the adoption, wishes to retain their parental rights, harms the children at issue because the rule fails to extend the full protection of the law to children existing in these non-traditional families. A categorical holding refusing to apply the parental termination clause in second-parent adoption cases would provide these families a buttress, which would allow them to thrive under the same legal protections given to traditionally structured families.

A. The Best Interest of the Child

The purpose of the Adoption Act is to serve the best interest of the child. The analysis of the best interest of the child standard, used to determine the appropriateness of adoption, focuses on the emotional, physical, and mental needs and welfare of the child. Interestingly, no statutory provision denies same-sex couples from jointly adopting a child who has no legal parents. For example, section 2312 of the adoption law says, “anyone may adopt.” Prohibiting adoptions merely because the children are either the biological or adopted children of one of the partners prior to filing of the adoption petition is illogical when juxtaposed with same-sex

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156 See Becker, supra note 17, at 168 (arguing that a child may experience material and psychological deprivation if the de facto parent relationship is not legally recognized through adoption).

157 See Unif. Adoption Act, supra note 60 (stating that the states should “clarify the legal and economic consequences of different types of adoption so that, within these formal structures, the emotional and psychological aspects of adoptive parent and child relationships can flourish”).


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162 See Strasser, supra note 47, at 1046 (commenting on the absurdity of laws that allow gay and lesbian individuals to adopt but prohibit gay and lesbian couples from doing the same.).

163 In re Adoption of R.B.F. and R.C.F., 803 A.2d at 1203.

164 Id. (citing In re McQuinston’s Adoption, 86 A. 205, 206 (Pa. 1913)).

165 See Glennon, supra note 30, at 260 (arguing that children do better emotionally if they have two legal parents); Adoption of Tammy, 619 N.E.2d 315, 317 (Mass. 1993) (explaining that adoption would not result in any tangible change in the child’s daily life but would entitle her to inheritance, support, and insurance from non-biological mother, and would grant the non biological mother custody if the biological mother died).

166 See Becker, supra note 17, at 116 (arguing that a child may experience material and psychological deprivation if the de facto parent relationship is not legally recognized through adoption); see also Jacobs, supra note 9, at 350 (stating that the failure of the court to recognize the actual parental relationship in these second-parent cases means that many of these people are treated as mere third parties rather than as the parent they are to the child).
of the family of the legal parent, should he or she become incapacitated, might successfully challenge the surviving coparent’s right to continue to parent the child, thus causing the child to lose both parents.

2. Protects the second-parent’s right to custody and visitation if the couple separates. Likewise, the child’s right to maintain relationships with both parents after separation, viewed as important to the positive outcome in separation or divorce of heterosexual parents, would be protected for families with gay or lesbian parents.

3. Establishes the requirement for child support from both parents in the event of the parents’ separation.

4. Ensures the child’s eligibility for health benefits from both parents.

5. Provides legal grounds for either parent to provide consent for medical care and to make education, health care, and other important decisions on behalf of the child.

6. Creates the basis for financial security for children in the event of the death of either parent by ensuring eligibility to all appropriate entitlements, such as Social Security survivor benefits.\(^{167}\)

Based on these findings, the American Academy of Pediatrics supports legislative and legal efforts that provide the possibility for second-parent adoption.\(^{168}\) Additionally, the Uniform Adoption

\(^{167}\) AM. ACAD. OF PEDIATRICS REPORT, supra note 4, at 3.

The American Academy of Pediatrics and its member pediatricians dedicate their efforts and resources to the health, safety and well-being of all infants, children, adolescents and young adults. The AAP has 57,000 members in the United States, Canada and Latin America. Members include pediatricians, pediatric medical subspecialists and pediatric surgical specialists. More than 41,000 members are board-certified and are called Fellows of the American Academy of Pediatrics.


\(^{168}\) AM. ACAD. OF PEDIATRICS REPORT, supra note 4, at 3.
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Act of 1994 seeks to approve second-parent adoptions where there is a demonstrable connection between the child and parent and it is in the best interest of the child.  

The Pennsylvania Supreme Court, while making strides in supporting second-parent adoption, could have better served the appellants in R.B.F., future litigants, as well as the children involved, if they had followed the recommendations of the American Academy of Pediatrics and established clear standards on how to determine cause that would allow for simple approval of same-sex adoption. Had the court categorically held that the parental termination clause of section 2711 does not apply to second-parent adoptions where the legal parent is a party to the adoption and wishes to retain his parental rights, the purpose of the Adoption Act to serve the “best interest of the child” would be met by granting two parents legal responsibility for the child. Professor Jane Schacter maintains that in analyzing the issues raised by second-parent adoption, “the question for the court should be whether the child will receive the added legal, emotional and financial benefits that would result from acquiring a second legal (as opposed to merely functional) parent.” By failing to establish clear standards and properly frame the analysis, the court leaves future litigants in same-sex adoption cases uncertain about where they stand in the eyes of the law.

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169 See Unif. Adoption Act, supra note 60.

170 See AM. ACAD. OF PEDIATRICS REPORT, supra note 4 (arguing that because these kinds of adoption cases are decided mainly by the courts on a case-by-case basis, “it is important that a broad ethical mandate exist nationally that will guide the courts in providing necessary protection for children through coparent adoption”).

171 See Jacobs, supra note 9, at 391 (concluding that categorical acceptance of second-parent adoption after initially determining that the parent/child relationship exists and is healthy provides the most supportive environment for these families both legally and emotionally).

172 Schacter, supra note 44, at 942.

173 See Morley, Albert, Kneedler & Pereira, supra note 155, at 169 (discussing the confusion caused by current second-parent adoption law).
B. The Rights of the Natural Parent and Finality of Adoption

The Pennsylvania Supreme Court concluded that appellants should be given an opportunity at an evidentiary hearing to demonstrate cause as to whether the purpose of Section 2711(d)’s relinquishment of the parental rights component is unnecessary or whether it is satisfied because of the individual situation. The purpose of the relinquishment provision is to protect the rights of biological parents and promote finality so the new family can develop in peace. When the appellants have refused to relinquish their parental rights because they want to remain legally bound, it is superfluous to require appellants to show why it is unnecessary for them to relinquish those rights. A court considering the unique situation of a second-parent adoption need not be concerned with either protecting the natural parents or promoting finality. Protecting the natural parent’s rights is a non-issue when they are a party to the petition for adoption and wish for the adoption by their same-sex partner to take place. Severing the natural parent’s rights instead decreases the legal protection extended to the child. Moreover, promoting finality of adoption proceedings is actually accomplished when a second-parent adoption is granted because the family already exists, giving the legal parent, who is a party to the petition, no reason to challenge it later.

The court should have held that the termination clause from

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174 See supra notes 96-100 and accompanying text (discussing the implications of intentionally omitting the consent in the trial court cases).
175 See In re Adoption of E.M.A., 409 A.2d 10 (Pa. 1979) (holding that a parent’s qualified consent to an adoption of his child by another who is not his spouse is not permissible under the law).
176 In re Adoption of R.B.F. and R.C.F., 803 A.2d 1195, 1202 (Pa. 2002) (“When the requisite cause is demonstrated, Section 2901 affords the trial court discretion to decree the adoption without termination of the legal parent’s rights under Section 2711(d).”).
177 See Unif. Adoption Act, supra note 60, § 2-401-409 (discussing the legal protections extended to a child when second-parent adoptions are granted).
178 See Adoption of Tammy, 619 N.E.2d 315, 317 (Mass. 1993) (explaining that adoption would not result in any tangible change in the child’s daily life).
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section 2711 does not apply in proceedings where the natural parent is both a party to, and in support of, the petition for adoption because the necessary cause has been shown by the fact of their participation in the petition. The trial court should then have analyzed the best interest of the child to determine if this particular parent has the emotional and financial interests beneficial to the child warranting approval of the petition. Rather than focusing on irrelevant statutory requirements, the court should instead evaluate whether the non-biological or non-adoptive petitioner has performed the obligations of parenthood for a substantial period of time and whether the relationship between the parent and child is publicly recognized. The court should consider whether the child believes the second-parent to be their parent. If the potential adoptive parent has performed these obligations and the relationship is publicly recognized, then the intent of the petitioners to become legally bound to the child through adoption should be effectuated.

179 In re Adoption of C.C.G. and Z.C.G., 762 A.2d 724 (Pa. Super. Ct. 2000), vacated by In re Adoption of R.B.F. and R.C.F., 803 A.2d 1195 (Pa. 2002) (Johnson, J., dissenting) (holding that the Pennsylvania legislature, in enacting section 2903, has already recognized that the trial judges who are on the front lines of these adoption proceedings are best situated to determine an appropriate procedure to follow in cases where there is a void of authority in the Adoption Act).


[W]hile the families of the past may have seemed simple formations repeated with uniformity (the so called “traditional family”) families have always been complex, multifaceted, and often idealized. This court recognizes that families differ in both size and shape and within and among the many cultural and socio-economic layers that make up this society. We cannot continue to pretend that there is one formula, one correct pattern that should constitute a family in order to achieve the supportive, loving environment we believe children should inhabit.

Id. at 554-55.

181 Jacobs, supra note 9, at 390.

182 See Duncan, supra note 3, at 66 (citing J.A.L. v. E.P.H., 682 A.2d 1314 (Pa. Super. Ct. 1996)) (finding that a same-sex partner standing “in loco parentis” to a child could seek partial custody if it would serve the best interest
A rule that grants these adoptions supports a beneficial relationship between prospective adoptive parent and child, and protects a natural parent’s liberty interest in their parental rights. A rule such as this would also speed the inquiry as to the fitness of the adoptive parents because it would skip the examination of whether cause has been shown to determine if the petition could go forward, and instead would initially examine whether the parent is actually fit. An expedited process would effectuate the best interest of the child by shortening the time in which the child is without the protection of two legal parents.\textsuperscript{183}

The court’s failure to set a clear mandate that allows for same-sex adoption when the best interest of the child criteria is met fails the state’s children who are part of non-traditional families.\textsuperscript{184} While their decision to remand the case was correct, the court should have gone further to protect the children and effectuate the purpose of the Adoption Act by acknowledging that second-parent adoptions are generally in the best interest of the child, recognizable under current statutory law and therefore legitimate in Pennsylvania.

IV. LEGISLATIVE ACTION OR LACK THEREOF

The legislature should protect the best interests of the state, the children and the greater society by codifying second-parent adoption.\textsuperscript{185} The law must acknowledge and reflect the reality that non-traditional families are raising children regardless of whether or not their petitions for adoption are approved.\textsuperscript{186} Statutes that in

\begin{footnotesize}
\textsuperscript{183} See Becker, supra note 17, at 133 (discussing the benefits for the child when the adoption is quickly adjudicated).

\textsuperscript{184} See Glennon, supra note 30, at 271 (arguing that a court’s focus should be on how the child will best thrive, not on what the particular family format should look like).

\textsuperscript{185} See In re Adoption of B.L.V.B., 628 A.2d 1271, 1275 (Vt. 1993).

\textsuperscript{186} See Becker, supra note 17, at 128 (arguing that a child may experience material and psychological deprivation if the de facto parent relationship is not
\end{footnotesize}
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practice deny adoption petitions by same-sex couples discriminate against them and their families, and in turn, sometimes fail to implement what is best for the child. Denial of these petitions harms the children emotionally by depriving them of the greatest protection under the law—it denies the children two legal parents. The legislature has a duty to clarify any ambiguities in the law to offer the highest level of legal protection to its children. At a minimum, the legislature should make clear that it does not support second-parent adoption so that ambiguities about its legality are eliminated, and equal protection challenges can go forward.

The National Conference of Commissioners on Uniform State Laws (NCCUSL) recently supported the movement urging legislatures to support second-parent adoptions by approving the

legally recognized through adoption); see also Schacter, supra note 44, at 942 (discussing the desirability of the law recognizing second-parents).


188 See Morley, Albert, Kneedler & Pereira, supra note 155, at 199 (discussing the status and implications of state laws for and against second-parent adoptions).

189 AM. ACAD. OF PEDIATRICS REPORT, supra note 4, at 2 (stating that it is important that a broad ethical mandate exist nationally that will guide policy makers in creating initiatives that establish permanency for the children of same-sex partners through second-parent adoption).

190 See Schacter, supra note 44, at 946-47 (“It is reasonable... to ask legislatures to be unmistakably clear if their will is to block second-parent adoption. Doing so would clarify the statutory issue, as well as force the constitutional question of whether children or their parents have any protected right to use the adoption laws made available to other families.”).

191 See MATTHEW BENDER, ADOPTION LAW AND PRACTICE (2001) (stating that “NCCUSL is a non-profit organization of state legislators, judges, lawyers, and law professors appointed by the governors of every state for the purpose of drafting and proposing uniform state legislation on topics normally subject to state legislative authority”).
Uniform Adoption Act (UAA). The Act attempts to manage the changing psychosocial and economic aspects of contemporary adoption by addressing the many different kinds of adoption that now occur and the various functions they serve. Moreover, the Act encourages secure relationships between children and individuals committed to parenting them. The American Academy of Pediatrics recommends that state legislatures take proactive measures to approve second-parent adoption and protect children in second-parent family situations. If the legislature amended the law to explicitly authorize second-parent adoption, courts would not need to employ statutory interpretation to furnish the legal protection that adoption offers. Legislative action would help define the best interest of the child standard and preempt conflicting lower court decisions in second-parent adoption cases. A clear statutory provision would also establish the right for these children to have two parents legally obligated to care for them and recognize that these situations, though unconventional, are a reality for a growing number of children.

CONCLUSION

Many gay and lesbian couples with children are still striving to create integrated families under the confines of adoption laws, and

192 See Unif. Adoption Act, supra note 60, at § 2-401-409.
193 See MATTHEW BENDER, ADOPTION LAW AND PRACTICE, supra note 191.
194 Id.
195 AM. ACAD. OF PEDIATRICS REPORT, supra note 4, at 2 (concluding that the weight of evidence gathered during several decades showed children raised by lesbian or gay couples were normal and healthy and thus supporting the legal adoption of children by second-parents).
196 Adoption of R.B.F. and R.C.F., 762 A.2d 739, 740 (Pa. Super. Ct. 2000) (Todd, J., dissenting) (stating that no legal mechanism other than adoption can offer the legal protection of existing familiar bonds, financial protection and two parents to these children).
197 See Morley, Albert, Kneedler & Pereira, supra note 155, at 197 (discussing the confusion caused by current second-parent adoption law).
198 See supra note 4 and accompanying text (discussing the growing number of same-sex parents).
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they often continue to be rebuffed.\(^\text{199}\) The court’s decision in *R.B.F.* makes possible legal recognition of the second-parent, but by failing to give the trial court categorical standards for approving second-parent adoption, the precedent offers limited support in promoting the best interest of the child.\(^\text{200}\) The Pennsylvania legislature should revisit the issue of qualified consent in second-parent adoptions to bring the law in line with reality and maximize the legal protection available to children.

Second-parent adoption effectuates the main purpose of the Adoption Act to promote the best interest of the child.\(^\text{201}\) Denying legal recognition to these families unfairly burdens them. To rectify this injustice, the state legislature should either codify approval of second-parent adoption, or the Supreme Court of Pennsylvania should categorically approve them to lift the injustice. Only then will these families be secure in their status under the law. The security provided by legal adoptive status is a vital step in upholding the statutory policy of protecting the best interest of the child.\(^\text{202}\)


\(^{200}\) See supra notes 179-82 and accompanying text (discussing the implications of a categorical standard).

\(^{201}\) See 23 PA. CONS. STAT. ANN. § 2723 (West 2001) (stating that the court “[s]hall decide the desirability of an adoption on the basis of the physical, mental, and emotional needs and welfare of the child”); *In re Adoption of Hess*, 608 A.2d 10, 13 (Pa. 1992) (stating that the Adoption Act “clearly focuses on the needs of the child”).

\(^{202}\) See 23 PA. CONS. STAT. ANN. § 2724(a)-(b) (West 2001) (setting forth factors taken into account in evaluating the child’s best interests). Section 2724(b) states that:

The court shall hear testimony in support of the petition and such additional testimony as it deems necessary to inform it as to the desirability of the proposed adoption . . . . In any case, the age, sex, health, social and economic status or racial, ethnic or religious background of the child or adopting parents shall not preclude an adoption but the court shall decide its desirability on the basis of the physical, mental and emotional needs and welfare of the child.

*Id.*
INSIDER TRADING: WHY TO COMMIT THE CRIME FROM A LEGAL AND PSYCHOLOGICAL PERSPECTIVE

Emily A. Malone*

INTRODUCTION

Insider trading,1 a crime that often involves the wealthy getting wealthier, is a behavior associated with cheating and greed.2 It is also a crime that is apparently difficult to deter.3 This phenomenon can be illustrated by exploring current events. Insider trading hit the newstands again last year with the scandal involving the ImClone Systems Inc. corporation (“ImClone”) and celebrity businesswoman Martha Stewart.4 This note uses that example as an

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1 Although not defined in any statute or regulation, for the purpose of this note insider trading is “the use of material, nonpublic information in trading the shares of a company . . . .” BLACK’S LAW DICTIONARY 798 (7th ed. 1999). For the purpose of this note, only the distinct crime of inside trading will be analyzed. Other forms of white collar crime will not be addressed.
2 See discussion infra Part II.B.1.b (discussing the connection between insider trading and behavior associated with cheating and greed).
3 See discussion infra Part II (discussing why the normative and legal costs associated with insider trading fail to effectively deter the crime).
4 See JAMES WILLIAM COLEMAN, THE CRIMINAL ELITE 89 (2d ed. 1989) (listing prominent businessmen as defendants in the 1987 insider trading scandal: “a partner in Goldman Sachs; the Director of Kidder, Peabody; the head of risk arbitrage for Merrill Lynch; Vice Presidents from Paine Webber, E. F. Hutton, Kidder, Peabody, and Shearson Lehman Brothers . . . .”); see also Holman W. Jenkins Jr., Business World: An Autumnal Resolution: Give Martha a Break, WALL ST. J., Sept. 4, 2002, at A23 (putting the coverage of Martha Stewart on par with impending war with Iraq). This scandal will be used in a hypothetical context as an illustration of the theories explored by this note. See
illustration of why people engage in the crime of insider trading and why the behavior is not being effectively deterred.\textsuperscript{5}

In Part I, this note examines how criminal causation theories apply to insider trading. Since insider trading is a crime limited to a particular kind of criminal, one who has achieved financial and social success, the causation model of rational choice is applied.\textsuperscript{6}

In Part II, this note, using the rational choice theory, weighs the potential benefits of illegal trading with inside information against potential costs from a psychological perspective. The potential costs are normative, social, and legal. The cost of violating social norms may be significant but, in the context of American culture, the normative costs of trading with inside information are low.\textsuperscript{7} In addition, the potential legal costs are examined and although found to be significant, they are rendered ineffective by their inability to adequately address the harms caused by insider trading and their failure to consistently punish all types of insider trading.\textsuperscript{8} This note suggests that people choose to engage in insider trading because the incentives to trade with inside information outweigh the deterrents.

Confounding the problem of ineffective costs is the possibility of justification.\textsuperscript{9} A person that rationally chooses to commit the crime of insider trading can justify his behavior in three ways:

\textit{also infra} Part II.A (discussing the facts of the Martha Stewart scandal).

\textsuperscript{5} See The Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 (stating a maximum jail term of ten years). Although Insider Trading may also incur civil and administrative liability, this note will discuss only the criminal aspect of insider trading. See THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION 658-60 (4th ed. 2002) (discussing the various means of enforcement of securities laws).

\textsuperscript{6} See \textit{infra} note 24 and accompanying text (applying rational choice theory).

\textsuperscript{7} See discussion \textit{infra} Part II.B.1 (comparing the norms espoused by American culture and the traits that are associated with insider trading).

\textsuperscript{8} See discussion \textit{infra} Part II.B.3 (discussing the failure of the law to adequately address the harms of insider trading). The low legal costs fail to stimulate higher conformity to the normative costs. \textit{Id}.

\textsuperscript{9} Justification is used in this note to explain the internal process of rationalizing a crime. See \textit{infra} Part III. This has, however, no bearing on justification as a legal defense.
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believing that insider trading is not actually illegal, believing that it is not harming anyone, or simply refusing to accept responsibility for the trade. The justification can resolve any conflicts the person may feel about violating societal norms or breaking the law. Therefore, Part II concludes that the decision to trade on inside information is in fact a rational one. The potential benefits outweigh the potential costs, and any conflict felt by the behavior can be neutralized through justification. Finally, in Part III, this note posits that the most plausible solution for deterrence of insider trading is a clarification of the existing laws such that the legal cost of the crime can compensate for low normative barriers.

I. CRIMINAL CAUSATION IN THE CONTEXT OF INSIDER TRADING

Insider trading is committed by people who have achieved a certain amount of success in society. This is a necessary conclusion because by definition, an “inside” trader must have a close enough connection to the financial world to receive access to the information. This link is often through an elevated employment position in a corporation, the position as a financial or legal advisor, or through a social relationship with someone in an inside position. This point is exemplified by the insider trading scandals of the late 1980s involving prominent people and by the current allegations against Martha Stewart. In light of the

10 See infra Part III (discussing how more effective legal costs could deter insider trading).

11 ELIZABETH SZOCKYJ, THE LAW AND INSIDER TRADING: IN SEARCH OF A LEVEL PLAYING FIELD 5 (1993) (defining the insider as someone who receives inside information through their employment, relationship with the company, or is tipped by others).

12 Id.

13 Id. at 116 (discussing the opportunity that executive officers, directors, and majority shareholders have for trading on inside information and depicting the stereotypical dissemination of inside information at the golf course). Printer employees also have contact with inside information. See Chiarella v. United States, 445 U.S. 222 (1980) (finding that printer who traded on inside information had no duty to abstain from the trade); infra Part II.B.3.a (discussing Chiarella).

14 See COLEMAN, supra note 4, at 89 (discussing previous scandals).
conclusion that people committing the crime of insider trading have already achieved relative success, it is important to look at why they are willing to commit the crime and put their status and wealth at risk.  

There are many competing theories on why people commit crime. While many other theories may, in whole or in part, explain the behavior of people who commit crime and disassociate from society, these theories often fail to explain the behavior of people who commit the specific act of insider trading but otherwise conform to the law.

It has been posited that certain people have an innate criminality resulting from biological or physiological characteristics. Similar to that theory is the claim that criminals have a different psychological make-up and possess a sickness, mental pathology or personality disorder that causes them to repeatedly engage in crime rather than conform to the rules of society. An innate physical, mental or psychological characteristic may explain the actions of those who commit a myriad of offenses or dishonest acts throughout their lifetimes, but it does not explain those who conform to the law in general, but trade on inside information because an opportunity presents

15 See supra note 4 and accompanying text (listing people who put their wealth and status at risk by committing the crime of insider trading).
16 See, e.g., CLAYTON A. HARTJEN, CRIME AND CRIMINALIZATION 41-51 (1978) (discussing the different theories of criminal causation as physiological, psychological, environmental factors or cost/benefit).
17 See infra note 24 (discussing rational choice theory).
18 See SZOCKYJ, supra note 11 (discussing the types of relationships involved with being an insider).
19 Id. at 42-44 (discussing the theory that crime is caused by predisposed biological factors). This theory has received recent support in the study of repetitive antisocial behavior and is better suited to the study of crimes that are the result of maladaptive behavior such as violent crimes. Diana H. Fishbein, Biological Perspectives in Criminology, in THE CRIMINAL THEORY READER 92-93 (Stuart Henry & Werner Einstadter eds., 1998).
20 See HARTJEN, supra note 16, at 58 (discussing the different theories of criminal causation).
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itself. In fact, personality factors that have been associated with people that commit insider trading hardly seem to be factors that evidence a mental pathology or biological abnormality.

Instead, personality factors associated with the crime of insider trading often coincide with personality factors that are common to people who achieve success. A study that examined the influence of personality factors on ethical decision-making found a positive correlation between insider trading and the factors of competitiveness, youth and the male gender. Insider trading is a crime of opportunity that, unlike other crimes of opportunity such as stealing cars or embezzlement, does not bar the perpetrator

21 Although this note uses the ImClone Scandal to illustrate the rational choice involved in the decision to commit the singular crime of insider trading, it is necessary to acknowledge that Dr. Waksal, the CEO of ImClone, has allegedly committed other infractions throughout his lifetime. See Geeta Anand, In Waksal’s Past: Repeated Ousters, WALL ST. J., Sept. 27, 2002, at A-1 (discussing Dr. Samuel Waksal’s repeated ousters from respected research laboratories because of possibility of falsified results and dishonest work suggesting a history of nonconformity). Perhaps Waksal’s behavior went undeterred because his dishonest means to succeed did in fact conform to societal norms. See discussion infra Part II B.1 (discussing the prevalence of dishonesty and cheating in American society).

22 COLEMAN, supra note 4, at 201 (“It is generally agreed that personal pathology plays no significant role in the genesis of white collar crime.”).


24 Id. It is also difficult to claim that people commit the act of insider trading because they face outside factors such as poverty or other like hardships. This would be unlikely because the ability to obtain inside information depends on a certain amount of wealth and status.

25 Rational choice theory argues that criminals weigh the costs and benefits of a crime when they are faced with situational factors that present an opportunity to commit crime. See Derek B. Cornish & Ronald V. Clarke, Understanding Crime Displacement: An Application of Rational Choice Theory, in THE CRIMINOLOGY READER, 46 (Stuart Henry & Werner Einstadter eds., 1998).

26 Embezzlement is distinguishable from insider trading because although both occur in the corporate environment, embezzlement does not possess the same legal gray areas as insider trading nor does it possess the social aspect of insider trading in which tips are spread among family and friends.
from participation in high society. Therefore, criminal law theories that use biological, psychological or environmental factors to understand the commission of crime are not useful to understand insider trading. Instead, this note conducts a cost-benefit analysis of insider trading.

II. A COST-BENEFIT ANALYSIS OF INSIDER TRADING

Insider trading, like other corporate crimes of opportunity, is best analyzed through the framework of the classical school of criminal law. The classical school views the human being as a rational decision maker with a free will. This framework discounts factors such as biological, psychological, or environmental abnormalities, which are proposed by competing criminal theories. Criminal conduct is viewed as a rational choice derived through a cost-benefit analysis. According to the legal theorist Jeremy Bentham, “[n]ature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do.” Put another way, crime is committed when potential benefits outweigh potential costs.

27 See Szokey, supra note 11, at 113-14 (discussing the social and employment rewards that may stem from insider trading).
28 See supra note 25 (describing rational choice theory).
29 Hartjen, supra note 16, at 54-55. The classical school employs a rational choice theory. Like other crimes of opportunity, insider trading can be explained by examining the hypothetical cost-benefit analysis a person would engage in before committing the act.
30 Id. (noting that the classical school of thought developed from judicial reform in the eighteenth century Europe).
31 See supra note 25 (discussing rational choice theory).
32 Id.
33 Jeremy Bentham, An Introduction to the Principles of Morals and Legislation (1789), reprinted in Joseph E. Jacobs, Classics of Criminology 61 (1979). More primitively, this can be described as a balance between pain and pleasure.
34 Hartjen, supra note 16, at 42 (relating the degree of punishment to the degree of deterrence). Modern criminal law recognizes rational choice theory when it attempts to deter potential criminals through the high cost of
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The benefits of insider trading outweigh the costs for the group of people that engage in the behavior. The cost-benefit analysis utilized when deciding whether or not to commit a crime is similar to that which is used in economic decisions. The nonexclusive potential benefits associated with insider trading are increased wealth, avoidance of loss, possible career growth, social status, and maintenance of social relationships. The potential costs of insider trading on inside information are violation of one’s own moral beliefs, violation of social norms, violation of the law, and the consequences that follow.

A. Potential Benefits

The benefits of insider trading can be illustrated using the ImClone scandal. A hypothetical analysis illustrates why the members of the ImClone scandal may have committed insider trading. The facts are alleged as follows: In December of 2001, imprisonment. Id. This is not to say, however, that deterrence is the only reason for imprisonment. Id. See also id. at 54-55 (stating that crime is the result of a cost-benefit analysis).


36 SZOCKYJ, supra note 11, at 113-14.


38 See Charles Gasparino & Jerry Markon, Merrill Aide Will Plead Guilty, Cooperate on Martha Stewart, WALL ST. J., Sept. 26, 2002, at A1 (naming players in scandal and their relative positions). See SZOCKYJ, supra note 11, at 116-22 (discussing common positions held by insider traders). The ImClone scandal is a useful example because the alleged participants cover a broad range of people likely to trade on inside information: a corporate officer, an investment broker, friends, and family.

39 At this time only Dr. Samuel Waksal, former CEO of ImClone, has pled guilty and been sentenced. See Jerry Markon & Geeta Anand, Waksal Pleads
before the news was released that the FDA would not review ImClone’s application for the new cancer drug Erbitux, former ImClone CEO, Dr. Samuel J. Waksal attempted to sell some of his shares in his corporation before the announcement caused a subsequent fall in price. He tipped off family members and close friends about the FDA’s decision not to review Erbitux. One of those friends was Martha Stewart. Her Merrill Lynch broker, Peter Bacanovic, subsequently sold Stewart’s shares of ImClone. The benefits each alleged inside trader would have gained if successful were substantial. With the knowledge that the company stock would plummet significantly when the news was released about the FDA’s refusal to accept Erbitux, the traders would avoid substantial pecuniary losses by trading before the information was released and the market value of the stock was drastically reduced. By avoiding the loss, the traders would not endanger the social status they enjoyed as wealthy individuals. Peter Bacanovic could have enjoyed potential career advancement associated with sharing inside information with an important client

Guilty as U.S. Widens Probe, WALL ST. J., Oct. 16, 2002, at C1, C15. All other parties are merely alleged to have traded on inside information. Id.


41 See supra note 40 and accompanying text (discussing the facts of the Martha Stewart scandal).

42 Id.

43 Id.

44 See Anand, supra note 21, at A10 (discussing the fact that Erbitux was ImClone’s leading prospect and had been responsible for the company’s previous success).

45 Id. at A1 (stating that as of September 26, 2002 ImClone’s stock fell to less than nine dollars a share compared with more than seventy-five dollars a share preceding the announcement regarding the rejection of Erbitux). Hypothetically, if the traders had information that the stock would rebound at a later date, they could then buy back their shares at a huge profit.

46 See SZOCKYJ, supra note 11 (discussing benefits associated with insider trading).
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such as Martha Stewart. Dr. Waksal, by tipping off friends and family, would have strengthened his social relationships with them.47

B. Potential Costs

The most significant costs involved with committing the crime of insider trading are the violation of one’s own moral beliefs, social norms, and the law.48 To get a complete picture of the costs a rational actor would face, it is helpful to evaluate the strength of these informal and formal costs individually and then examine the strengthening or weakening effect of the costs on each other.

1. Violation of Moral Beliefs and Social Norms

Informal costs associated with committing a crime can be both internal and external.49 Norms control people’s behavior internally by affecting one’s view of oneself as a moral being and externally by influencing the way others view their behavior.50 The cost of violating a moral belief or social norm is perhaps even more influential on behavior than the cost of breaking the law.51 The internal cost associated with committing a crime is the violation of one’s own moral beliefs.52 This violation reduces the ability to view oneself as a moral being.53 Internal costs are closely related to external costs because internal morals are often formed from

47 See Markon, supra note 38 (describing Waksal’s crimes). It is the author of this note’s conclusion that Waksal received social reinforcement when tipping his friends and family members. This conclusion is derived from the fact that insider trading may serve as a form of social networking. See SZOCKYJ, supra note 11, at 117 (illustrating how insider trading is often committed in a social context).
48 See Robinson, supra note 37 (explaining the costs associated with breaking the law).
49 Id. at 1861 (discussing types of informal costs).
50 Id.
51 Id.
52 Id. at 1862.
53 Id. (noting that people generally want to see themselves as moral beings).
external sources. An example of this is a child that adopts his parent’s view of right and wrong.

An external cost of committing a crime is a violation of social norms. Social norms define the line between socially acceptable behavior and unacceptable behavior. They create an obligation to act or not act in a particular way. Costs of violating a social norm include a loss of decent public image, employment position and social acceptance. Howard S. Becker, a distinguished sociologist, posited that “[d]eviance is not a quality that lies in behavior itself, but in the interaction between the person who commits an act and those who respond to it.” In other words, it is society’s reaction to behavior that acts as a deterrent. In terms of insider trading, it is not the actual effect on the market that would deter a potential insider trader, but the fact that he or she would be viewed as a deviant by society.

The costs associated with breaking an internal or external norm, whether or not it is also a law, heavily influence an individual’s decision to commit a crime. A useful explanation of this influence is the “Esteem Theory” which states:

If many people agree that a behavior deserves disapproval, if there is an inherent risk the behavior will be detected, and

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54 See Robinson, supra note 37, at 1862 (stating that people come to hold the moral standards with which they are raised as their own).
55 Id.
56 Id. (describing the power of social norms to deter crime).
57 RICHARD A. CLOWARD & LLOYD E. OHLIN, DELINQUENCY AND OPPORTUNITY (1960), reprinted in JOSEPH E. JACOBY, CLASSICS OF CRIMINOLOGY 171 (1979) (noting that norms define what is legitimate behavior in society versus what is illegitimate).
58 Id.
59 Id. (discussing costs that occur even if not arrested for crime).
61 In applying the above hypothesis to the crime of insider trading the assumption is made that societal norms provide deterrence rather than the possible bad effects of the crime itself.
62 Robinson, supra note 37, at 1863 (discussing research that found internal and societal control have stronger deterrent effect than legal sanctions).
if this agreement and risk are well-known, then the pattern of disapproval itself creates the cost to the behavior. When sufficiently large, these costs produce a norm against the behavior. People conform their behavior to receive positive esteem or avoid a negative reaction. Therefore, in order to understand whether insider trading is sufficiently deterred, it is helpful to ascertain whether society disapproves of insider trading, and if so, whether there is a well-known risk of detection.

a. Is Insider Trading Fair?

The harm most commonly associated with insider trading is that it produces an unfair result. The claim that insider trading is unfair derives from the belief that trading on inside information destroys the integrity of the marketplace by giving an informational advantage to a select group of insiders. This informational advantage harms the outside uninformed investors and causes instability in the marketplace. The idea that insider trading is fundamentally unfair draws on the proposition that all investors should have equal access to information and the benefits of investing in securities. The trader using inside information

64 *Id.* at 356.
66 See HAZEN, *supra* note 5, at 640. Unlike other corporate crimes, such as looting the assets of a company, insider trading, standing alone, affects stock price by affecting the supply and demand of the shares rather than removing value from the underlying company. See JONATHAN R. MACEY, *INSIDER TRADING: ECONOMICS, POLITICS, AND POLICY* 25 (1991) (discussing the effect on a company’s shares when a corporate insider trades on nonpublic adverse information).
68 MACEY, *supra* note 66, at 28.
trades at the wrong price because the price of the security does not yet reflect the inside information. Likewise, the uninformed investor is unable to benefit from the nonpublic information. Thus, the uninformed investor is unable to trust the price of the security as reflecting its true value and investor confidence will suffer.

There some lack of consensus as to whether trading with inside information deserves disapproval, however. To counter the argument that insider trading is unfair and harms outside uninformed shareholders, there is an economic argument that insider trading helps shareholders both by setting an advantageous market price and by transmitting the information into the share value. The argument claims that insiders benefit shareholders by boosting share prices when they trade on information that a company is going to have a future gain. This boost in price is beneficial to outside uninformed shareholders whether they sell at the time insiders are buying or if they hold onto their stock and sell when the insiders sell. Likewise, a shareholder that buys shares during the time that insiders are selling in advance of knowledge that the company is going to have a future loss is benefited by the decreased share price at the time of the buy. The buyer,
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hypothetically, would have bought the stock regardless of the insider activity and therefore reduces his loss when the stock falls because the difference between the buy and sell price is reduced. The uninformed outside trader that does not react to the insider activity and merely holds onto his shares is neither helped nor harmed by the insider trading.

There is also an argument that legalizing insider trading would provide benefits for shareholders by lowering the cost of management. Proponents of legalizing insider trading argue that individual companies could decide whether to permit trading on their own inside information and even offer it as part of a compensation package to managers and directors. Allowing managers and directors to trade on inside information involves no more risk than allowing managers and directors to set their own salaries and bonuses. In essence, this economic argument not only rebuts the claims that trading on inside information is unfair and harms the market, but actually proposes that insider trading creates a more fair and accurate market by disseminating information into the share price more quickly.

The argument that insider trading can actually help the market conflicts sharply with the idea that insider trading is so unfair that information becomes public. If the quantity traded by insiders is not sufficient to affect the price of the security then the uninformed investor will not be affected. Id. (noting that it is the pressure put on the market by the insiders that would affect the price).

Id.

Id.

Id. at 28-29 (arguing that including insider trading rights in a compensation package would benefit shareholders by lowering managers’ and directors’ demands for monetary compensation).

Id. at 30-31. This argument is premised on the argument that managers sufficiently motivated by profits to harm shareholders through insider trading would also be sufficiently motivated to harm shareholders through demands for excessive compensation. Id.

Id. at 24-31. The argument, however, ignores other issues that may make regulation of insider trading practical such as the difficulty of deregulated monitoring, uneven compliance, and international pressure to regulate global markets.
it should be punishable by an extended prison sentence.\textsuperscript{83} Therefore, because there are such sharply opposed schools of thought in the debate of how to treat insider trading, it is unclear whether a person weighing the costs associated with insider trading would perceive the crime to deserve disapproval from society.\textsuperscript{84}

\textit{b. Is There a Different Set of Norms?}

Furthermore, it is possible that the class of people likely to commit insider trading subscribe to a different set of norms.\textsuperscript{85} The potential benefits associated with insider trading signify that behavior associated with insider trading may actually be viewed as positive among the type of people likely to commit the crime.\textsuperscript{86} The example of a corporate director passing along insider stock tips to his friends at a golf course illustrates the potential for positive social reinforcement for the behavior.\textsuperscript{87} That director may receive positive feedback such as elevated status, gratitude from friends or the promise of future inside information from other members of his group. A person in this social group is encouraged to trade on inside information because of positive social

\textsuperscript{83} See Hang, supra note 67 (saying that insider trading is “fundamentally unfair”).

\textsuperscript{84} For the purpose of this note, it is the perception of disapproval that is important because it is this perception that will potentially deter the person from trading with inside information. If that person is able to justify the act of insider trading as fair or as failing to create a true harm, then the cost of violating social norms will not be sufficiently high to deter the crime. See discussion infra Part III (discussing the power of justification).

\textsuperscript{85} See Szockyj, supra note 11 (discussing the likelihood that perpetrators of insider trading have achieved significant social or monetary success). See also Toni M. Massaro, \textit{Shame, Culture, and American Criminal Law}, 89 Mich. L. Rev. 1880, 1933-34 (1991) (discussing the difference between middle class and the wealthy in relation to public shame). Massaro found that the middle class is much more responsive to the threat of public shame than the wealthy because they need society’s approval to achieve success, whereas the wealthy are already outliers of mainstream society. \textit{Id}.

\textsuperscript{86} See supra Part II.A (discussing the benefits of insider trading).

\textsuperscript{87} See Szockyj, supra note 11 (discussing the relationships involved in insider trading).
reinforcement, not dissuaded from the activity because of a fear that society would view them as engaging in unfair behavior.88

An illustration of this type of reinforcement is the insider that is immersed in the business world driven by financial gain. In a study involving students in various business schools it was determined that a person would be likely to commit corporate crime if the crime was supported by their corporate environment.89 This propensity to commit crime was not explained by a feeling of invulnerability to legal sanctions, but instead by a feeling that behavior was deemed necessary or acceptable by their workplace.90 The study found that people were especially likely to commit crime for their workplace when the company was doing poorly or faced with international competition.91 This may indicate that people that trade with inside information may be influenced by a different set of social values—the values of their particular social group or corporate society. Similarly, an individual may also be influenced by the ethics of his profession to commit acts that harm the corporation.92 Corporate managers or directors may want to match the monetary success of their contemporaries and may put their own needs above their duty to the corporation in order to achieve exorbitant ends.93

88 See, e.g., Raymond Paternoster & Sally Simpson, Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime, 30 LAW & SOC’Y REV. 549, 573-74 (1996) (finding that employees are more likely to commit crime when it is reinforced by their corporate society).
89 Id.
90 Id. at 574. This propensity to commit crime for the benefit of the employer is illustrative of the more relaxed ethical standards of the business world. Id. (providing examples of when the business world espouses more relaxed ethics).
91 Id. at 568.
92 See Lisa G. Lerman, The Slippery Slope From Ambition to Greed to Dishonesty: Lawyers, Money, and Professional Integrity, HOFSTRA L. REV. 879, 889 (2002) (detailing the decline in legal ethics in response to the increase in legal earnings).
93 See Matt Murray, Rachel Emma Silverman, & Carol Hymowitz, GE’s Jack Welch Meets His Match in Divorce Court, WALL ST. J, Nov. 27, 2002, at A1 (noting that after divorce proceedings revealed exorbitant retirement perks, Welch was forced to relinquish 2.5 million to the corporation). This example
The low normative cost can also be understood when looking at the positive and negative aspects of insider trading in the context of American culture as a whole. Insider trading is often thought of as cheating, unfair and greedy. Although none of the above named traits sound especially moral or positive, American culture does reinforce self-interested, competitive behavior and highly values material gain. Especially in the business world, unfair and greedy behavior is accepted as commonplace. Greed has been considered so commonplace that “rather than be an aberration, this attitude reflects business ethics and practices throughout North American history.” Cheating, despite its negative connotations, shows how a member of the business world may be influenced to act against the interest of the corporation in contrast to the employee that commits crime for the benefit of the corporation.

94 See infra notes 100-07 and accompanying text (discussing the values of a capitalist society). It is worthwhile to note that other countries with market economies also have insider trading, however, many of the other countries do not condemn insider trading as much as the American legal system does, and some of the countries did not start regulating insider trading until recently under pressure from the United States.

95 See William R. McLucas et al., Common Sense, Flexibility, and Enforcement of the Federal Securities Laws, 51 BUS. LAW. 1221, 1233 (1996) (stating that “insider trading pure and simple, is cheating”); see also Peter M. Donnelly, The Insider Trading and Securities Fraud Enforcement Act of 1988 and Controlling Person Liability: Can Firms Outside the Securities Industry Risk Not to Adopt Insider Trading Safeguard?, 67 U. DET. L. REV 261, 265 (1990) (finding the unfairness argument to be based on the premise that insider trading is cheating). See supra Part II.B.1.a (discussing insider trading as fundamentally unfair). See SZOCKYJ, supra note 11, at 113 (noting the large monetary gains that can result from trading with inside information). It is the author of this note’s conclusion that insider trading is perceived as greedy.

96 COLEMAN, supra note 4, at 203 (“[T]he culture of industrial capitalism tends to encourage values, attitudes, and personality structures conducive to white collar crime.”). The culture of industrial capitalism encourages people to strive for material success of the individual in a highly competitive atmosphere. Id. In contrast to a culture that encourages success for the group or sharing of wealth, industrial capitalism leads one to act for one’s own benefit potentially at the expense of others. Id.

97 See Paternoster, supra note 88 (giving examples of when corporate society encourages crime to get ahead).

may not be a significant enough deviation from normative behavior to impose a high enough cost to outweigh the benefits of insider trading.

Although insider trading is labeled unfair, unfairness is actually a societal norm. A capitalist economy values self-interest over public interest. Although considered to be immoral by some, promotion of self-interest is at the heart of the American economy and culture. In American culture the individual is placed above the group and must be both aggressive and competitive to survive. Some people have unfair advantages over others because American society reflects a huge disparity between the wealthy and the poor. If one is born with material advantages, one can receive a better education, often have better access to employment opportunities, and exert more influence over social

99 Although the acceptance of this unfairness maybe grudging in some cases, the author posits that unfairness is an inherent characteristic of a capitalist society where all people are not economic equals.

100 Capitalism is defined as “[a]n economic system that depends on the private ownership of the means of production and on competitive forces to determine what is produced.” BLACK’S LAW DICTIONARY 202 (7th ed. 1999). Therefore, by definition the American economy encourages a society in which individuals compete against each other to increase production and material success. See JOYCE KOLKO, AMERICA AND THE CRISIS OF WORLD CAPITALISM XIV (1974) (labeling America as capitalist).

101 IAN TAYLOR, CRIME IN CONTEXT: A CRITICAL CRIMINOLOGY OF SOCIETIES 64 (1999).


103 GABOR, supra note 98, at 52 (discussing the pursuit of winning and self-interest as central themes in history).

104 Id. at 222-23 (describing how American culture influences crime).

Although cheating has more negative connotations than unfairness and is at times considered unacceptable business practice, cheating does not have an extremely high moral cost. Cheating can be seen as immoral because it is profiting at the expense of other’s moral behavior and gleaning an unfair advantage. Achieving that unfair advantage in American society, however, is not necessarily in violation of social norms. Whether or not cheating truly violates social norms varies along a

106 See LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY 256-57 (2001) (looking at German and Japanese corporations and stating that “it is not the case that all advanced industrial countries treat material wealth as the end, at least anywhere near the degree that Americans do.”). Many countries have a large disparity between the rich and the poor, though it is arguable that American culture is distinguishable from other advanced industrialized countries as more individualized and materialistically driven. See COLEMAN, supra note 4, at 203 (discussing the values of a capitalist country). Although insider trading occurs and is illegal in both Germany and Japan, and although insider trading just became illegal in Germany in 1992, neither country punishes insider trading with the level of seriousness that the United States does. See Victor F. Calaba, The Insiders: A Look at the Comprehensive and Potentially Unnecessary Regulatory Approaches to Insider Trading in Germany and the United States, Including the SEC’s Newly Effective Rules 10b5-1 and 10B5-2, 23 LOY. L.A. INT’L & COMP. L. REV. 457, 469 (2001) (discussing Germany’s recent promulgation of insider trading regulations under pressure to compete with foreign markets); Ramnzi Nasser, The Morality of Insider Trading in the United States and Abroad, 52 OKLA. L.REV. 377, 381 (1999) (noting that Japan did not enact criminal sanctions for insider trading until 1988 despite “rampant” insider trading, and also noting that Japan had only sentenced one trader to jail at time of article’s publication). It is unclear and a potential area for research to determine if this lack of punishment means that insider trading is not as disruptive on the Japanese and German markets because of a more responsible corporate culture or whether it is just not perceived to be as great a wrong. See Calaba, supra; Nasser, supra.

107 Stuart P. Green, Why It’s a Crime to Tear the Tag Off a Mattress: Overcriminalization and Moral Content of Regulatory Offense, 46 EMMORY L.J. 1533, 1552 (1997) (categorizing cheating as a prima facie immoral act). This note will show that although cheating may be “a prima facie immoral act” it is relatively acceptable in our society.

108 Id.

109 See supra Part II.B.1.b (discussing the norms in American culture).
continuum of behavior. At one extreme, cheating in such a way that produces a dangerous outcome must be considered wrong.\textsuperscript{110} At the other extreme, however, certain forms of cheating are considered to be acceptable because the harm is not identifiable or the harm is expected.\textsuperscript{111}

At both extremes the person’s dishonesty is in fact cheating another person out of value owed.\textsuperscript{112} Likewise insider trading varies from a small dollar amount with little or no effect on the market to a large trade that will drastically affect share prices.\textsuperscript{113} Many forms of cheating thus do not have a high normative cost. Therefore, at least at the lower end of the continuum, insider trading is not in clear violation of societal norms. Insider trading can be considered a relatively morally neutral behavior.\textsuperscript{114}

2. Interaction between Societal Norms and the Law

The costs associated with moral belief and societal norms are low. It is also probable that much insider trading goes undetected

\textsuperscript{110} See Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 370 (Cal. Ct. App. 1981) (finding that Ford did not include a bladder in the fuel system that could have prevented harm at a cost of four to eight dollars per car to realize a savings of 20.9 million dollars).

\textsuperscript{111} Examples of cheating that do not have a high normative cost could be looking at the answers while completing a puzzle or taking extra “post it” notes from the company supply closet. Cf. GABOR, supra note 98, at 57-60 (looking at dishonest acts committed by law abiding citizens).

\textsuperscript{112} See supra notes 110-11 (giving examples of cheating behavior).

\textsuperscript{113} See discussion supra Part II.B.1 (noting the harms caused by insider trading). See also SZOCKYJ, supra note 11, at 59 (quoting a SEC official stating that only the larger trades get picked up by surveillance and that only a tiny fraction of the smaller illicit trades are caught).

\textsuperscript{114} This note argues that although insider trading is considered cheating behavior, cheating is in fact considered acceptable in many situations. Green, supra note 107, at 1547 (quoting Peter Arenella in defining morally neutral conduct as behavior that does not “violate any religious doctrine or community-based moral norms”). This is a helpful definition of morally neutral behavior although Green comes to the conclusion in his article that insider trading does in fact violate the community based norm of cheating. Id.
because of the secretive nature of the crime.\textsuperscript{115} The difficulty of detection in combination with the fact that insider trading is an ill-defined offense fail to provide the “well known risk” necessary to generate the pattern of disapproval espoused by the “Esteem Theory.”\textsuperscript{116} Therefore, it is likely that despite the great influence societal norms have on human behavior, there is not a strong normative cost to committing insider trading.

The amount of influence a norm has on the decision to commit a crime can be strengthened or weakened by the law.\textsuperscript{117} Since this analysis has concluded that there is not a sufficiently high normative cost, an effective legal cost would be necessary to offset the benefits of insider trading.\textsuperscript{118} The legal consequences for

\textsuperscript{115} Szockyj, supra note 11, at 55 (insinuating that although the SEC has publicly prosecuted a high profile case they have been unable to detect the majority of insider trading). See id. at 59 (noting that SEC is unable to proactively detect many of the illicit trades because they are too small to register on the surveillance system). See also Stephen M. Bainbridge, Incorporating State Law Fiduciary Duties into the Federal Insider Trading Prohibition, 52 Wash. & Lee L. Rev. 1189, 1262 (1995) (noting that it is difficult to detect when insider trading is taking place, who is making the trades, and if detected it is difficult to build a case against the trader); Stephen M. Bainbridge, Insider Trading Under the Restatement of the Governing Lawyers, 19 J. Corp. L. 1, 29 (1993) (citing that it has been estimated that one in five cases of insider trading is successfully prosecuted and that it is very difficult to tell when insider trading is taking place). A contributing factor to the problem of detection may be the SEC’s lack of funding. See Peter M.O. Wong, Insider Trading Regulation of Law Firms: Expanding ITSFEA’S Policy and Procedures Requirement, 44 Hastings L.J. 1159, 1163 (1993) (citing the SEC’s lack of funding as contributing to problems of detection). See also Molly Ivins, Mutual Funds Managers Ambush the Middle Class, Chi. Trib., Nov. 6, 2003, at 31 (saying that the SEC is underfunded); Craig D. Rose, Only a Few Bad Apples? Despite Reforms, Investors Haven’t Seen the Last of Corporate Greed, San Diego Union-Trib., May 4, 2003, at H-1 (noting that the SEC is underfunded and understaffed).

\textsuperscript{116} See supra note 63 and accompanying text (discussing the Esteem Theory).

\textsuperscript{117} McAdams, supra note 63, at 347 (finding that “(1) sometimes norms control individual behavior to the exclusion of the law, (2) sometimes norms and law together influence behavior, and (3) sometimes norms and law influence each other”).

\textsuperscript{118} Robert Cooter, Symposium: Normative Failure of Law, 82 Cornell L.
behavior increase the social view that the behavior is not acceptable. If a law is passed expressing values that the culture already espouses, then conformity to the law will be strengthened. If the legal sanction does not coincide with normative values and is not perceived as a sincere risk, however, the legal sanction may not be perceived as a high enough cost and will have little or no deterrent effect.

In theory, criminal law can shape ambiguous social norms by highlighting the “wrongfulness of the contemplated conduct,” but insider trading has an ambiguous relationship to social norms. The behavior is a form of cheating because it uses an unfair advantage at the expense of another. Also, the positive value of the behavior benefits the individual rather than society. Although, as previously discussed, it may not be at odds with American culture, insider trading could be susceptible to being constrained by the law. Insider trading law, however, is both

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119 See Cooter, supra note 118 (discussing how the law interacts with societal view).
120 See McAdams, supra note 63 (discussing the relationship between social norms and compliance with the law).
121 Robinson, supra note 37, at 1868 (noting the failure of Prohibition laws).
122 Id. at 1864.
123 See supra note 95 and accompanying text (labeling insider trading as cheating).
124 See discussion supra Part II.A (discussing the individual benefits associated with insider trading).
125 See Cooter, supra note 118 (noting how the law may impose a beneficial social norm).
vague and contradictory.\textsuperscript{126} The law does not highlight the wrongfulness of the behavior because the law does not consistently punish those that produce an “unfair”\textsuperscript{127} result, nor does it punish all of the people who knowingly use inside information to their advantage.\textsuperscript{128} It fails to clearly define the offense or to provide consistent deterrence for the behavior.\textsuperscript{129} Therefore, it fails to strengthen the normative values or increase the cost of insider trading.

3. Violation of the Law

Violating the law puts an individual at risk of being arrested, prosecuted and convicted.\textsuperscript{130} Conviction includes the possibility of monetary fines or loss of freedom.\textsuperscript{131} The crime of insider trading carries significant civil and criminal penalties.\textsuperscript{132} These penalties have increased overtime presumably with the hope that deterrence would increase.\textsuperscript{133} The high costs of treble damages and the possibility of five to ten years in prison should outweigh the benefits to insider trading.\textsuperscript{134} In order to be effective, however, legal costs associated with insider trading must be perceived as a

\textsuperscript{126} See infra Part II.B.3 (discussing ambiguity of insider trading law).
\textsuperscript{127} See Hang, supra note 67 (describing insider trading as unfair).
\textsuperscript{128} See infra note 150 and accompanying text (discussing the fact that corporate insiders are permitted to profit from inside information by holding onto their shares or tipping others to hold shares, rather than making their regular trades, if they have knowledge that prices will increase).
\textsuperscript{129} See supra Part II.B.3.a-c (discussing how the law fails to provide a clear message as to what constitutes insider trading and why some types of insider trading are allowed despite producing the same harms as illegal insider trading).
\textsuperscript{130} KADISH, SANFORD H. & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 2-6 (7th ed. 2001) (discussing criminal justice system).
\textsuperscript{132} 17 C.F.R. § 243.100-243.103 (2000).
\textsuperscript{133} See supra note 131 (noting the increased penalties).
\textsuperscript{134} See supra Part II.A (describing the benefits of insider trading).
real risk and the act of insider trading must be perceived as a true crime.

Unfortunately, the law fails to adequately support the legal cost. Insider trading is an ambiguous offense that is difficult to detect and is not actually defined in any legislation. The Supreme Court’s interpretation of the legislation is often at odds with the SEC and offers confusing results. Insider trading is commonly described as a trade in which “a person, [in breach of their duty,] in possession of material nonpublic information about a company, trades in the company’s securities and makes a profit or avoids a loss.” It is often unclear, however, who has a duty, why some material nonpublic information is treated differently than other material nonpublic information, and why only some people who profit from inside information are punishable. Although all trades using inside information would affect the marketplace and the uninformed outside investor in the same way, not all trades using inside information are considered illegal. This formulation of insider trading does not adequately serve to prevent the harm caused by insider trading. Thus, unpredictable means of enforcement do little to provide society with a clear understanding.

135 See supra note 131 (describing the legal penalties of insider trading).
136 See supra note 115 and accompanying text (discussing the difficulty of detecting insider trading).
137 See HAZEN, supra note 5, at 640 (saying that insider trading is not actually defined in legislation).
138 See infra Part II.B.3.a (showing the courts limitations on Rule 10b-5 liability).
140 See discussion supra Part II.B.3.a-c.
141 An example of a trade on inside information that is legal would be a person with no relationship to the corporation that fortuitously overhears a piece of material nonpublic information and buys or sells securities based on that information.
142 See supra Part II.B.1.a and accompanying text (describing the harms associated with insider trading as being unfair to outside investors and causing instability in the marketplace).
the crime of insider trading.\textsuperscript{143}

The three major rules that are used to prosecute insider trading are rule 10b-5,\textsuperscript{144} rule 16b,\textsuperscript{145} and rule 14e-3.\textsuperscript{146} Rule 10b-5, which is most commonly used to prosecute insider trading is vague and unevenly applied.\textsuperscript{147} Although section 16b and rule 14e-3 appear clear, they are too narrow in scope to address the inadequacy of rule 10b-5.\textsuperscript{148} An analysis of each of the rules reveals the difficulty in defining what insider trading is and shows that the law is often unable to adequately prevent the harm associated with insider trading.

\textit{a. Rule 10b-5}

Rule 10b-5, promulgated under the authority of section 10(b) Securities Exchange Act of 1934,\textsuperscript{149} does not even use the term insider trading.\textsuperscript{150} Instead the language used to prosecute insider

\begin{itemize}
\item \textsuperscript{143}See supra Part II.B.3 (noting that a crime must be a well defined risk to deter a rational actor in their cost-benefit analysis).
\item \textsuperscript{144}17 C.F.R. § 240.10b-5 (2003) (finding it unlawful to "engage in any act, practice, or course of business which operates or would operate as a fraud . . . in connection with the purchase or sale of any security").
\item \textsuperscript{145}17 C.F.R. § 240.16b-5 (2003) (finding that it any short swing profit by an insider "shall inure to and be recoverable by the issuer, irrespective of any intention on the part of the beneficial owner, director or officer . . .").
\item \textsuperscript{146}17 C.F.R. § 240.14(e)(3) (2003) (stating that to trade on inside information with respect to a tender offer "shall constitute a fraudulent, deceptive, or manipulative act . . .").
\item \textsuperscript{147}See HAZEN, supra note 5, at 640 (stating that insider trading is not defined in legislation and that the law has failed to develop systematically or provide bright line rules).
\item \textsuperscript{148}See discussion infra Part II.B.3.b-c (discussing the inadequacy of section 16b and rule14e-3).
\item \textsuperscript{149}Section 10(b) of the Securities and Exchange Act of 1934 says in relevant part that it shall be unlawful "to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors . . ." 15 U.S.C. § 78j(b) (2003).
\item \textsuperscript{150}Rule 10b-5 provides:
trading is that it is illegal to knowingly “engage in any act, practice, or course of behavior which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.” Since rule 10b-5 does not actually define the crime of insider trading, the courts have interpreted the rule in a way that is often confusing in application.

The evolution of the duty element of 10b-5 liability illustrates the inconsistent application of rule 10b-5 to prevent the harm caused by insider trading. In In re Cady, Roberts & Co., the SEC determined that rule 10b-5 mandated that corporate insiders have a duty to either abstain from trading on material inside information or disclose the inside information prior to trading. Since Cady, Roberts, & Co., the Supreme Court has further interpreted the duty element to scale back the broad reach of rule 10b-5. In Chiarella v. United States, the Supreme Court exposed the inconsistent application of insider trading laws when it overturned the SEC conviction of a financial printer employee who traded on

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) to employ any device, scheme, or artifice to defraud, (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.


151 See HAZEN, supra note 5, at 640 (stating that “the law [with regard to insider trading] has not developed systematically nor has it evolved in such a way to produce bright-line tests of when it is permissible to trade”).

152 In re Cady, Roberts & Co., 1961 WL 69638, at *3 (S.E.C. Release No. 34-6668) (stating that corporate insiders owe a duty to disclose or abstain from trading on inside information). See also United States v. O’Hagan, 521 U.S. 642, 651-52 (1997) (discussing that under the classical theory of 10(b) liability the duty derived from the relationship of trust and confidence between the insider of a corporation and the shareholders of a corporation). This duty has since been extended to include the source of the information that has been misappropriated. Id. at 653 (adopting the misappropriation theory).
confidential information regarding tender offers. The Supreme Court held that the printer did not have a duty to disclose, prior to the trade, the information he traded on under rule 10b-5 and section 10(b) of the Securities and Exchange Act of 1934. This was because the printer owed no duty to the corporation or its shareholders.

Again in 1983, the Supreme Court overturned a conviction for insider trading using rule 10b-5 and section 10(b) when it found there was no requisite breach of duty in United States v. Dirks. In Dirks, a broker, that was tipped by a corporate insider that the corporation had been engaging in fraudulent behavior, selectively disclosed that information to his clients, who were in turn able to avoid significant loss. The Court found, however, that because the corporate insider did not gain a personal benefit when he tipped Mr. Dirks there was no requisite breach of duty. Although not typical insiders, such as a director or officer, who owe a duty of disclosure to a corporation, both Chiarella and Dirks knowingly subjected the market to the potential adverse effects of insider trading. Both men took advantage of access to nonpublic inside information through their positions of employment. Both men

155 Id. at 232. A tender offer is “[a] public announcement by a company . . . that it will pay a price above the current market price for shares ‘tendered’ of a company it wishes to acquire control of.” BLACK’S LAW DICTIONARY 1468 (6th ed. 1990).
156 Id.
158 Id. at 648-49.
159 Id. at 665-66.
160 See Cady, Roberts & Co., 1961 WL 69638 at *3 (finding that corporate insiders owe a duty to disclose or abstain from trading with inside information). See also Chiarella, 445 U.S. at 227-28 (citing Cady and noting that although insiders owe a duty to the corporation through their employment, Chiarella was not under a duty to disclose his misuse of information).
161 Dirks, 463 U.S. 646; Chiarella, 445 U.S. 222. Chiarella directed traded securities with inside knowledge regarding a tender offer while Dirks passed the inside information onto his clients who then trade on the information. Chiarella, 445 U.S. at 222.
162 See Dirks, 463 U.S. at 651 (finding that Dirks passed the inside
also had an unfair advantage over outside uninformed traders. Yet, neither one was ultimately found guilty of insider trading.\footnote{163}

In response to the gray areas illustrated in the duty analysis of \textit{Chiarella} and \textit{Dirks}, the Supreme Court adopted the misappropriation theory in \textit{United States v. O’Hagan}.\footnote{164} \textit{O’Hagan} defined the misappropriation theory as holding that “a person commits fraud ‘in connection with’ a securities transaction, and thereby violates section 10(b) and rule 10b-5, when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information.”\footnote{165} The misappropriation theory broadened the duty requirement under rule 10b-5 and imposed a fiduciary duty on investors who trade with inside information to the source of the information.\footnote{166} The misappropriation theory reaches people who under previous law would be exempt from liability because they did not owe a fiduciary duty to the corporation and the corporation’s shareholders.\footnote{167}

The SEC has since supplemented the misappropriation theory with the promulgation of rule 10b5-2 which defines three situations in which a person owes a duty of trust or confidence.\footnote{168}

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\footnote{164} 521 U.S. 642, 647 (1997) (finding that lawyer owed no duty to corporation but owed duty to law firm who worked with corporation and simultaneously holding that the SEC did not exceed rule making authority in rule 14e-3 and adopting the misappropriation theory).
\footnote{165} \textit{Ibid.} at 652.
\footnote{166} \textit{Ibid.} (stating that information is misappropriated when there is a breach of duty to the source of information).
\footnote{167} See Lee, \textit{supra} note 65, at 128 (noting that the property approach of the misappropriation theory did not displace duty analysis, but rather extended the reach of the securities laws).
\footnote{168} Section 10(b)5-2 states in relevant part that a person owes a duty of trust or confidence:

(1) Whenever a person agrees to maintain information in confidence;
(2) Whenever the person communicating the material nonpublic information and the person to whom it is communicated have a history,
The three situations focus on a duty to keep a confidence either through a work relationship, past dealings or familial relations. The facts in O’Hagan, a case in which a partner at a law firm traded on inside information regarding an upcoming tender offer from one of the firm’s clients, clearly fit into one of these categories. O’Hagan owed a duty of trust and confidence under the misappropriation theory because of the confidence required between a lawyer, the firm at which he is employed and the client. The misappropriation theory does not, however, succeed fully in clarifying the law of insider trading because there are many situations when the duty imposed by the misappropriation theory is either unclear or insufficient.

Applying the misappropriation theory to the ImClone scandal, it is unclear whether all the actors will be found to have a duty.

pattern, or practice of sharing confidences, such that the recipient of the information knows or reasonably should know that the person communicating the material nonpublic information expects that the recipient will maintain its confidentiality; or (3) Whenever a person receives or obtains material nonpublic information from his spouse, parent, child, or sibling; provided, however, that the person receiving or obtaining the information may demonstrate that no duty of trust or confidence existed with respect to the information, by establishing that he or she neither knew nor reasonably should have known that the person who was the source of the information expected that the person would keep the information confidential, because of the parties’ history, pattern, or practice of sharing and maintaining confidences, and because there was no agreement or understanding to maintain the confidentiality of the information.

17 C.F.R. § 240.10(b)5-2 (2001).

169 Id. It is possible that an employment contract with Merrill Lynch may include some confidentiality agreement. This agreement would make it easier to claim that Bacanovic owed a duty to Merrill Lynch. Id.


171 Id. at 653.

172 An example of this would be a live-in partner that does not quite fit the “familial category” or past dealings with counselor that does not impose the same type of professional duty to keep a confidence to their clients as a psychiatrist.

173 See supra note 40 and accompanying text (explaining the facts of the ImClone scandal).
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Dr. Waksal, the CEO of Imclone, had a fiduciary duty to the corporation and shareholders so it is unnecessary to further evaluate his behavior under the misappropriation theory. Peter Bacanovic, the Merrill Lynch broker, could be found to have owed a duty to Merrill Lynch under “a shared history, pattern or practice of sharing confidences” or even under his employment contract. Martha Stewart, however, would be difficult to fit within one of the categories unless it could be shown that her past dealings with Waksal showed a pattern of shared confidences or that she knew that Bacanovic was in breach of his duties when he advised her to sell her shares. If Martha Stewart had a familial

174 Dr. Waksal would also have a duty under traditional 10b-5 analysis because he was the CEO of ImClone and owed the corporation a fiduciary duty. See supra note 153 (noting the duty analysis introduced in In re Cady).

175 Peter Bacanovic may have a duty under traditional analysis without the necessity of the misappropriation theory. See Dirks, 463 U.S. 646. It would be, however, difficult to prove because under Dirks the court held that breach of duty required a benefit to the trader. Id. (finding broker did not breach a duty because he did not financially benefit when he tipped his customers). If Bacanovic was only executing Martha Stewart’s order and not trading for his own benefit, it would be a harder case. See supra note 159 and accompanying text (discussing the Dirks duty analysis).


177 17 C.F.R. § 240.10(b)(5)-2(1) (2001).

178 It is important to note that Martha Stewart could still be subject to 10b-5 under traditional analysis. She would be, however, subject to duty analysis under Chiarella and Dirks, which would require a finding that Dr. Waksal was in breach of his duty to ImClone that he benefited from this breach and that she knew he was in breach of his duty. See supra notes 154-59 and accompanying text (discussing the difficulties with duty analysis under Chiarella and Dirks). Reflecting the difficulty in prosecuting insider trading cases Martha Stewart has not been indicted for criminal insider trading charges. Colleen Debase, Stewart Seeks Dismissal of Charges, WALL ST. J., Oct. 7, 2003, at C12 (citing that although the government investigated Martha Stewart’s trading activity, the indictment did not reflect an insider trading indictment). It is necessary to note that the SEC has filed civil insider trading charges. Id. This indictment, however, has been criticized. See Warren L. Dennis and Bruce Boyden, Stewart Prosecution Imperils Business Civil Liberties, LEGAL BACKGROUNDER, Oct. 2, 2003, available at http://www.marthatalks.com (referring to the indictment as “an unprecedented and unanticipated expansion of insider trading theory, one that gives every indication of having been crafted to snare Stewart rather than
relation to Waksal or Bacanovic, she would be easier to prosecute.\footnote{179} This is an arbitrary distinction. The proposed harm of insider trading, disruption of market confidence and unfair trade practices\footnote{180} is not lessened because the person trading on inside information is unrelated to the source. Therefore, as illustrated by this one example, the misappropriation theory is also under-inclusive in application.

\textit{b. Section 16(b)}

Section 16(b) of the Securities and Exchange Act prohibits corporate insiders from profiting on short swing trades.\footnote{181} It only applies to a limited class of people, however, and only prohibits active trades.\footnote{182} The rule considers all trades to be illegal within a period of less than six months to be insider trading unless there is a previously written schedule of trades.\footnote{183} Section 16(b) does not have a scienter requirement like rule 10b-5 because it states that the profit shall inure and be recoverable “irrespective of any intention on the party of such beneficial owner, director, or

\footnote{179} 17 C.F.R. § 240.10(b)(5)-2(3) (2001) (listing familial relationship as one that will be presumed to encompass a duty of confidence).

\footnote{180} See supra Part II.B.a (discussing the harms associated with insider trading).

\footnote{181} 15 U.S.C. § 16 78p(b) (2002). Section 16(b) provides that:

For the purposes of preventing unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase or sale, or any sale and purchase, of any equity security of issuer (other than an exempted security) or a security-based swap agreement . . . involving any such equity security within any period of less than six months . . . shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer . . . .

\textit{Id.}

\footnote{182} Id. (applying to the “beneficial owner, director, or officer” and to the “purchase and sale” or sale and purchase” of securities).

\footnote{183} Id.
officer.\textsuperscript{184} It is too narrow in scope, however, to close the gaps in enforcement left open by rule 10b-5.\textsuperscript{185} The application of section 16(b) is inconsistent when compared to the harms it is designed to prevent because of its requirement that the insider must actively trade to commit the offense.\textsuperscript{186} Therefore, the insider, who has a permissible schedule of trades, may decide to hold his shares based on material nonpublic information. Likewise the insider could tip his friends and family to hold their shares in advance of an upcoming event that will increase the price of the shares.\textsuperscript{187} The insider, therefore, has an unfair advantage over the outside uninformed investor and knowingly uses inside information to dictate market activity. Nonetheless, he would not violate section 16(b) because he did not actively trade on his inside information.\textsuperscript{188}

c. Rule 14e-3

The enactment of rule 14e-3\textsuperscript{189} under the statutory authority to...
regulate tender offers in the 1980s attempted to close the gap between what was legal versus illegal insider trading. Rule 14e-3 eliminates the need for a breach of fiduciary duty when trading

(a) [i]f any person has taken a substantial step or steps to commence, or has commenced a tender offer (the ‘offering person’), it shall constitute a fraudulent, deceptive or manipulative act or practice within the meaning of section 14(e) of the Act for any other person who is in possession of material information relating to such tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from: (1) The offering person (2) The issuer of the securities sought or to be sought by such tender offer, or (3) Any officer, director, partner or employee or any other person acting on behalf of the offering person or such issuer, to purchase or sell or cause to be purchased or sold any of such securities or any securities convertible into exchangeable for any such securities or any option or right to obtain or to dispose of any of the foregoing securities, unless within a reasonable time prior to any purchase or sale of such information and its source are publicly disclosed by press release or otherwise.


Section 14(e) of the Securities and Exchange Act of 1934 gives the SEC the authority by providing:

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request or invitation. The Commission shall, for the purpose of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.


O’Hagan did this by extending the duty analysis to include an employee’s duty to their employer. This expansion of duty dealt with the previous problem exposed in Chiarella v. United States in which a printer employee who traded on inside information was held not to have a duty to stockholders under section 10(b) of the Securities Exchange Act of 1934. 445 U.S. 222 (1980).
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material nonpublic information relating to a tender offer.\textsuperscript{192} Rule 14e-3 makes it “fraudulent, deceptive, or manipulative act or practice” to engage in the trade of material, nonpublic information in relation to a tender offer without proof of any fiduciary duty.\textsuperscript{193} Although this rule appears to capture most situations involved in trading on material nonpublic information during a tender offer, it fails to explain why information regarding tender offers is worthy of more legal attention than other types of corporate inside information that could have a volatile effect on the stock market.\textsuperscript{194}

Although probably a reaction to the prevalence of takeovers and tender offers in the 1980s,\textsuperscript{195} the discrepancy between the specificity of Rule 14e-3 and a catch-all rule such as 10b-5 is troubling.\textsuperscript{196} Using the example of the ImClone scandal, a tippee such as Martha Stewart who allegedly received material nonpublic information through someone she knew to be a corporate officer will be more difficult to prosecute because the information was in relation to the FDA examination of Erbitux rather than a tender offer.\textsuperscript{197} If the information Martha Stewart had allegedly traded on were in relation to a tender offer, she would clearly fall under the purview of the rule. But because it was not in relation to a tender offer and therefore must be analyzed under traditional 10b-5 liability, it is necessary to prove a duty.\textsuperscript{198} This distinction is

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\textsuperscript{192} 17 C.F.R. § 240.14(e)(3) (2002).

\textsuperscript{193} Id.

\textsuperscript{194} For example, news that a corporation is going to be facing expensive litigation, or that an overstatement of assets is about to be exposed could also have a dramatic effect on a stock’s market value.

\textsuperscript{195} See HAZEN, supra note 5, at 480 (stating that a new type of financing that first became available in the 1980’s became a very common method for takeovers).

\textsuperscript{196} Rule 10(b)(5)(c) merely provides in relevant part “to engage in any act, practice, or course of business, which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.” 17 C.F.R. § 240.10b-5 (2002). See supra note 150.

\textsuperscript{197} 17 C.F.R. § 240.14(e)(3) (2002) (extending duty only in relation to a tender offer).

\textsuperscript{198} See supra Part II.B.3.a (discussing the duty requirement under 10b-5). See also Jerry Markon, Martha Stewart Could be Charged as ‘Tippee,’ WALL ST. J., Oct. 3, 2002, at C1 (stating that “[t]ypically, insider-trading cases are
illogical because, for example, in the particular situation involving ImClone, the effect of the success or failure of the cancer drug Erbitux on the stock price of ImClone is comparable to the effect of information regarding a tender offer.\(^{199}\)

Rule 14e-3 also fails to resolve the discrepancy between a person who uses the inside information with knowledge of the source and a person who comes across the information fortuitously.\(^{200}\) This is because rule 14e-3 states that the trade:

shall constitute a fraudulent, deceptive or manipulative act or practice within the meaning of section 14(e) of the Act for any person who is in possession of material information relating to such tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from: (1) The offering person, (2) The issuer of the securities sought or to be sought by such tender offer, or (3) Any officer, director, partner or employer or any other person acting on behalf of the offering person.\(^{201}\)

This distinction may have roots in the principle that a person must have a sufficient \textit{mens rea} to commit a crime, but it does little to justify the fact that both situations will have an identical effect on the market. Therefore, although Rule 14e-3 is both highly specific as to what constitutes an offense in relation to tender offers and encompasses traders with and without a traditional duty, it is still under inclusive and inadequate in relation to the enforcement of a ban on insider trading as a whole.\(^{202}\) Rule 14e-3 fails to fully

\(^{199}\) See Anand, \textit{supra} note 21 (noting the huge impact Erbitux had on the value of ImClone).

\(^{200}\) An example of a person who receives the information without knowledge would be someone who overhears a conversation or receives the information from an acquaintance without realizing that it is nonpublic.


\(^{202}\) See \textit{id.} (applying only in relation to a tender offer when someone violates the provision with intent).
address the harms caused by insider trading because it punishes some people who trade on inside information, potentially harm small investors and create instability in the market, but benefits those that create the same effect yet do not fit into the necessary categories.203

The result of the ambiguity of what constitutes illegal insider trading and the laws inability to adequately address the harms lower the effectiveness of a legal cost for the behavior. Rather than resolving the ambiguity a potential inside trader may face as to the wrongfulness of the action, the law exacerbates the problem. Like a child that is inconsistently disciplined without logical explanation, the potential trader is not deterred from engaging in the behavior.

C. Justification of Trading on Inside Information

Even if a potential trader of inside information perceives the potential normative and legal costs of insider trading, that trader can justify the behavior. Justification can ameliorate the guilt that a generally law-abiding citizen feels when breaking the law.204 Rather than giving up the potential benefits of the crime, they can still “derive . . . personal benefit by going through with the act . . . strip[ping] it of its negative connotation by casting it into a positive, or at least acceptable, light.”205 Sociologists Sykes and Matza identified five common types of justification: denial of injury, denial of victim, denial of responsibility, appeal to higher loyalties and condemning the condemner.206 Most relevant to a discussion of insider trading are the denials of injury, victims, and responsibility. Thus, even though a person is aware that trading with inside information is against the law and that society views people that commit the crime as greedy and cheating, they may

203 Id.
204 See supra Part II.B (discussing the internal costs associated with breaking the law).
205 GABOR, supra note 98, at 186.
206 SZOCKYJ, supra note 11, at 104 (discussing Sykes and Matza’s theory of neutralization which explains the techniques that offenders employ to retain their positive self-image while breaking the law).
deny that they are actually doing anything wrong.\textsuperscript{207} Justification of law-breaking behavior is very common, especially among people who view themselves as law abiding.\textsuperscript{208} People often commit small acts of theft without categorizing them as stealing or may cheat on their taxes because they feel that the government does not have a rightful claim on their earnings.\textsuperscript{209} People may rationalize insider trading by viewing it as a “victimless” crime because they are not harming a specific person but a corporation or the market in general.\textsuperscript{210} The victim of insider trading, presumably the market and the uninformed shareholder, is amorphous and difficult to conceptualize.\textsuperscript{211} If the victim is acknowledged, then the victim, like the government in the tax scenario, may not be sufficiently sympathetic.\textsuperscript{212}

It is also relatively easy to deny that the trader is committing any actual harm. Not only is the offense poorly defined, leaving the perpetrator to question whether his conduct falls under the confines of the law, but many scholars argue that the insider trading helps rather than hurts the market.\textsuperscript{213} A person, therefore, could reasonably justify an act of insider trading as not hurting anyone or not being a crime at all. Someone who could be liable under the misappropriation theory may have merely passed on the information rather than committed the trade.\textsuperscript{214} That person may

\textsuperscript{207} See supra Part II.B (discussing the costs associated with insider trading).

\textsuperscript{208} GABOR, supra note 98, at 186.

\textsuperscript{209} Id. at 73-74 (describing common theft situations such as stealing a grocery cart from the supermarket, towels from a hotel, and menus from a restaurant).

\textsuperscript{210} See SZOCKYJ, supra note 11, at 104 (discussing denial of victim as a powerful justification).

\textsuperscript{211} See Hang, supra note 67(discussing the victim as the uninformed shareholder).

\textsuperscript{212} Id. at 189 (discussing a robber who claimed he only robbed people who could afford it). But see supra notes 66-71 and accompanying text (discussing the argument that insider trading is fundamentally unfair and highlighting the injury to outside uninformed investors).

\textsuperscript{213} See MACEY, supra note 66, at 25-28 (discussing the relationship between insider trading and the shareholder’s welfare).

\textsuperscript{214} United States v. O’Hagan, 521 U.S. 642, 652 (1997) (holding that a person may be liable for insider trading under the misappropriation theory when
justify their actions by denying responsibility of insider trading because the actual trade rather than the mere transfer of information causes the harm.

The power of justifications is enormous. Every time a person fails to come to a complete stop at a stop sign when driving in the middle of the night because “they aren’t going to hurt anyone” or refills a drink at a restaurant without paying because “the restaurant charges too much for soda anyway,” the person is employing justifications to rationalize breaking the law. Therefore, the ability to justify insider trading lowers the incentive to comply with the law.215

III. A POTENTIAL SOLUTION

The decision to commit the crime of insider trading is a rational one because the costs a person risks when trading illegally on material nonpublic information are outweighed by potential benefits and available justifications. It is likely that successful people, such as Martha Stewart, will continue to risk losing wealth and social status and face the possibility of jail time in order to potentially protect assets and increase wealth and social status.216

215 See GABOR, supra note 98, at 186 (discussing the power of justification).
216 See supra Part II (concluding that the costs associated with insider trading do not outweigh the benefits).
In order to more effectively deter this type of decision, the law must be strengthened to override the normative structure of society.

The law can override the high informal benefits and low informal costs.217 If insider trading is a behavior that the country wants to prevent, then it must be viewed as wrongful. That view must be supported through consistent legal deterrence. If, in fact, insider trading has a negative effect on the markets and is actually

217 There are other potential solutions. For example an adjustment of the informal costs and benefits associated with insider trading would influence the level of normative deterrence felt by those that illegally trade on inside information. This would be difficult, however because many of the norms that reinforce insider trading also coincide with the countries economic structure. See supra Part II.B.1.b (discussing the way the norms in a capitalist society such as the United States may fail to adequately deter insider trading). Another potential solution is to conform the law to the ambivalent societal norms and legalize insider trading. It is argued that insider trading could be controlled through a deregulated scheme by the owners of information themselves, namely the corporations. MACEY, supra note 66, at 28. In this scenario, corporations could decide whether to allow insiders to trade on their information in lieu of other benefits such as compensation and regulate those that breached a company wide ban by monitoring and threat of potential loss of employment. Id. Although this solution is plausible, this possibility is also unlikely because insider trading has been consistently regulated since the 1930’s following the Depression. NASSER ARSHADI & THOMAS H. EYSSELL, THE LAW AND FINANCE OF CORPORATE INSIDER TRADING THEORY AND EVIDENCE 19 (1993) (discussing the history of insider trading regulation). The legalization of insider trading is also unlikely because, although not as strictly policed, much of the international community has stepped up their insider trading regulations to keep pace with the United States. See Calabra, supra note 106, at 469 (saying that Germany made insider trading illegal in 1994 to remain competitive in the international market); see also Nasser, supra note 106, at 377 (stating that although insider trading is illegal in Canada and Japan it is not punished as severely and that Japan did not consider insider trading punishable by imprisonment until 1997). There has also been a European Community Directive issued which proscribes a minimum uniform standard of legislation for all members to regulate insider trading. Thomas Lee Hazen, Defining Illegal Trading—Lessons from the European Community Directive on Insider Trading, 55 LAW & CONTEMP. PROBS. 231, 236 (1992) (discussing the implementation in 1989 of the European Community Directive that defines insider trading based on trading while in possession of information). Therefore, in today’s fluid global market it would be difficult for the United States to deregulate insider trading at this time.
fundamentally unfair, then all insider trading should be deemed wrongful.\textsuperscript{218} Like other legally wrongful behavior, unintentional trading need not be punished.\textsuperscript{219} A clear definition of the offense and consistent application is necessary for sufficient deterrence. If the law is to effectively deter insider trading, the law must work to strengthen weak normative costs associated with insider trading and raise a barrier against effective use of justifications.

This cannot be accomplished by a mere increase in sanctions.\textsuperscript{220} A clear definition is necessary to allow the costs of insider trading to outweigh the benefits. It must be clear to a potential perpetrator that they will actually be committing illegal insider trading. Although not perfect, the directive issued by the European Community is a good example.\textsuperscript{221} Rather than regulating insider trading under a catchall fraud statute such as 10(b), the directive clearly defines insider trading without a duty requirement.\textsuperscript{222} The directive prohibits trading with the possession

\begin{footnotesize}
\begin{enumerate}
\item See Hang, \textit{supra} note 67 (discussing the fairness argument of insider trading).
\item See KADISH, \textit{supra} note 130, at 203 (discussing the concern of a perpetrator’s mental state when punishing criminal behavior). For example, if the \textit{mens rea} requirement was abandoned, then an outside investor could trade on inside information he reasonably believed to be public and inadvertently commit a crime.
\item See \textit{supra} note 131 and accompanying text (noting the increase in legal sanctions in 1984 and 1988; a failed response to insider trading scandals of the 1980’s).
\item See Hazen, \textit{supra} note 221 (noting the implementation of the European Community Directive on Insider Trading).
\item The Council Directive 89/592 Coordinating Regulations on Insider Dealing, defines the both inside information and the people who will be held liable for trading with it:
\begin{enumerate}
\item ‘inside information’ shall mean information which has not been made public of a precise nature relating to one or several issuers of transferable securities or to one or several transferable securities, which, if it were made public, would be likely to have a significant effect on the price of the transferable security or securities in question.
\item ‘transferable securities’ shall mean:(a) shares and debt securities, as well as securities equivalent to shares and debt securities; (b) contracts or rights to subscribe for, acquire or dispose of securities referred to in (a); (c) futures contracts, options and financial futures in respect of
\end{enumerate}
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of material nonpublic knowledge. 223 The duty requirement in current American legislation is especially problematic as illustrated by Chiarella and Dirks and has not been completely solved by the misappropriation theory. 224 The directive does not resolve all ambiguities regarding insider trading, but is a good example of legislation that offers a clear definition of insider trading. 225

Not only does the offense have to be clearly defined, but it also has to be perceived as wrong. The law must compensate for the weak societal deterrence of insider trading. A potential way to increase the perception of wrongfulness would be to transfer the legislation used to prosecute insider trading from the SEC’s

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223 Id.

224 United States v. Dirks, 463 U.S. 646 (1983) (finding that a broker did not breach a duty because he did not gain a financial benefit when tipping his customers inside information); Chiarella v. United States, 445 U.S. 222 (1980) (finding that a printer did not owe shareholders a duty when he traded on inside information). See supra Part II.B.3.a (discussing the difficulty of applying the misappropriation theory and finding it is unclear who it will reach).

225 See supra note 150 and accompanying text. For example, a person must still actively trade with inside information. Id.
INSIDER TRADING: A RATIONAL CHOICE

administrative regulations, incorporating insider trading into federal criminal law.\(^\text{226}\) It is necessary to clearly provide what state of mind is required as well as what specific acts are required to commit the offense. A lower \textit{mens rea}, such as negligence, would widen the scope of insider trading laws.\(^\text{227}\) The law should also address all illegal use of insider information rather than just punishing those that actually purchase or sell securities.\(^\text{228}\) An insider that holds while using inside information is gaining the same unfair advantage against the uninformed investor as the insider that actively trades.\(^\text{229}\) The law needs to adequately address the harm it seeks to prevent.\(^\text{230}\) It must be exceptionally clear and consistent because the prohibition of insider trading it does not necessarily coincide with the norms in this country.\(^\text{231}\) Although strengthening insider trading legislation is the most likely solution, the decision to trade on inside information, in American culture, is one that must be made more difficult if criminalization of insider trading is to be made effective.

\(^{226}\) It is necessary that regulation of insider trading remain on the federal level rather than the state level because of the fluidity of the market across state lines. Although criminal law is generally the responsibility of the states, in this case the federal government has authority to regulate insider trading under the commerce clause. \textit{See U.S. Const. art. I, \S 8, cl. 3}; \textit{see also} William Brian Gaddy, \textit{A Review of Constitutional Principals to Limit the Reach of Federal Criminal Statutes}, 67 UMKC L. REV. 209, 210 (1999).

\(^{227}\) For example a \textit{mens rea} requirement of negligence would address the trader that overhears inside information and trades on it without determining whether the information is public or not. Negligence is defined as “the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do” \textit{Black’s Law Dictionary} 1032 (6th ed. 1990).

\(^{228}\) \textit{See supra} note 187 and accompanying text (discussing the benefits and insider could achieve by holding his shares based on inside information).

\(^{229}\) \textit{Id.}

\(^{230}\) The harm most commonly associated with insider trading is that it is unfair to uninformed investors and causes instability in the marketplace. \textit{See discussion supra} Part II.B.1.a.

\(^{231}\) \textit{See supra} Part II.B.1.b (finding that normative costs do not adequately deter insider trading).
CONCLUSION

A person faced with the rational choice of whether or not to trade on inside information will confront many potential costs and benefits. Many potential perpetrators will find that the benefits outweigh the costs. In addition, they can justify this criminal behavior. With the current state of the law, it is not surprising that a person with significant wealth and/or social status, such as Martha Stewart, would risk the penalties of insider trading at the possibility of achieving the benefits. In order to curb the problem insider trading the potential costs must be clearly perceived and increased. Therefore, the crime of insider trading should be more clearly defined in legislation and more consistently applied in order to compensate for weak informal costs.
HOME IS WHERE THE NO-FAULT EVICTION IS: THE IMPACT OF THE DRUG WAR ON FAMILIES IN PUBLIC HOUSING

Peter J. Saghir

INTRODUCTION

In 1990, Congress passed the Public and Assisted Housing Drug Elimination Act in response to its findings that drug dealers were imposing a “reign of terror” on federally subsidized housing communities.1 In Department of Housing & Urban Development v.

* Brooklyn Law School Class of 2004; B.F.A., New York University, 1994. The author would like to thank Marisa, Hae Jin, Jerry, and the rest of the staff of the Journal of Law and Policy for their hard work and guidance. He also wishes to thank his family for their unconditional support over the years. Special thanks to Alexandra, my wife, my love.


(1) the Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs; (2) public and other federally assisted low-income housing in many areas suffers from rampant drug-related or violent crime; (3) drug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants; (4) local law enforcement authorities often lack the resources to deal with the drug problem in public and other federally assisted low-income housing, particularly in light of the recent reductions in Federal aid to cities; (5) closer cooperation should be encouraged between public and assisted housing managers, local law enforcement agencies, and residents in developing and implementing anti-crime programs . . . and (8) anti-crime strategies should be improved through the expansion of community-oriented policing initiatives.
Rucker, Chief Justice Rehnquist hijacked the language describing drug dealers and applied it to four tenants of the Oakland Housing Authority who had eviction proceedings brought against them for the criminal acts of third parties.\(^2\) Shockingly enough, none of these tenants participated in the criminal activity, and three of the four of them had no knowledge the criminal activity of the third parties was even occurring.\(^3\)

The lease governing their housing is saddled with 42 U.S.C. § 1437d(l)(6), a statutorily mandated clause permitting the local housing authority to evict tenants for the criminal acts of a third person (“Provision”).\(^4\) And according to the Supreme Court of the United States, the Provision permits eviction “whether or not the tenant knew, or should have known, about the activity.”\(^5\)

While one might consider such a proposition outrageous and unfair, the Supreme Court affirmed the Provision’s bright-line no-fault rule, holding that it was not absurd and thus not a violation of the statute to permit the eviction of tenants who have no knowledge of the


\(^3\) See \textit{Rucker v. Davis}, 237 F.3d 1113, 1117 (9th Cir. 2001) (en banc), \textit{rev’d sub nom.} Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002). The fourth plaintiff, Herman Walker, was a seventy-five year-old disabled man who required the attention of a caregiver. \textit{Id.} at 1117. Mr. Walker received three lease violations in two months because his caregiver possessed cocaine in the apartment. \textit{Id.} With the third violation, the housing authority instituted eviction proceedings against Mr. Walker despite Mr. Walker firing his caregiver. \textit{Id.}


Each public housing agency shall utilize leases which . . . provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.

\textit{Id.}

\(^5\) \textit{Rucker}, 535 U.S. at 130.
Evicting the Innocent

Evicting the innocent tenants with drug dealers is unfair at best. The excessive crime in the country’s public housing projects over the past thirty years has resulted in a low standard of living for its residents. While it is necessary for both our government and individual communities to implement solutions to reduce crime in public housing, the solutions and actions must be balanced so as not to adversely affect law-abiding tenants. Both the Provision and the Court’s holding in Rucker fail to adequately.

6 42 U.S.C. § 1437d(l)(2) (2003) (prohibiting public housing authorities from including “unreasonable terms and conditions [in their leases]”); Rucker, 535 U.S. at 134 (finding “it was reasonable for Congress to permit no-fault evictions in order to ‘provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs’” (quoting 42 U.S.C. § 11901(1) (2003)). See Rucker, 535 U.S. at 131 (holding that the tenant need not know of the drug-related criminal activity to be evicted for that drug-related criminal activity). The Department of Housing and Urban Development agreed and argued that such an interpretation was necessary. Id. at 133 n.4. Contra Evelyn Nieves, Drug Ruling Worries Some in Public Housing, N.Y. TIMES, Mar. 27, 2002, at A18; Robert Hornstein, Treena Kaye, & Daniel Atkins, Bush Public Housing Versus Pearlie Rucker Public Housing: One Strike for the Poor and How Many for the Rest of Us?, LEGAL TIMES, Mar. 18, 2002, at 66 (criticizing the impact of the Provision on the poor).

7 See Rucker, 535 U.S. at 134 (concluding that people who cannot control the criminal acts of a household member are themselves a threat to the community); HUD Public Housing Lease and Grievance Procedure, 56 Fed. Reg. 51560, 51567 (Oct. 11, 1991) (“[A] family which does not or cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project.”).


9 See id. at 135 (noting that “people who cannot control their drug-related criminal activity” are themselves a threat to the community).
balance those interests. Instead of protecting innocent tenants, the Provision and the Court’s interpretation endanger this vulnerable group’s health and safety by exposing them to the possibility of homelessness. Indeed, these law-abiding tenants are not only victims of the crime in their communities, but also of our government’s ill-conceived policies.

This note focuses on the bad public policy that will likely result from the Court’s strict liability interpretation of the Provision in Rucker. Part I briefly looks at the Provision itself, the Supreme Court’s interpretation, and the problems that resulted from this interpretation. Part II applies this reasoning to the recent events of summer 2004.

9 See Rucker, 535 U.S. at 129-30 (permitting the eviction of a law-abiding tenant even where they were unaware of criminal activity and therefore unable to take preventive action); see also 42 U.S.C. § 1437d(l)(6) (2003) (permitting the eviction of tenants for the crimes of third parties).

10 See United States Conference of Mayors, Mayor’s National Housing Forum Fact Sheet (“The shortfall in affordable housing for the very poorest now stands at 3.3 million units. These numbers understate the shortage because higher-income households occupy 65% of the units affordable to the poorest families.”), at http://www.usmayors.org/uscm/news/press_releases/documents/housingfactsheet_052102.pdf (last visited Nov. 12, 2003) [hereinafter U.S. MAYOR’S HOUSING FACT SHEET]; Judith Goldiner, Congress Eyes Public-Housing Decontrol (reporting median national income of public housing tenants is below $6,500), at http://www.tenant.net/Tengroup/Metcounc/Apr96/brooke.html (last visited Nov. 12, 2003). See also National Coalition for the Homeless, Fact Sheet #1: Why Are People Homeless? (Sept. 2002) (“A lack of affordable housing and the limited scale of housing assistance programs have contributed to the current housing crisis and to homelessness.”), at http://www.nationalhomeless.org/causes.html.

11 See 42 U.S.C. § 1437d(l)(6) (providing for the eviction of tenants for the criminal acts of a third party); In the Crossfire, supra note 8, at 14 (reporting that despite overall declining crime rates in public housing, “[p]ersons residing in public housing are over twice as likely to suffer from firearm-related victimization as other members of the population”). See also Rucker, 535 U.S. at 127-28 (holding that a tenant may be evicted for the criminal acts of a third party even if the tenant did not know or should not have known of that activity); infra note 70 (citing the Department of Housing and Urban Development’s “One Strike and You’re Out” directive articulated by President Clinton).

12 See Rucker, 535 U.S. at 130 (holding section “1437d(l)(6) unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity”) (emphasis added).
Court and Ninth Circuit’s interpretations of the Provision, and examples of how courts have struggled with no-fault evictions.\footnote{See, e.g., Hous. Auth. of Joliet v. Chapman, 780 N.E.2d 1106 (Ill. App. Ct. 2002) (holding that in light of Rucker, a tenant need not have knowledge of her son’s criminal activity or control over his actions to violate her lease).} Part II defines innocent tenant and presents examples of tenants who have had eviction proceedings brought against them pursuant to the Provision or a similar clause.\footnote{States have enacted provisions similar to section 1437d(l)(6). See, e.g., N.Y. REAL PROP. LAW § 231 (McKinney 2003): Whenever the lessee or occupant other than the owner of any building or premises, shall use or occupy the same, or any part thereof, for any illegal trade, manufacture or other business, the lease or agreement for the letting or occupancy of such building or premises, or any part thereof shall thereupon become void, and the landlord of such lessee or occupant may enter upon the premises so let or occupied.} Part III focuses on the negative public policy the Provision creates by breaking up families, imposing on tenants an affirmative duty to engage in crime prevention and deterring recovery of people addicted to drugs. Additionally, Part III proposes that because an indigent tenant lacks meaningful choice in choosing living accommodations and is at a procedural disadvantage with no bargaining power when entering into the lease with the government for an apartment, the lease is arguably unconscionable. Finally, Part IV presents alternatives to the current strict liability policy that would ensure safe housing for the community while allowing individual tenants to feel secure in their homes and protected against arbitrary evictions.

I. THE POLICY OF SECTION 1437D(1)(6) AND HUD v. RUCKER

In response to Congressional findings that crime in public housing had reached intolerable proportions, Congress passed the Public and Assisted Housing Drug Elimination Act (the “Act”) as part of the Anti-Drug Abuse Act of 1988.\footnote{See supra note 1 (discussing Congressional findings); Public and Assisted Housing Drug Elimination Act, Pub. L. No. 100-690, 102 Stat. 4181} The Act included a
provision requiring public housing authorities to issue leases that provide for the termination of a tenant’s lease if the tenant, a member of the tenant’s household or guest engages in any criminal activity that threatens the peace and enjoyment of the premises by other tenants.\textsuperscript{16} In applying this provision, some courts have used a strict liability standard for eviction while others have required a showing that the tenant knew or should have known of the criminal activity to warrant eviction.\textsuperscript{17} The Ninth Circuit in \textit{Rucker v. Davis} held that “Congress did not intend § 1437d(l)(6) to permit the eviction of innocent tenants.”\textsuperscript{18} The Supreme Court reversed the Ninth Circuit and held that the local housing authorities have “the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity.”\textsuperscript{19} Since the Court’s holding in \textit{Rucker}, courts

\begin{footnotesize}
\textsuperscript{16} \textit{See} 42 U.S.C. § 1437d(l)(6).

\textsuperscript{17} \textit{See} Hous. Auth. of New Orleans v. Green, 657 So. 2d 552, 552 (La. Ct. App. 1995) (“The question in this case is whether a Housing Authority of New Orleans [] tenant may be evicted because a guest in her apartment had illegal drugs without her knowledge. The answer is yes.”); Ann Arbor Hous. Comm’n v. Wells, 618 N.W.2d 43, 45 (Mich. Ct. App. 2000) (“[W]e hold that a public housing tenancy may be terminated . . . regardless of whether the tenant had knowledge of the drug-related activity conducted on or off the premises by the tenant, a member of the tenant’s household, or a guest or another person under the tenant’s control.”). \textit{But see} Kimball Hill Mgmt. v. Roper, 733 N.E.2d 458, 465 (Ill. App. Ct. 2000) (requiring “tenant have some minimum connection with the criminal activity before she can be evicted”); Charlotte Hous. Auth. v. Patterson, 464 S.E.2d 68, 72 (N.C. Ct. App. 1995) (holding “good cause for eviction does not exist when a public housing tenant is not personally at fault for a breach of the criminal activity termination provision of a public housing lease by a member of the tenant’s household”); Delaware County Hous. Auth. v. Bishop, 749 A.2d 997, 1002 (Pa. Commw. Ct. 2000) (“[W]e refuse to hold a tenant strictly liable for unforeseeable criminal acts committed, without the tenant’s knowledge, by family members who are not under the tenant’s control.”).


\textsuperscript{19} \textit{Rucker}, 535 U.S. at 136.
\end{footnotesize}
have been forced to rethink their approaches to no-fault evictions.20

A. The Provision

The Public and Assisted Housing Drug Elimination Act provides that:

Each public housing agency shall utilize leases which . . . provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.21

The Act was passed at a time when drugs and violence plagued public housing and local law enforcement lacked the resources to bring the dangers of these crimes under control.22 It provides grants to local housing authorities to implement measures to minimize the negative impact of drugs and crime on their communities.23 In past years, program grants have been used to

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20 See Hous. Auth. of the City of Pittsburgh v. Fields, 816 A.2d 1099 (Pa. 2003) (reversing a lower court’s holding that the tenant could not be evicted under section 1437d(l)(6) where her son was not under her control in light of “the decision of the United States Supreme Court in Department of Housing and Urban Development v. Rucker”). See also infra Part I.C (citing two courts confronted with the change since the Court’s decision in Rucker).


22 See 42 U.S.C. § 11901(2) (2003) (finding “public and other federally assisted low-income housing in many areas suffers from rampant drug-related or violent crime”); see also id. § 11901(5) (finding “local law enforcement authorities often lack the resources to deal with the drug problem in public and other federally assisted low-income housing, particularly in light of the recent reductions in Federal aid to cities”).

23 See 42 U.S.C. §§ 11901-11925 (creating the Public and Assisted Housing Drug Elimination Act); 42 U.S.C § 11903(a). Providing funds to public housing and other low income housing projects for:

(1) the employment of security personnel; (2) reimbursement of local law enforcement agencies for additional security and protective services; . . . (5) the provision of training, communications equipment,
employ security personnel, develop programs to reduce and eliminate the use of drugs (including Youth Sports activities), make physical changes to improve security and train and equip voluntary tenant patrols. While the program has contributed to a reduction in overall rates of crime, gun violence still remains a severe problem.

B. HUD v. Rucker

In *HUD v. Rucker*, the Supreme Court interpreted and applied section 1437d(l)(6) to four elderly tenants of the Oakland Housing Authority who were threatened with eviction because of the criminal acts of other household family members or guests. Reversing the Ninth Circuit’s decision, the Supreme Court held

and other related equipment for use by voluntary tenant patrols acting in cooperation with local law enforcement officials; (6) programs designed to reduce use of drugs in and around public or other federally assisted low-income housing projects, including drug-abuse prevention, intervention, referral, and treatment programs . . . .

*Id.* See also Jim Moye, *Can't Stop the Hustle: The Department of Housing and Urban Development's “One Strike” Eviction Policy Fails to Get Drugs Out of America's Projects*, 23 B.C. THIRD WORLD L.J. 275, 281-82 (2003) (discussing the new funding and programs instituted under the Anti-Drug Abuse Act of 1988).


25 *Living in Projects Raises the Risk of Being Shot*, N.Y. TIMES, Feb. 16, 2000, at 16 (discussing a report issued by the Department of Housing and Urban Development showing that while gun violence has increased, overall levels of crime are falling in public housing projects); see *In the Crossfire*, supra note 8, at 2 (“An analysis of detailed crime-trend data for 55 public housing authorities . . . found that the crime rate declined in two-thirds of the authorities (37 of the 55) between 1994 and 1997.”). But see *id.* at 14 (“The annual rate of victimization between 1995 and 1997 for residents of public housing was 10 per 1,000 persons. The rate for persons not in public housing was 4 per 1,000.”).

that these tenants could be evicted pursuant to the Provision, regardless of whether or not they knew or should have known of the criminal acts.\textsuperscript{27} The policy and application of the Provision is best understood with an appreciation for the distinctions between the Ninth Circuit and Supreme Court’s interpretations of the Provision.

1. The Tenants

The four plaintiffs in \textit{Rucker} were tenants of the Oakland Housing Authority: Pearlie Rucker, 63, Willie Lee, 71, Barbara Hill, 63, and Herman Walker, 75.\textsuperscript{28} Ms. Rucker, a resident of public housing for sixteen years, had eviction proceedings brought against her after her mentally disabled daughter was found possessing cocaine several blocks from their home.\textsuperscript{29} The eviction proceeding against Ms. Rucker was initiated despite routine searches she made of her daughter’s room that came up negative for drugs.\textsuperscript{30} Willie Lee, who lived in the public housing complex for twenty-five years, and Barbara Hill, who lived in the public housing complex for more than thirty years, had eviction proceedings initiated against them after their grandsons were found smoking marijuana in the parking lot of the housing complex.\textsuperscript{31} Neither Ms. Lee nor Ms. Hill was aware of their grandsons’ drug use.\textsuperscript{32} The final plaintiff, Herman Walker, a partially paralyzed former minister, had lived in public housing for eight years.\textsuperscript{33}

\textsuperscript{27} \textit{Rucker}, 535 U.S. at 127-28.


\textsuperscript{29} \textit{Id.} at *6.

\textsuperscript{30} \textit{Id.}; Kara Platoni, \textit{Collateral Damage from the Drug War: Elderly OHA Tenants Hope the Supreme Court Will Allow Them to Stay in their Homes}, EAST BAY EXPRESS (California), Oct. 17, 2001.

\textsuperscript{31} \textit{Rucker}, 1998 U.S. Dist. LEXIS 9345, at *6-7; Platoni, \textit{supra} note 30.


\textsuperscript{33} \textit{Id.} at *6; Emelyn Cruz Lat, \textit{One Strike Evictions: First of Two Parts}, SAN FRANCISCO EXAMINER, Aug. 23, 1998, at A-10.
Oakland Housing Authority instituted eviction proceedings against Mr. Walker when his caregiver was found with cocaine in his apartment.\textsuperscript{34} Even though he fired the caretaker upon being told that he was being evicted for her criminal conduct, the building manager told him it was too late and the housing authority would file suit anyway.\textsuperscript{35}

2. The Ninth Circuit’s Approach

In \textit{Rucker}, the Ninth Circuit found that the Provision “is not a picture of clarity and may be subject to varying interpretations.”\textsuperscript{36} The Ninth Circuit concluded that the statute does not “expressly address the level of personal knowledge or fault that is required for eviction, or even make it clear who can be evicted.”\textsuperscript{37} Because of the ambiguity, the Ninth Circuit looked to the overall statutory scheme and noted that Congress has placed a number of restrictions on the ability of local housing authorities to evict tenants.\textsuperscript{38}

\textsuperscript{34} Mr. Walker’s caregiver was found possessing cocaine in Mr. Walker’s apartment in three instances within two months. \textit{Rucker} v. Davis, 237 F.3d 1113, 1117 (9th Cir. 2001) (en banc), \textit{rev’d sub nom.} Dep’t of Hous. & Urban Dev. v. Rucker, 533 U.S. 125 (2002). After a stroke left him paralyzed, Mr. Walker hired a health care aide to assist him with cooking and bathing. \textit{Hard Line in Public Housing}, L.A. TIMES, Mar. 29, 2002, at 14. Mr. Walker, at the time of hiring the aide, was unaware she was a cocaine user or that she hid drugs and a crack pipe in Walker’s apartment. \textit{Id}. She was caught possessing the drugs during a security check of the building. \textit{Id}.

\textsuperscript{35} Cruz Lat, \textit{supra} note 33 (“Walker recalls the manager telling him, ‘We’ll file suit and you won’t stand a chance. We win 98 percent of our cases.’”).

\textsuperscript{36} \textit{Rucker}, 237 F.3d at 1123. The Ninth Circuit held that HUD’s interpretation permitting the eviction of innocent tenants is inconsistent with congressional intent and must be rejected under the first step of \textit{Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.}, 467 U.S. 837 (1984). \textit{Rucker}, 237 F.3d at 1119. In \textit{Chevron}, the court held that an agency’s interpretation of a statute should not be deferred to where Congress has spoken on the issue and the agency’s interpretation is contrary to congressional intent. \textit{Chevron}, 467 U.S. at 842-43.

\textsuperscript{37} \textit{Rucker}, 237 F.3d at 1120.

\textsuperscript{38} \textit{Id}. (citing 42 U.S.C. § 1437d(l)(2) prohibiting leases with unreasonable terms and conditions and § 1437d(l)(5) forbidding housing authorities from
The court also considered the civil forfeiture provision of the Controlled Substances Act, which appears in the same chapter and subtitle of the Anti-Drug Abuse Act of 1988 and is part of a single legislative scheme to combat drug abuse in public housing. The Controlled Substances Act provided for an innocent owner defense and recognized an innocent owner as one who either did not know of the conduct giving rise to the forfeiture, or did all that could reasonably be expected under the circumstances to terminate such criminal conduct. The Department of Housing and Urban Development argued to the court that the innocent owner defense applied only to civil forfeitures, not lease eviction proceedings, and that because they were two different statutes, the innocent owner defense was inapplicable to the Provision. The Ninth Circuit was unpersuaded and reasoned that although the statutes were different, they govern the same subject matter, were enacted at the same time in the same chapter of the same Act and thus, it was fair to presume the Congress meant them to be read together.

The Department of Housing and Urban Development also put forth a negative implication argument. It argued that Congress’s amendment of the civil forfeiture provision of the Controlled Substances Act to include an innocent tenant defense, when considered with Congress’s failure to write such a defense into the Provision, indicates they did not intend for one to be available terminating tenancies except for “serious or repeated violation of the terms or conditions of the lease or for other good cause”).


40 18 U.S.C. § 983(d) (2003). An innocent owner is one who “(i) did not know of the conduct giving rise to forfeiture; or (ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.” Id. at § 983(d)(2).

41 Rucker, 237 F.3d at 1121-22.

42 Id. at 1122 (“When dealing with two different statutes which not only govern the same subject matter but were also enacted at the same time in the same chapter of the same Act, we presume Congress meant them to be read consistently.”).

43 Id.
under the Provision. The Ninth Circuit rejected this argument because the civil forfeiture amendment and section 1437d(l)(6) were drafted by different Congresses and “[t]o say Congress could have drafted the defense more explicitly in § 1437d(l)(6) is not to say it did not do so at all.”

Thus, the Ninth Circuit found that the innocent tenant defense provided in the Controlled Substances Act indicated that Congress intended for the Provision to apply to innocent tenants under section 1437d(l)(6).

Additionally, the Ninth Circuit recognized that the Provision led to absurd results and stated that the court should not assume that Congress intended absurd results in passing a law. The
absurd results are illustrated by the cases that were before the court. 48 Ms. Rucker took steps to stop her daughter’s drug abuse, yet still had eviction proceedings brought against her. 49 Additionally, Ms. Lee and Ms. Hill had eviction proceedings instituted against them when their grandchildren were found smoking marijuana in the parking lot, an act that can hardly be considered a serious offense. 50 Evicting such innocent tenants

an example, the Court explained that under the Ninth Circuit’s interpretation, “a retail druggist who returns an uninspected roll of developed film to a customer ‘knowingly distributes’ a visual depiction and would be criminally liable if it were later discovered that the visual depiction contained images of children engaged in sexually explicit conduct.” Id. at 69. The Court concluded: “We do not assume that Congress, in passing laws, intended such results.” Id. See infra text accompanying notes 81-86 (citing examples of absurd evictions).

48 Rucker, 237 F.3d at 1124 (“We need look no further than the facts of this case for an example of the odd and unjust results that arise under HUD’s interpretation.”); see infra note 78 (criticizing the lack of geographical limits in applying the statute); see also supra Part I.B.1 (discussing the plaintiffs’ in Rucker).

49 Rucker, 237 F.3d at 1124 (“HUD conceded at oral argument that there was nothing more Pearlie Rucker could have done to protect herself from eviction, but argued that the statute authorized her eviction nonetheless.”).

50 See id. at 1117 (“[The Oakland Housing Authority] sought to evict Lee and Hill because their grandsons were caught smoking marijuana together in the apartment complex parking lot.”); CAL. HEALTH & SAFETY CODE § 11357(b) (West 2003) (“Except as authorized by law, every person who possesses not more than 28.5 grams of marijuana, other than concentrated cannabis, is guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars ($100).”); N.Y. PENAL LAW § 221.05 (McKinney 2003) (“Unlawful possession of mari[juana] is a violation punishable only by a fine of not more than one hundred dollars.”). See also NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS, Personal Use 1, at http://www.norml.org/pdf_files/NORML_personal_use_introduction.pdf (last visited Nov. 30, 2003).

Since 1973, 12 state legislatures—Alaska, California, Colorado, Maine, Minnesota, Mississippi, Nebraska, Nevada, New York, North Carolina, Ohio and Oregon—have enacted versions of marijuana decriminalization. In each of these states, marijuana users no longer face jail time (nor in most cases, arrest or criminal records) for the possession or use of small amounts of marijuana. Id.; Clifford Krauss, Chretien Leaves at Ease, Even If Bush Is Displeased, N.Y. TIMES, Nov. 14, 2003, at A3 (“I don’t think a kid of 17 years old who has a joint
undermines any incentive there could have been to take action against the wrongdoing.\textsuperscript{51}

Finally, the Ninth Circuit noted potential Due Process concerns in that the tenant’s interest in the home was taken even where the tenant’s home was not connected to the criminal act.\textsuperscript{52} The

should have a criminal record,” (quoting Canadian Prime Minister Jean Chretien discussing liberalizing drug laws)); James C. McKinley Jr., \textit{Signs of a Drug War Thaw; As Fear Eases, Rockefeller Laws Seem Less Necessary}, N.Y. TIMES, Jan. 21, 2001, at 29 Metropolitan Desk (“In 1977, President Carter formally advocated legalizing marijuana in amounts up to an ounce.”); Sam Howe Verhovek, \textit{Alaska’s Voters to Decide On Legalizing Marijuana}, N.Y. TIMES, Oct. 10, 2000, at A18 (discussing Alaskans’ vote on Proposition 5 which would legalize marijuana consumption for anyone over 18).

\textsuperscript{51} See Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 134 (2002) (reasoning that the strict liability inherent in “no-fault” evictions maximizes deterrence). It could be argued, however, that not evicting tenants who take steps to stop criminal activity would maximize deterrence, as the tenants may more readily get involved if they know it will save them from eviction. Evicting innocent tenants even where they took action to stop the prohibited conduct (as did Pearlie Rucker in searching her daughter’s room and warning her of the possibility of eviction, \textit{Rucker}, 237 F.3d at 1117) creates a disincentive for tenants to get involved for they will have nothing to gain by doing so. Thus, prohibiting their eviction where they take action creates an incentive to get involved and maximizes deterrence. Additionally, absurd results would be less likely, and the Provision more reasonable, if the housing authorities were obliged to consider all circumstances relevant to a particular case before evicting the tenant. See HUD Public Housing Lease and Grievance Procedure, 24 C.F.R. § 966.4 (2003) (stating that in considering whether to evict, the housing authorities “\textit{may} consider all circumstances relevant to a particular case” as opposed to \textit{shall} consider the relevant circumstances) (emphasis added). Among the circumstances that \textit{may} be considered are the “seriousness of the offending action,” “extent of participation by the leaseholder in the offending action,” and “the effects that the eviction would have on family members not involved in the offending activity.” \textit{Id. See infra} Part IV (discussing alternatives to the harsh no-fault eviction standard).

\textsuperscript{52} \textit{Rucker}, 237 F.3d at 1125 (“HUD’s interpretation of § 1437d(l)(6), which would permit the deprivation of a tenant’s property interest when the property was not used in the commission of a crime and when the tenant did not know of the illegal activity, would raise serious due process questions.”). See Nelson H. Mock, \textit{Note, Punishing the Innocent: No-Fault Eviction of Public Housing Tenants for the Actions of Third Parties}, 76 TEX. L. REV. 1495, 1522-23 (1998) (explaining that to establish a substantive due process claim, a tenant must show
Department of Housing and Urban Development argued that the Supreme Court’s decision in *Bennis v. Michigan* \(^{53}\) disposed of any due process concerns because *Bennis* held that depriving an innocent owner of a property right does not violate due process. \(^{54}\) Central to the *Bennis* Court’s holding, however, was the fact that the property was used in connection with the criminal activity. \(^{55}\) Contrarily, in *Rucker*, the leased premises were not used in connection with the crime. \(^{56}\) Although the Ninth Circuit found that the evictions “raise serious due process questions,” it did not reach

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\(^{54}\) In *Bennis*, the Court upheld the forfeiture of a car, *id.* at 453, against a wife’s due process claim, where the car, which was jointly owned with the husband, was forfeited as a public nuisance, *id.* at 446, when the husband used it to engage in sexual activity with a prostitute, *id.* at 443. In *Rucker*, the Ninth Circuit reasoned that the tenants had a property interest in their homes under *Greene v. Lindsey*, 456 U.S. 444, 451 (1982). *Rucker*, 237 F.3d at 1125. In *Greene*, the Court held that public housing tenants had a property interest and were deprived of that interest when they were not given adequate notice before final eviction proceedings were instituted against them. *Greene*, 456 U.S. at 456.

\(^{55}\) See *Bennis*, 516 U.S. at 453. “[A] long and unbroken line of cases holds that an owner’s interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use.” *Id.* at 446. “The Bennis automobile, it is conceded, facilitated and was used in criminal activity.” *Id.* at 453. See also *id.* at 455 (Thomas, J., concurring) (stressing that in the case of an innocent owner and civil forfeiture, courts should strictly apply “historical standards for determining whether specific property is an ‘instrumentality’ of crime” before the property is forfeited).

\(^{56}\) *Rucker* v. Davis, No. C 98-00781, 1998 U.S. Dist. LEXIS 9345, at *6-7 (N.D. Cal. June 24, 1998), *vacated*, 203 F.3d 627 (9th Cir. 2000), *amended by* 237 F.3d 1113 (9th Cir. 2000) (en banc), *rev’d sub nom.* Dep’t of Hous. & Urban Dev. v. *Rucker*, 535 U.S. 125 (2002) (finding Rucker’s daughter was three blocks from their apartment and Lee and Hill’s grandsons possessed marijuana in a parking lot of the housing complex). Herman Walker is an exception in that his premise was used in connection with the criminal activity because his caregiver, upon whom he was dependent, brought cocaine into the apartment. *Rucker*, 237 F.3d at 1117.
that issue. Instead, the court held “that if a tenant has taken reasonable steps to prevent criminal drug activity from occurring, but, for a lack of knowledge or other reason, could not realistically exercise control over the conduct of a household member or guest, § 1437d(l)(6) does not authorize the eviction of such a tenant.”

3. *The Supreme Court’s Approach*

Despite the Ninth Circuit’s concerns over the enforcement of section 1437d(l)(6) against innocent tenants, the Supreme Court reversed, unanimously holding that the Provision “unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity.” The Court found that a plain reading of the statute would not lead to absurd results, there was no need to consult legislative history, and the statute does not violate the Due Process Clause of the Fourteenth Amendment.

The Court grounded its holding in the plain language of the statute, which provides that: “any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.”

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57 *Id.* at 1125-26. “It is also a settled principle of statutory interpretation that whenever possible, a statute should be construed to avoid substantial constitutional concerns.” *Id.* at 1124.

58 *Id.* at 1126. In reaching its holding, the court construed the term “control” as “a limitation on the breadth of the [P]rovision.” *Id.* The Provision states in relevant part: “any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.” 42 U.S.C. § 1437d(l)(6) (2003).

59 *Rucker*, 535 U.S. at 130.

60 *Id.* at 132-33, 135.

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precludes any knowledge requirement." In addition, the Court found it important that under the statute, any drug related activity is grounds for termination, “not just drug-related activity the tenant knew, or should have known, about.” Because the Court found the statute unambiguous, the Court did not consult the legislative history.

Not only did the Supreme Court find the statute unambiguous, but it also found it reasonable and not a violation of section 1437d(l)(2), which prohibits public housing authorities from including “unreasonable terms and conditions [in their leases].” While one might conclude that evicting a tenant for something they did not do is unreasonable and, thus, a violation of section 1437d(l)(2), the Court found the statute reasonable because it does not require the eviction of the tenant. Instead, the Court found, it vests in the local housing authority the decision to evict based on “the seriousness of the offending action,” and “the extent to which the leaseholder has . . . taken all reasonable steps to prevent or

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64 Rucker, 535 U.S. at 133. Had the Court consulted the legislative history of section 1437d(l)(6), the Court would have found a Senate Report expressly speaking to the issue of knowledge. See Rucker v. Davis, 237 F.3d 1113, 1123 (9th Cir. 2001) (en banc), rev’d sub nom. Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) (finding no House or Senate reports accompanied the original version of § 1437d(l)(6), but finding Senate Report issued when the Provision was amended in 1990). That Senate Report states:

The committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity.


66 Rucker, 535 U.S. at 133.
mitigate the offending action.”  That discretion, the Court concluded, makes the Provision reasonable and, thus, not a violation of section 1437d(l)(2). Finally, the Court dismissed any Due Process concerns because tenants receive notices of eviction and are given the opportunity in the eviction proceedings to dispute whether the lease provision was actually violated.

C. The Influence of Rucker on Courts Struggling with No-Fault Evictions

Prior to HUD v. Rucker, both state and federal courts were split over whether Congress intended this “zero tolerance” policy. Since Rucker, courts have been forced to rethink their approaches

67 Id. at 134. See HUD Public Housing Lease and Grievance Procedure, 24 C.F.R. § 966.4 (2003).
68 Rucker, 535 U.S. at 133-34.
69 Id. at 136.
to no-fault evictions. For instance, before Rucker, in Housing Authority of Joliet v. Keys, Illinois’s Appellate Division held that “where a tenant could not realistically exercise control over the conduct of a household member or guest due to lack of knowledge or some other reason, section 1437d(l)(6) [did] not authorize the eviction of that tenant.” However, in the wake of Rucker, the same court held that according to the Supreme Court’s interpretation of the Provision, local public housing authorities have discretion to terminate the lease of a tenant when a member of the household or a guest causes a violation of the lease by engaging in drug related criminal activity, “regardless of whether the tenant knew, or should have known, of the drug-related activity.”

Similarly, before Rucker, New Jersey recognized an “innocent lessee exception” to eviction proceedings commenced for a third-party’s criminal activity. In Oakwood Plaza Apartments v. Smith,
New Jersey’s Appellate Division held that to justify eviction—the “ultimate sanction”—a court must find the tenant permitted the guest to be in the apartment, and the tenant knew the guest was violating the state drug laws. The court specifically recognized that to hold otherwise would run contrary to the remedial purpose of the act—to “address [a] critical shortage of residential housing and to prevent ‘the dispossession of tenants who are paying their rent and generally complying with their obligations as tenants.’” After Rucker, New Jersey’s innocent lessee exception was severely weakened, for the New Jersey courts were free to uphold evictions of tenants unaware of the criminal activity of a household guest or member.

II. MEET THE INNOCENT TENANT

The Provision fails in large part due to its broad reach. To knowingly harbors or harbored therein a person who committed such an offense [i.e., use, possession, manufacture, dispensing or distribution of an illegal narcotic], or otherwise permits or permitted such a person to occupy those premises for residential purposes . . . .

Id. at § 2A:18-61.1(p) (emphasis added).


76 Alicea, 688 A.2d at 110.

77 See Oakwood Plaza Apartments, 800 A.2d at 267. Instead the court emphasized the Supreme Court’s recognition that various factors should be evaluated when deciding whether to evict. Id. at 268. The factors are: the seriousness of the violation, the effect of the eviction on the household members not involved in the criminal activity, and the willingness to remove the wrongdoing household member from the lease as a condition for continued occupancy. Id. at 268.

ILLUSTRATE THIS POINT, IT IS IMPORTANT TO UNDERSTAND WHO IS SUBJECT TO LIABILITY UNDER THE PROVISION. NOT ONLY IS THE PERSON ACCUSED OF COMMITTING THE CRIME SUBJECT TO EVICTION FOR THEIR CRIMINAL ACTS, BUT SO ALSO IS THE TENANT OF RECORD, WHO MAY BE UNCONNECTED TO AND LACK ANY KNOWLEDGE ABOUT THE CRIMINAL ACTIVITY. THIS PERSON IS OFTEN REFERRED TO AS THE INNOCENT TENANT WHOM THE NINTH CIRCUIT DESCRIBED AS A TENANT WHO “DID NOT KNOW OF OR HAVE ANY REASON TO KNOW OF SUCH ACTIVITY OR TOOK ALL REASONABLE STEPS TO PREVENT THE ACTIVITY FROM OCCURRING.”

THESE INNOCENT LOW-INCOME PUBLIC HOUSING TENANTS ARE EXCEPTIONAL VICTIMS OF THEIR CIRCUMSTANCES: NOT ONLY DO THEY HAVE HIGH RATES OF CRIME, INCLUDING VIOLENT CRIME, TO FEAR, BUT THE THREAT OF HOMELESSNESS AS WELL. THE INNOCENT TENANT IS ROSARIO ALBINO, A

would apply and permit eviction of an entire family if a tenant’s child was visiting friends on the other side of the country and was caught smoking marijuana, even if the parents had no idea the child had ever engaged in such activity and even if they had no realistic way to control their child’s actions 3,000 miles away.”

79 See 42 U.S.C. § 1437d(l)(6) (2003). “[A]ny drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.” Id.; see also Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 131 (2002) (holding “any drug-related activity engaged in by the specified persons is grounds for termination, not just drug-related activity that the tenant knew, or should have known, about”).

80 See Rucker, 237 F.3d at 1115-16; see also 18 U.S.C. § 983(d)(2) (2003) (stating that an innocent owner is one who “(i) did not know of the conduct giving rise to forfeiture; or (ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property”). In Rucker, Rucker did not know of her granddaughter’s drug use, regularly searched her room for evidence of drug use, and warned her and others that drug use on the premises could result in eviction. Rucker v. Davis, No. C 98-00781, 1998 U.S. Dist. LEXIS 9345, at *6 (N.D. Cal. June 24, 1998), vacated, 203 F.3d 627 (9th Cir. 2000), amended by 237 F.3d 1113 (9th Cir. 2000) (en banc), rev’d sub nom. Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002). Similarly, Lee and Hill were not aware of any prior illegal drug activity by their grandsons and warned them that such prohibited conduct could result in eviction. Id. at *7.

81 See Rucker, 237 F.3d at 1115. The Ninth Circuit stated:

Many of our nation’s poor live in public housing projects that, by many
sixty-eight year-old widowed mother of eight with a total monthly fixed income of $411. The court found her only fault was “in raising two daughters who went astray and got involved in narcotics.” The innocent tenant is Ms. Green, “an exemplary tenant of the housing complex” and “volunteer on the Resident Council Board for the complex” who was evicted from her apartment when her daughter’s friend secretly brought drugs into the home. And finally, the innocent tenant is Teri Wells, who was evicted from her home where she and her children had lived for nine years when her brother, who was staying with her on a temporary basis after living in a homeless shelter, was found selling narcotics in the vicinity of her home. That she had no knowledge of the activity and asked her brother to leave upon his arrest was not enough to keep the housing authority from evicting her.

Eviction proceedings do not necessarily result in evictions, though. In the case of the respondents in Rucker, for instance, the accounts, are little more than illegal drug markets and war zones. Innocent tenants live barricaded behind doors, in fear for their safety and the safety of their children. What these tenants may not realize is that, under existing policies of the Department of Housing and Urban Development [], they should add another fear to their list: becoming homeless . . . .

Id. See also HUD USER, U.S. DEP’T. OF HOUS. & URBAN DEV., Gun-Related Violence: The Costs to Public Housing Communities (“In 1998 there were an estimated 360 gun-related homicides in 66 of the Nation’s 100 largest public housing authorities.”), at http://www.huduser.org/periodicals/rrr/rrr_3_2000/0300_1.html (last visited Nov. 12, 2003); NATIONAL COALITION FOR THE HOMELESS, Fact Sheet #1: Why Are People Homeless? (Sept. 2002) (“Two trends are largely responsible for the rise in homelessness over the past 20-25 years: a growing shortage of affordable rental housing and a simultaneous increase in poverty.”), at http://www.nationalhomeless.org/causes.html.

83 Id. at 1011.
86 Id. at 44-45.
87 See, e.g., infra note 89 (citing cases that did not result in eviction). While
Oakland Housing Authority dismissed the eviction proceedings against three of the four tenants.88 Additionally, in New York, several eviction proceedings have been dismissed at the trial level;89 however, some are not overturned until appealed. In Brown no-fault evictions might be vacated on appeal, certainly not all are vacated and even where they are, the family has nonetheless been put in a dangerous position bordering on homelessness. See, e.g., Lloyd Realty Corp., 552 N.Y.S.2d at 1009 (acknowledging the merits of a narcotics eviction program, but also recognizing “concern regarding evictions from residential premises of innocent family members including those who are senior citizens, disabled tenants and tenants with infant children, especially in light of the present acute housing shortage”).

88 Lakiesha McGhee, 2 of 4 ‘Evicted’ Oakland Tenants Can Stay, OAKLAND TRIB., Apr. 5, 2002, at Front Page (reporting that one week after the Supreme Court’s decision in Rucker, the Oakland Housing Authority dropped eviction proceedings against Lee and Hill). The case against Rucker was dismissed in 1998. Id. The Oakland Housing Authority is still reviewing the case against Herman Walker. OAKLAND HOUSING AUTHORITY, OHA Reviews Cases (Apr. 4, 2002), at http://www.oakha.org/rucker.html.

89 See, e.g., Lloyd Realty Corp., 552 N.Y.S.2d at 1008. In Lloyd Realty Corp., petitioner landlord sought to recover possession of the tenant’s premises after a “buy and bust” operation resulted in the arrest of the tenant’s daughter and daughter’s friend for selling narcotics in front of the subject premises. Id. at 1009. Rosario Albino, the tenant, lived in the apartment for fifteen years. Id. She was sixty-eight, widowed, suffered from hypertension and bronchial asthma, had no knowledge of the drug activity, and received a total monthly income of $411 from Social Security Widow’s Pension and Supplemental Security Income. Id. at 1009, 1011. The court reasoned that to uphold such an eviction, it must be shown that Mrs. Albino knew of the illegal drug activity and thus acquiesced in the use of the premises for such purposes. Id. at 1010. The court did not find that the evidence supported such a finding. Id. Additionally, the court found that “that the eviction of a senior citizen who has no knowledge nor involvement of the illegal drug activity conducted in her apartment will [not] further serve the purpose of the narcotics eviction program. Id. See, e.g., 1895 Grand Concourse Assocs. v. Ramos, 685 N.Y.S.2d 580 (Civ. Ct. Bronx County 1998). In 1895 Grand Concourse, the landlord sought to recover possession of the respondent tenant’s premises alleging respondent has been using the premises for the illegal sale of drugs. Id. Tenant, Theresa Ramos, resided in the apartment for the last twenty-five years with her seven children and husband. Id. at 582. She was never arrested prior to the charges underlying this case and those charges against her were dismissed. Id. She did not sell nor did she consume drugs. The landlord sought recovery when a search of the premises resulted in the police finding cocaine. Id. at 581. A detective involved in the search testified that the search
v. Popolizio, for example, Rachel Brown’s tenancy was terminated when her son, who had not lived with her for six months, was arrested on housing grounds for possession of a controlled substance in the seventh degree, a Class A misdemeanor.\textsuperscript{90} The possession was his first arrest, and he pled to disorderly conduct, a violation.\textsuperscript{91} Ms. Brown had lived in the same apartment for nearly twenty years and at the time of the eviction proceedings resided there with her twin minor daughters, another son and his family.\textsuperscript{92} The Appellate Division vacated the housing authority’s decision as contrary to the law and an abuse of discretion.\textsuperscript{93} The court noted that the housing authority’s management manual did not authorize termination of tenancy for misdemeanor non-desirable acts, such as the one here, unless there are other factors of an undesirable nature on the tenant’s record.\textsuperscript{94} The court found that Ms. Brown’s record contained no complaint of any kind during her twenty-year tenancy.\textsuperscript{95} Thus, the court found the hearing officer’s determination “arbitrary and capricious, contrary to law, and the penalty imposed constituted an abuse of discretion.”\textsuperscript{96}

In Robinson v. Martinez, Tawana Robinson had eviction proceedings brought against her when she violated a stipulation she entered into with the housing authority to exclude her son from

\textsuperscript{90} 569 N.Y.S.2d 615, 617 (N.Y. App. Div. 1991); see N.Y. \textsc{Penal Law} § 220.02 (McKinney 2003). A class A misdemeanor is punishable by a fine of up to $1,000. \textit{Id.} at § 80.05.

\textsuperscript{91} \textit{Brown}, 569 N.Y.S.2d at 617, 622.

\textsuperscript{92} \textit{Id.} at 617.

\textsuperscript{93} \textit{Id.} at 622.

\textsuperscript{94} \textit{Id.}

\textsuperscript{95} \textit{Id.}

\textsuperscript{96} \textit{Id.}
the premises. The housing authority instituted termination proceedings after she permitted her son, who was seriously ill, to spend the night at her apartment so that she could assure that he went to a doctor’s appointment for his bone disease at a hospital across the street from the project. The Appellate Department, however, found the penalty of termination “shockingly disproportionate” in light of her twenty-one-year residency, her compelling explanation for allowing her son to stay only for one night and the fact that her son’s stay there did not compromise the health or safety of other tenants.

While one might argue these cases demonstrate that courts serve as an effective check on the often harsh decisions of housing authorities, one must consider the number of cases that are not appealed for lack of resources. In addition, courts often uphold evictions of innocent tenants even when they are challenged. In Syracuse Housing Authority v. Boule, for example, Ann Boule was evicted for the criminal activity of her baby sitter. Ms. Boule was on her way to work when her usual baby-sitter became unavailable. To avoid jeopardizing her employment, she called the child’s father at the last minute to baby-sit while she worked. Unbeknownst to Ms. Boule, while she was at work, the father

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98 Robinson, 764 N.Y.S.2d at 95-96.

99 Id.

100 See 42 U.S.C. § 2996 (2003) (finding, in connection with the creation of the Legal Services Corporation, that “there is a need to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel and to continue the present vital legal services program”).


103 Id.
invited two other people to the house where they sold drugs and were subsequently arrested.\textsuperscript{104} While the lower court held that evicting the mother, the tenant of record, was unwarranted since she was unaware of, did not consent to and could not foresee the criminal activity, the Appellate Division affirmed the eviction of Ms. Boule and applied a strict liability standard.\textsuperscript{105} The Appellate Division found the housing authority is not bound to exercise discretion or consider mitigating circumstances where there is a violation of section 1437d(l)(6).\textsuperscript{106}

Similarly, in San Francisco, a mother and father were evicted from their federally subsidized apartment for failure to ensure that no drug-related activity took place on the premises.\textsuperscript{107} During a routine search of their son’s jacket hanging in a closet, the police found four packets of narcotics.\textsuperscript{108} Despite no evidence that the parents knew of, controlled, acquiesced in or had reason to know of their son’s possession of narcotics in the apartment, the eviction was upheld.\textsuperscript{109} The court reasoned that the eviction was proper because the parents were not being evicted for the conduct of their son, but for their failure to fulfill their commitment in the lease to

\textsuperscript{104} Id. The court found:

The following further facts are stipulated: respondent did not know Mr. Troutman had invited the other two persons upon the premises and she did not give permission for them to be present; none of the three persons arrested reside at the apartment; respondent was unaware of the presence or sale of the drugs on the premises; respondent was not in any way involved in the possession or sale of the drugs; respondent was not criminally charged regarding this incident; respondent believed that Mr. Troutman did not have a criminal record; and neither neighbors nor the Housing Authority notified respondent of the criminal activity during its occurrence.

\textsuperscript{105} See id. at 780 (applying a balancing approach at the trial level); but see Boule, 701 N.Y.S.2d at 542 (applying strict liability approach in the appellate division).

\textsuperscript{106} Boule, 701 N.Y.S.2d at 542.


\textsuperscript{108} Id. at 369.

\textsuperscript{109} Id. at 369-70, 372.
III. IT’S JUST BAD PUBLIC POLICY

The Provision implements poor public policy in several ways. First, the Provision puts tenants at risk by implying an affirmative duty on tenants to prevent and stop criminal behavior of third parties. Second, the Provision inhibits the recovery of tenants who are substance abusers by denying them one of the most fundamental components of recovery—family. Third, the provision breaks up families by conditioning their continued occupancy on permanently excluding the third party, who often is a family member. And finally, the Provision is unconscionable and renders the lease an unconscionable contract.

A. The Provision Unfairly Imposes an Affirmative Duty on Public Housing Tenants to Prevent and Stop the Criminal Behavior of Third Parties

While one may have a moral duty to prevent harm, the law distinguishes this from causing harm, punishing only the latter affirmative action. Generally, one is not liable for failing to act. Under the Provision, however, tenants are under an

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110 Id. at 372 (holding “drug-related activity by any member of a tenant household is cause per se for termination of the lease where, as here, the housing authority receives federal funds”).
111 See infra Part III.A.
112 See infra Part III.B.
113 See infra Part III.C.
114 See infra Part III.D.
116 RESTATEMENT (SECOND) OF TORTS § 314 (1965) (“The fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”); Id. at Illustration 1 (“A sees B, a blind man, about to step into the street in front of an approaching automobile. A could prevent B from so doing by a
affirmative obligation, subject to termination, to ensure no tenant, member of the household or guest under the tenant’s control engages in criminal activity.\textsuperscript{117} Courts have expressly upheld this duty of tenants to ensure that no other tenant or guest engages in a criminal drug activity.\textsuperscript{118} 

This requirement is unfair because, as seen with the elderly and disabled plaintiffs in \textit{Rucker}, not all residents are capable of ensuring that a member of the resident’s household, guest or other person does not engage in criminal activity.\textsuperscript{119} Moreover, it is poor word or touch without delaying his own progress. \textit{A} does not do so, and \textit{B} is run over and hurt. \textit{A} is under no duty to prevent \textit{B} from stepping into the street, and is not liable to \textit{B}.\textsuperscript{115} \textsuperscript{116}; \textit{see} \textit{L.S. Ayres \\& Co. v. Hicks, 40 N.E.2d 334, 336 (Ind. 1942) (“One is not bound to guard against a happening which there is no reason to anticipate or expect.”). 

\textsuperscript{117} \textit{See} HUD Public Housing Lease and Grievance Procedure, 24 C.F.R. § 966.4(f) (2003). The lease shall provide that the tenant shall be obligated: 

\begin{itemize}
  \item[(12)(i)] To assure that no tenant, member of the tenant’s household, or guest engages in: (A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents; or (B) Any drug-related criminal activity on or off the premises; 
  \item[(ii)] To assure that no other person under the tenant’s control engages in: (A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents; or (B) Any drug-related criminal activity on the premises; 
  \item[(iii)] To assure that no member of the household engages in an abuse or pattern of abuse of alcohol that affects the health, safety, or right to peaceful enjoyment of the premises by other residents.
\end{itemize}

\textit{Id.} This obligation is a great burden in light of the Supreme Court’s ruling that the phrase under control “means control in the sense that the tenant has permitted access to the premises.” \textit{See Dep’t of Hous. \\& Urban Dev. v. Rucker, 535 U.S. 125, 131 (2002).} 

\textsuperscript{118} \textit{See} Burton v. Tampa Hous. Auth., 271 F.3d 1274, 1276 (11th Cir. 2001) (“Embodied within this agreement is the understanding that it is the resident’s obligation to ensure that no member of the resident’s household, guest, or other person under the resident’s control shall engage in any criminal activity on THA premises.”); \textit{see also} Remedeer H.D.F.C., Inc. v. Francis, No. 2000-1406 K C, slip op. at 1 (N.Y. App. Term Dec. 6, 2001) (comparing 42 U.S.C. § 1437d(l)(6) (2003) with 42 U.S.C. § 1437d(l)(5) (2003) and concluding that “both versions of the federal statute seem to make tenants the guarantors of the conduct by other household members, guests, or other people under a tenant’s control”). 

\textsuperscript{119} \textit{Rucker v. Davis, 237 F.3d 1113, 1117 (9th Cir. 2001) (en banc), rev’d}
public policy to expect a civilian to endanger himself by implying a duty to spot illegal drug activity and stop it.\textsuperscript{120} In fact, Congress has recognized this danger and protected against it in other contexts.\textsuperscript{121} Such impositions on people not qualified to fulfill these tasks will likely lead to incorrect reporting of crimes as well as potentially dangerous situations for the civilians involved.\textsuperscript{122}


\textsuperscript{120} \textit{See} Rucker, 535 U.S. at 134 (remarking “a tenant who ‘cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project’”); \textit{see also} Michael A. Cavanagh \& M. Jason Williams, \textit{Low-Income Grandparents as the Newest Draftees in the Government’s War on Drugs: A Legal and Rhetorical Analysis} of Department of Housing and Urban Development v. Rucker, 10 GEO. J. POVERTY LAW \& POL’Y 157 (2003).

The Court’s reflection thus blames the victims. The full force of the United States government, consisting of the courts, the military, and the police, has been unable to stop drug crime for more than thirty years . . . . The Court simply fails to explain how poor elderly grandmothers and disabled persons are, single-handedly, to rid the PHAs of drug dealers.

\textit{Id.} at 164-65.

\textsuperscript{121} \textit{See} 18 U.S.C. § 983(d)(2)(B)(ii) (2003) (setting forth an innocent owner defense, the statute states: “A person is not required by this subparagraph to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger”); \textit{see also} William Raspberry, \textit{Clean Up Public Housing With One Strike}, TIMES UNION, Apr. 1, 2002, at A9 (“A rule requiring eviction under any and every circumstance of family-member involvement with criminality would be just another example of ‘zero tolerance’ gone mad.”).

\textsuperscript{122} \textit{See} Cavanagh \& Williams, \textit{supra} note 120, at 165 (“The Court simply fails to explain how poor elderly grandmothers and disabled persons are, single-handedly, to rid the PHAs of drug dealers.”); 18 U.S.C. § 983(d)(2)(B)(ii) (stating in connection with a civil forfeiture defense that “[a] person is not required . . . to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger”).
Nonetheless, the Chief Justice remarked that if a tenant cannot control the criminal activity of someone else, the tenant is a threat to the community, and the threat warrants eviction. According to this reasoning, a paralyzed minister is a threat to the community because he did not stop his caregiver, upon whom he was dependent, from storing drugs in his apartment. By the Court’s logic, it seems the only people who are truly “safe” enough to live in public housing are people with detective-like skills and the courage to confront criminals about their illegal behavior and subdue them when they pose a physical or criminal threat.

Finally, a grandparent or parent should be entitled to the presumption that their children are not engaged in a criminal activity. It is unfair to hold someone liable for what amounts to

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123 See Rucker, 535 U.S. at 134. The Supreme Court reasoned:

[T]here is an obvious reason why Congress would have permitted local public housing authorities to conduct no-fault evictions: Regardless of knowledge, a tenant who “cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project.”

Id. (quoting HUD Public Housing Lease and Grievance Procedure, 56 Fed. Reg. 51560, 51567 (Oct. 11, 1991)). In an apparent attempt to soften the harsh language, the Federal Register states that “If a tenant cannot control criminal activity by a household member, the tenant can request that the PHA remove the person from the lease as an authorized unit occupant, and may seek to bar access by that person to the unit.” 56 Fed. Reg. 51560. While this might work with someone who is not a member of the family or whom is not wanted on the premises, the idea that a family that desires to stay united should simply call the housing authorities to remove the offender, especially in the case of a low-level crime like smoking marijuana, is absurd. See supra note 50 and accompanying text (citing California statute classifying possession of marijuana as a misdemeanor and New York statute classifying it as a violation). Furthermore, even if the tenant calls upon the housing authority to remove the offender, the tenant may still be evicted. See supra note 51 (explaining that courts are not obligated to consider all circumstances relative to a particular eviction case, but may consider them in its discretion).

124 See, e.g., Rucker, 535 U.S. at 131-33 (explaining that a tenant’s eviction may rest solely on his or her having provided an individual engaged in drug-related activity with “access to the premises”).

125 See Daniel E. Witte, Note, People v. Bennett: Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment, 1996
failing to report their son or daughter because they might be using drugs. Such a duty should not be imposed upon a familial relationship where trust is an essential component to the health of the relationship.

BYU L. REV. 183, 221 (1996) (“In the realm of family law, the presumption ‘that children ordinarily will be best cared for by those bound to them by the ties of nature’ serves a similar function as the presumption of ‘innocent until proven guilty’ . . . . Without such basic presuppositions, an existing orderly and secure society cannot long maintain itself.”) (citations omitted).

126 See Rucker, 237 F.3d at 1117 (“Lee and Hill contend they had no prior knowledge of any illegal drug activity by their grandsons.”). Because plaintiff’s Barbara Hill and Willie Lee had no knowledge of their grandson’s marijuana use they had no reason to either report the situation to the housing authority or attempt to have them excluded from the household. See also HUD Public Housing Lease and Grievance Procedure, 24 C.F.R. § 966.4 (2003) (“Exclusion of culpable household member. The PHA may require a tenant to exclude a household member in order to continue to reside in the assisted unit, where that household member has participated in or been culpable for action or failure to act that warrants termination.”). Nonetheless, it is clear that it would be to their advantage, insofar as being able to maintain their residences, to just report their grandsons because it is possible they may be using drugs.


The role of the family, particularly that of the mother and father, in establishing a child’s emotional stability, character and self-image is universally recognized. The erosion of this influence would have a profound effect on the individual child and on society as a whole. Child psychologists and behavioral scientists generally agree that it is essential to the parent-child relationship that the lines of communication remain open and that the child be encouraged to “talk out” his problems. It is therefore critical to a child’s emotional development that he know that he may explore his problems in an atmosphere of trust and understanding without fear that his confidences will later be revealed to others.

Id.; Wendy Meredith Watts, The Parent-Child Privileges: Hardly A New Or Revolutionary Concept, 28 WM. & MARY L. REV. 583, 604 (1987) (“In order for parents to exercise their rights to raise their children and instill in them morals and values, society must encourage a mutual trust between parent and child.”); Michael D. Moberly, Children should be Seen and not Heard: Advocating the Recognition of a Parent-Child Privilege in Arizona, 35 ARIZ. ST. L.J. 515, 532 (2003) (“[T]he ability to provide effective parental guidance largely depends
B. The Provision Inhibits Recovery Where The Tenant Being Evicted Is Addicted To Illegal Drugs

While the criminal activities at issue in Rucker, smoking marijuana and possession of cocaine, arguably present dangers to other tenants, the crimes are generally consequences of substance abuse. This addiction-driven behavior is not similar to “drug dealers . . . imposing a reign of terror on . . . housing tenants,” and this difference is recognized in the way criminal courts have prosecuted these crimes. While drug abuse has largely been considered a criminal issue, it is now being considered and treated more consistently as a medical issue. Yet, the Provision, seemingly overlooking the medical aspects of drug abuse, still provides that tenants may be evicted for using or abusing drugs or having guests who do so.

upon the existence of loyal and trusting family relationships.”); Jeff Murrah, Why Should I Trust You?, (“Trust is an essential part of family life. In . . . [the] parental relationships, there must be trust. Each person needs to be able to count on each other, and have that sense of safety that comes from trust within the home. When trust is established in families, everyone benefits.”), at http://www.myparentime.com/articles/ articleS43.shtml (last visited Dec. 1, 2003).

128 See Rucker, 535 U.S. at 128.
131 WASH. STATE BAR ASS’N, Resolution Regarding Drug Abuse Policies in Washington State (advising that “‘low-level’ drug crimes, such as simple possession, should be approached as health problems not criminal problems”), http://www.kcba.org/drug_law/WSBA.pdf (Dec. 11, 2001).
132 See 42 U.S.C. § 1437d(l) (2003) (“For purposes of [§ 1437d(l)(6)], the term ‘drug-related criminal activity’ means the illegal . . . use, or possession with intent to . . . use . . . a controlled substance.”); see also Rucker, 237 F.3d at 1117 (eviction proceedings instituted against two tenants for smoking marijuana); HUD Public Housing Lease and Grievance Procedure, 24 C.F.R. § 966.4 (providing for the termination of a tenant’s lease for abusing alcohol where the “abuse or pattern of abuse . . . threatens the health, safety, or right to
Evictions conducted against substance abusers are unreasonably harsh because substance abusers need the stability of a home to recover—not homelessness.\textsuperscript{133} Addiction to mood altering substances such as alcohol or cocaine is a chronic disease classified with cancer, AIDS and other illnesses, which produce long-term physical, psychological and social damages.\textsuperscript{134} While there is no cure for addiction, it may be effectively treated through abstinence and sobriety.\textsuperscript{135} It is well accepted that a vital component to the addiction recovery process is communication.\textsuperscript{136} One of the most effective forms of communication geared toward recovery involves the family.\textsuperscript{137} Yet, the strict and unforgiving parameters of the Provision do not allow one the proper means to recover. Because the Provision impresses an affirmative duty on a tenant of record to ferret out criminal activity, one who is suffering peaceful enjoyment of the premises by other residents").

\textsuperscript{133} See CONN. CLEARING HOUSE, WHEELER CLINIC, Facts About Drug and Alcohol Addiction, Treatment, Recovery, and Use (“Family and friends can play critical roles in motivating individuals with drug and alcohol problems to enter treatment, stay in it, and maintain sobriety. Family therapy is also important, especially for adolescents. Additional support is available through the recovery community in the form of 12-step programs.”), at http://www.ctclearinghouse.org/FactSheets/fs_treatment_facts_about.pdf (2001).

\textsuperscript{134} TERENCE T. GORSKI & MERLENE MILLER, STAYING SOBER: A GUIDE FOR RELAPSE PREVENTION 39-40 (1986); see AMERICAN COUNCIL ON ALCOHOLISM, What is Alcoholism (defining alcoholism as a fatal addictive disease), at http://www.aca-usa.org/acadefinition.htm (page last updated July 23, 2003).

\textsuperscript{135} GORSKI & MILLER, supra note 134, at 50 (“Total abstinence is necessary to recover from an addiction . . . . Abstinence is a necessary first step for recovery.”).


\textsuperscript{137} Id. at 152. See James Garrett, Judith Landau & Robert Shea, The ARISE Intervention: Using Family and Network Links to Engage Addicted Persons in Treatment, 15 J. OF SUBSTANCE ABUSE TREATMENT 333, 333 (1998) (“The most well-known and widely applied [treatment alternative to self-help groups for substance abusers] is the ‘Intervention’ approach . . . [which] proceeds by enlisting and convening as many of a chemically dependent person’s (CDP’s) significant others as possible in an effort to induce the CDP to enter treatment.”).
from addiction or relapsing is unlikely to come forward and ask a family member or friend in the public housing project for help for fear of being reported and subsequently evicted.\textsuperscript{138} While recovery is most successful when it is discussed openly in the family unit, the Provision deprives families of the ability to openly address the use of illegal drugs because it creates the risk of eviction.\textsuperscript{139} Thus, substance abusers are deprived of the family as a valuable component of their recovery.\textsuperscript{140}

\textsuperscript{138} See Platoni, supra note 30 (“As a matter of fact, [the Provision] puts tenants in a situation where they’re afraid to reveal any activity in their homes or address the issue because they know the moment they say anything, the housing authority could move to evict them.” (quoting Catherine Bishop of the Oakland-based National Housing Law Project)). Relapse is typical during the recovery process and is in some ways to be expected. See also Gorski \& Miller, supra note 134, at 112.

\textsuperscript{139} See Geller, supra note 136, at 152-55 (discussing how open lines of communication with family members contributes to the success of an individual’s recovery from alcohol and drugs).

\textsuperscript{140} Indigent families often lack access to affordable health services as compared to wealthy families and thus are already at a disadvantage. See Henry J. Kaiser Family Foundation, Kaiser Commission on Medicaid and the Uninsured, Key Facts (Jan. 2003), at http://www.kff.org/uninsured/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=14185 (last visited Dec. 1, 2003).

Low-income Americans (those who earn less than 200% of the federal poverty level, or $28,256 for a family of three in 2001) run the highest risk of being uninsured. Over a third of the poor and more than a quarter of the near-poor lack coverage. The poor and the near-poor comprise two-thirds (66%) of the uninsured population. Id. That disadvantage is only amplified when these families are denied the most simple and basic means to assist in the rehabilitation of addicts within the family. A family that owns their home is able to recover as a family because they are not forced to choose between either excluding a family member to prevent eviction or including him to help him recover. The Provision and its rules apply only to individuals leasing public housing. See 42 U.S.C. § 1437d(l)(6) (2003) (“Each public housing agency shall utilize leases . . . .”) (emphasis added). The lease Provision effectively denies this same benefit of recovering as a family to the poor who are only able to rent through public housing programs and cannot afford to own. This disparate treatment of families based on wealth and ownership of property is bad public policy. Compare plaintiff Rucker’s daughter and Florida Gov. Bush’s daughter: both residents of
C. The Provision Breaks Up Families Through Permanent Exclusion

One of the more devastating effects of the Provision is that it divides and breaks up families. Tenants are sometimes given the option to exclude the offending person as a condition to their continued occupancy. This option effectively is a choice between losing your home or breaking up your family. This decision may not be a difficult choice where the individual you are agreeing to exclude is someone you do not want to visit your home. Such a decision, however, is extremely difficult when the person you are being asked to exclude is your child, spouse or caretaker; but, under the current policy, one who refuses to permanently exclude will likely be evicted.

Powell v. Franco illustrates how tenants are forced to choose housing funded by taxpayers and both had problems with alcohol or drugs, but the disparate treatment—eviction for a poor elderly woman with no knowledge of her daughter’s drug use, versus medical treatment for a privileged young woman with a history of substance abuse and addiction. See Arianna Huffington, I Strike, You’re Out on the Street, L.A. Times, Apr. 2, 2002, at B13.

141 See HUD Public Housing Lease and Grievance Procedure, 24 C.F.R. § 966.4 (2003) (“Exclusion of culpable household member. The PHA may require a tenant to exclude a household member in order to continue to reside in the assisted unit, where that household member has participated in or been culpable for action or failure to act that warrants termination.”).

142 See Featherstone v. Franco, 742 N.E.2d 607, 610 (N.Y. 2000) (terminating tenant’s lease when tenant “refused a possible mitigated sanction predicated upon [her 18 year old son’s] . . . permanent exclusion [from the apartment]”); Patrick v. Hernandez, 765 N.Y.S.2d 508, 508 (N.Y. App. Div. 2003) (affirming the housing authority’s termination of a tenant’s lease for violating, on at least one occasion, a stipulation to permanently exclude her son from the home); Holiday v. Franco, 709 N.Y.S.2d 523, 527 (N.Y. App. Div. 2000) (annulling the housing authority’s termination of a tenant’s lease for violating a stipulation to exclude her son where the son came to the home on one occasion without the tenant’s knowledge and the tenant was in her late sixties, resided in New York City Housing Authority premises since 1957 with an unblemished record and her household included a disabled daughter); see also Robinson v. Martinez, 764 N.Y.S.2d 94 (N.Y. App. Div. 2003) (illustrating the difficulty with excluding a family member from one’s home). See supra text accompanying notes 97-99 (discussing the facts of Robinson v. Martinez).
between breaking up their family and most likely homelessness.\textsuperscript{143} In \textit{Powell}, New York’s Appellate Division reversed a determination by the housing authority that the tenants permanently exclude their son as a condition to remain in housing.\textsuperscript{144} The court held that conditioning the tenants’ continued occupancy upon permanently excluding their son was shocking to its sense of fairness where the son pled to disorderly conduct, performed five days of community service, the incident was isolated and the family was otherwise law-abiding and stable.\textsuperscript{145} While some might argue it is drug use that breaks up families, it is also true that the recovery process can strengthen the family in many ways.\textsuperscript{146} Indeed, families fulfill a critical role for delinquent youths as systems of emotional support and models of appropriate behavior.\textsuperscript{147} Disrupting the family unit negatively impacts

\begin{itemize}
\item[\textsuperscript{143}] 684 N.Y.S.2d 226, 226 (N.Y. App. Div. 1999) (finding the housing authority “required the permanent exclusion of petitioners’ son, Kenneth, as a condition of their continued occupancy in public housing”).
\item[\textsuperscript{144}] \textit{Id.} In \textit{Powell}, the tenants’ son was arrested after he was seen making several “hand-to-hand” exchanges with individuals and was found with what the arresting officer believed was crack cocaine. \textit{Id.}
\item[\textsuperscript{145}] \textit{Id.} at 226-27. While the Appellate Division was able to protect the family in this instance, it is important to note that the case was nonetheless brought against the indigent family. In this case, the family was fortunate to secure representation, yet many poor families are unable to afford representation in civil cases, and thus, are unlikely to challenge such inappropriate applications of permanent exclusion. See \textit{Di Angelo v. Illinois Dep’t of Pub. Aid, 891 F.2d 1260, 1262 (7th Cir. 1989)} (“Indigent civil litigants have no constitutional right to counsel at the expense of another—whether of the adversary or of the private bar.”). On one hand, it makes sense to have public housing managers responsible for recommending eviction in that they are on site everyday and are in touch with the severity of the problems that exist. On the other hand it places a great deal of power and responsibility in the hands of a group of people responsible for managing buildings who are not necessarily capable of making difficult and sensitive decisions regarding crime, the elderly and families. While the courts can serve as a check on potential abuses, this is only effective if the people can afford to utilize the courts. This is uncertain where people are indigent.
\item[\textsuperscript{146}] GELLER, \textit{supra} note 136, at 164-65.
\item[\textsuperscript{147}] Debra A. Madden-Derdich, Stacie A. Leonard & Gordon A. Gunnel, \textit{Parents’ and Children’s Perceptions of Family Processes in Inner-City Families}
D. The Provision Is Unconscionable Rendering the Lease an Unconscionable Contract

The Court has characterized the government’s role in connection with public housing “as a landlord of property that it owns, invoking a clause in a lease to which respondents have agreed and which Congress has expressly required.”

This characterization, however, is over-simplified and inaccurate. The government is not simply a landlord, and the tenants had


148 Id. (findings supported previous empirical research highlighting the importance of family interaction processes in the lives of delinquent youths). See UNITED STATES DEPT. OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, Risk Factors for Delinquency: An Overview, (“Family characteristics such as poor parenting skills, family size, home discord, child maltreatment, and antisocial parents are risk factors linked to juvenile delinquency.”), at http://www.ncjrs.org/html/ojjdp/ijjournal_2003_2/ page3.html (last visited Nov. 28, 2003).

149 Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 134-35 (2002) (finding “‘no-fault’ eviction is a common ‘incident of tenant responsibility under normal landlord-tenant law and practice’” (citation omitted); see Hous. Auth. v. Chapman, 780 N.E.2d 1106 (Ill. App. Ct. 2001) (finding that a tenant assumed the obligations of a valid contract in signing a lease for public housing); HUD Public Housing Lease and Grievance Procedure, 56 Fed. Reg. 51560, 51567 (Oct. 11, 1991) (“As in a conventional tenancy, a public housing tenant holds tenure of the unit subject to the requirements of the lease . . . .”) (emphasis added).

150 See 42 U.S.C. § 1437(a)(1)(A) (2003) (“It is the policy of the United States . . . to promote the general welfare of the Nation . . . as provided in this Act . . . to assist States and political subdivisions of States to remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families.”). Unlike a landlord in a simple lease assignment who enters into agreements with the expectation of profits, the government did not create public housing to generate income. See U.S DEP’T OF HOUS. & URBAN DEV., What is Public Housing (“Public housing was established to provide decent and safe rental housing for eligible low-income families, the elderly, and persons with disabilities.”), at http://www.hud.gov/renting/ phprog.cfm (last updated Dec. 5, 2000).
virtually no choice but to agree to the contracts’ terms. In light of the tenants’ absence of choice and the leases’ grossly unfavorable terms, the Court is arguably enforcing unconscionable contracts.


“[I]f one party has the power of saying to the other, ‘that which you require shall not be done except upon the conditions which I choose to impose,’ no person can contend that they stand upon anything like an equal footing.” . . . The fundamental principle of law that the courts will not enforce a bargain where one party has unconscionably taken advantage of the necessities and distress of the other has found expression in an almost infinite variety of cases.

152 “Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965). Generally, the unconscionable contract requires inequality “so strong and manifest as to shock the conscience and confound the judgment of any (person) of common sense.” See Christian v. Christian, 365 N.E.2d 849, 855 (N.Y. 1977) (quoting Mandel v. Liebman, 100 N.E.2d 149, 152 (N.Y. 1951)). Courts have utilized the language of unconscionable contracts when they have been confronted with strict liability evictions. See Holiday v. Franco, 709 N.Y.S.2d 523, 526 (N.Y. App. Div. 2000) (finding tenants expulsion from her home “shocking to the conscience” where her excluded son was found in her apartment on a single occasion and the tenant was a longtime tenant, cared for her disabled daughter and had an unblemished record as a tenant); Spand v. Franco, 663 N.Y.S.2d 813, 813 (N.Y. App. Div. 1997) (holding eviction of petitioner was “shocking to one’s sense of fairness” where petitioner was involved in one isolated incident, had no other violations and there was no indication that she posed any risk to other tenants or property); Charlotte Hous. Auth. v. Patterson, 464 S.E.2d 68, 72-73 (N.C. Ct. App. 1995) (holding that to evict the tenant and her daughters “with no evidence of fault on their part for the shooting would . . . indeed shock our sense of fairness”); Brown v. Popolizio, 569 N.Y.S.2d 615, 622 (N.Y. App. Div. 1991) (“It would be shocking to one’s sense of fairness to terminate the tenancies of persons who have not committed ‘nondesirable acts’ and have not had control over those who have committed such acts.”); New York City Hous. Auth. v. Watson, 207
Standards developed in the common law doctrine of unconscionability generally govern whether a clause in a real estate lease is unconscionable.\textsuperscript{153} Courts generally do not enforce unconscionable contracts.\textsuperscript{154} A contract is unconscionable where there is both procedural and substantive inequality.\textsuperscript{155} The key components rendering the clause or the entirety of a contract unconscionable are, first, lack of meaningful choice and, second, unreasonably favorable terms to the party seeking enforcement.\textsuperscript{156}

N.Y.S.2d 920, 924 (App. Term 1960) (Hofstadter, J., dissenting) (arguing that affirming the housing authority’s eviction of a family based solely on the criminal activity of the father when the father was incarcerated “shocks the conscience”). Thus, it can be fairly said that courts have brought the common law doctrine of unconscionability to bear on the issue of no fault evictions.\textsuperscript{153}


Scott v. United States, 79 U.S. 443, 445 (1870) (“If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to.”). See also Bethlehem Steel Corp., 315 U.S. at 326 (Frankfurter, J., dissenting)

Does any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other? . . . Fraud and physical duress are not the only grounds upon which courts refuse to enforce contracts . . . . More specifically, the courts generally refuse to lend themselves to the enforcement of a ‘bargain’ in which one party has unjustly taken advantage of the economic necessities of the other . . . . The fundamental principle of law that the courts will not enforce a bargain where one party has unconscionably taken advantage of the necessities and distress of the other has found expression in an almost infinite variety of cases.

Id. at 326-28.\textsuperscript{155}

See Williams, 350 F.2d at 449; see also Sablosky v. Gordon Co., 535 N.E.2d 643, 647 (N.Y. 1989) (explaining that an unconscionable contract is a contract where both substantive and procedural unfairness exist); Restatement (Second) of Contracts § 208 (1981).\textsuperscript{156}

See Williams, 350 F.2d at 449 (“Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the
In determining whether meaningful choice exists, one must consider the totality of the transaction, and if there is a gross inequality of bargaining power, meaningful choice is not present.\(^{157}\)

Meaningful choice implies an alternative—a decision after considering more than one option.\(^{158}\) Yet, public housing tenants are essentially presented with two options: the Provision in the lease, or, if they choose not to sign the lease, homelessness, which is no option.\(^{159}\) The procedural inequality is also manifest in the circumstances surrounding the formation of the contract, including the circumstances of the parties at the signing of the contract.\(^{160}\) People can wait up to ten years for public housing.\(^{161}\) And wait

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\(^{157}\) See id. (stating the unreasonableness or unfairness of the terms of the contract must be considered in light of the circumstances that existed when the contract was made); see also Christian v. Christian, 365 N.E.2d 849, 855 (N.Y. 1977) (noting that an unconscionable contract has been described as one where "no (person) in his (or her) senses and not under delusion would make on the one hand, and as no honest and fair (person) would accept on the other" (quoting Hume v. United States, 132 U.S. 406, 411 (1889))).

\(^{158}\) WEBSTER’S NEW WORLD COLLEGIATE DICTIONARY 258 (4th ed. 1999).

\(^{159}\) See Weidman v. Tomaselli, 365 N.Y.S.2d 681, 687 (Rockland County Ct. 1975), aff’d, 386 N.Y.S.2d 276 (App. Term 1975) (“The Court takes judicial notice that food, clothing, shelter, and employment are necessities of life. The respondents must seek and obtain housing for themselves and for their infant daughter. The respondents do not have the alternative of foregoing shelter, nor is any natural shelter, such as a cave, available to them.”); see also Featherstone v. Franco, 703 N.Y.S.2d 11, 13 (App. Div. 2000) (Rubin, J., dissenting) (finding “public housing is a last resort for many of its residents”), aff’d, 742 N.E.2d 607 (N.Y. 2000).

\(^{160}\) See Villa Milano Homeowners Ass’n v. Il. Davorge, 102 Cal. Rptr. 2d 1, 7 (Cal. Ct. App. 2000) (noting that procedural inequality analysis in an unconscionable contract focuses on oppression which is found where there is “an absence of real negotiation or a meaningful choice on the part of the weaker party”).

\(^{161}\) See U.S. MAYOR’S HOUSING FACT SHEET, supra note 10, at 2 (finding families in some large cities wait ten years or more for an available unit of public housing); Kathleen McGowan, Nation’s Poorest Wait (and Wait) for Housing Help (finding the typical wait for public housing in New York City can be up to eight years), at http://www.tenant.net/Tengroup/Metcounc/Apr99/poorest.html (last visited Oct. 23, 2003).
they must for there is a serious lack of affordable housing alternatives.\footnote{See U.S. MAYOR’s HOUSING FACT SHEET, supra note 10, at 2 (noting how public housing and subsidized apartments fall far short of the need and waiting lists for public housing have grown to about 1 million households); NATIONAL COALITION FOR THE HOMELESS, The Affordable Housing Crisis and Homelessness in New York City, The Problem and the Solutions (“According to Census Bureau statistics, in 1999 there was shortage of nearly 390,000 affordable apartments for extremely-low-income renter household in New York City (i.e., households earning less than $16,100 per year). In contrast, in 1970 there was actually a surplus of more than 270,000 affordable apartments for extremely-low-income renters.”), at http://www.coalitionforthehomeless.org/home/downloads/nychousing01.pdf (updated Sept. 2002).} Under such conditions the sharp imbalance between the bargaining power of the waiting tenant and that of housing authority is exacerbated—the longer the wait, the greater the desperation and the weaker the bargaining strength of the tenant.\footnote{See supra note 161 and infra note 166.} Further, the tenants are neither able to bargain out the harsh Provision, nor are they likely to be in a position to rent on the private market.\footnote{See Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 128-29 (2002) (finding HUD regulations administering § 1437d(l)(6) “require lease terms authorizing evictions” even where the tenant had no knowledge of the criminal activity); see also U.S. MAYOR’s HOUSING FACT SHEET, supra note 10 (noting the widening public housing gap between supply and demand and that no significant new public housing has been built in the past twenty-five years); id. (“Almost 2 million low- and moderate- income working families pay more than half of their income on rent or live in severely inadequate housing.”).} Finally, the lease is virtually entirely dictated by the Department of Housing and Urban Development.\footnote{Rucker v. Davis, 237 F.3d 1113, 1126 (9th Cir. 2001) (en banc), rev’d sub nom. Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) (finding that there is “no bargained-for-exchange in public housing leases” . . . and “public housing leases [are] almost entirely dictated by HUD”).} These factors, when considered as a whole, demonstrate a lack of meaningful choice that significantly contributes to the procedural unfairness.\footnote{See United States v. Bethlehem Steel Corp., 315 U.S. 289, 326 (1942) (Frankfurter, J., dissenting). Justice Frankfurter stated: [T]he courts generally refuse to lend themselves to the enforcement of a “bargain” in which one party has unjustly taken advantage of the
The unfavorable terms of the public housing lease are manifest in the fact that it allows tenants to be evicted not for their own criminal acts, but instead, for the criminal acts of third parties. The unreasonable terms are hardly more apparent than in Rucker, where, despite efforts by the plaintiffs to prevent criminal activity, eviction proceedings were still pursued by the local housing authority. In light of the advanced age of the people evicted and that the tenants had neither participated in nor committed criminal activity, the Provision’s effect shocks the conscience. It is economic necessities of the other. “And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them.”

*Id.* (citation omitted).

**167** *Rucker*, 237 F.3d at 1124 (“HUD conceded at oral argument that there was nothing more Pearlie Rucker could have done to protect herself from eviction, but argued that the statute authorized her eviction nonetheless.”). See Bennis v. Michigan, 516 U.S. 442, 466 (1996) (Stevens, J., dissenting) (“Fundamental fairness prohibits the punishment of innocent people.”).

**168** See *Rucker v. Davis*, No. C 98-00781, 1998 U.S. Dist. LEXIS 9345, at *5-8 (N.D. Cal. June 24, 1998), vacated, 203 F.3d 627 (9th Cir. 2000), amended by 237 F.3d 1113 (9th Cir. 2000) (en banc), rev’d sub nom. Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) (finding Ms. Rucker regularly searched her daughter’s room for evidence of drug and alcohol activity; Ms. Hill and Ms. Lee were not alleged to have knowledge of their grandsons’ marijuana use and in fact warned them that such conduct could result in eviction); see also *Rucker*, 237 F.3d at 1117 (Mr. Walker fired his caregiver, upon whom he was dependent, short after receiving an eviction notice). Admittedly, the housing authorities are not required to evict tenants and “may consider all circumstances relevant to a particular case,” HUD Public Housing Lease and Grievance Procedure, 24 C.F.R. § 966.4 (2003), however, this discretion may create a greater level of insecurity in that the tenants may be subject to the whims of the housing authority. *See supra* note 51 (discussing how housing authorities are not required to consider mitigating factors before evicting, but may do so in their discretion).

**169** *See supra* note 152 (citing courts that have utilized the phrase, “shocks the conscience,” in connection with no-fault evictions). The shocking effect of the provision is illustrated by the eviction proceedings instituted against Mr. Walker who was elderly, partially paralyzed and a former minister. Cruz Lat, *supra* note 33 (describing Mr. Walker as a “former minister, . . . 75, partially paralyzed in his left arm, and suffer[ing] from severe arthritis”). Nonetheless, he
unlikely that the majority of law abiding public housing tenants or fair-minded citizens find such evictions reasonable—especially where the innocent tenant is elderly or infirm and has been a good tenant for over twenty years.\textsuperscript{170} The Provision contained in the lease is an example of poor public policy.\textsuperscript{171}

...
IV. FINDING AN ALTERNATIVE

The individual rights of tenants appears to be an afterthought in Congress’ enactment of the Provision and the Court’s subsequent interpretation in Rucker. A better policy, however, is one that will protect the leasehold interest of the innocent public housing tenant and assure them that so long as they live within the law, they will be safe in their homes from both criminals and the government. Because the Supreme Court has ruled on the issue of knowledge, the following suggestions are necessarily directed toward Congress.

A. No Strict Liability Requirement in Leases

Congress should eliminate the strict liability requirement in the leases each tenant signs. Congress could do this in one of two ways: by writing a knowledge requirement into the statute or by enacting a provision expressly providing an innocent lessee exemption. The innocent lessee exemption could mirror the

policy and void.” See supra text accompanying notes 153, 159-66 (discussing the lack of meaningful choice for tenants).


173 88-09 Realty LLC v. Hill, 737 N.Y.S.2d 227, 231 (N.Y. App. Term 2001) (Patterson, J., dissenting) (affirming the important objective of combating the drug crisis, but recognizing that “[i]t can and should be accomplished . . . without the need to dispossess a tenant who is wholly unconnected to any illegal activities”).

174 Rucker, 535 U.S. at 130.

175 See § 1437d(l)(6), “[A]ny criminal activity . . . engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.” Id.

176 Such a requirement would be similar to New York’s knowledge or acquiescence requirement, see infra note 181, or New Jersey’s Anti-Eviction
innocent owner defense set forth in the Controlled Substances Act.\textsuperscript{177} Pursuant to the exemption, a tenant would not be evicted where he did not know of the conduct or was aware of it and did all that could reasonably have been expected to stop the activity.\textsuperscript{178} An innocent lessee exemption surely would have protected Pearlie Rucker who, at sixty-three, took affirmative steps to prevent criminal activity by searching her daughter’s room for any possible contraband.\textsuperscript{179} It also would have protected Mr. Walker, who fired his aide.\textsuperscript{180} A knowledge requirement could be similar to the knowledge or acquiescence requirement which has been utilized by New York courts.\textsuperscript{181} Pursuant to the requirement, a tenant would not be evicted unless they knew of or acquiesced in the criminal conduct.\textsuperscript{182} Such a requirement would have protected Ms. Hill and

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Act, N.J. STAT. ANN. § 2A:18-61.1-61.12 (West 2003). That statute permits eviction of a tenant or lessee who “knowingly harbors or harbored [in the leased premises] a person who committed [a drug offense], or otherwise permits or permitted such a person to occupy those premises for residential purposes, whether continuously or intermittently.” Id. at § 2A:18-61.1(p).

\textsuperscript{177} See supra notes 38-39 (discussing the innocent owner defense in the Controlled Substances Act).

\textsuperscript{178} Id.

\textsuperscript{179} Rucker v. Davis, 237 F.3d 1113, 1117 (9th Cir. 2001) (en banc), rev’d sub nom. Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) (“Rucker asserts that she regularly searches her daughter’s room for evidence of alcohol and drug use and has never found any evidence or observed any sign of drug use by her daughter.”).

\textsuperscript{180} Bob Egelko, \textit{HUD’s Drug Rule Overturned; Appeals Court Says One Strike Rule Evicts Tenants Unfairly}, SAN FRANCISCO CHRON., Jan. 25, 2001, at A6 (reporting how Herman Walker fired his caretaker as soon as he could find a replacement, as he needed around the clock care).

\textsuperscript{181} See Remeeder H.D.F.C., Inc. v. Francis, No. 2000-1406 K C, slip op. at 5 (N.Y. App. Term Dec. 6, 2001) (Patterson, J., dissenting) (“in order to demonstrate ‘use’ of the premises for illegal purposes . . . a tenant must have knowledge of and acquiesce to the use of the demised premises for such an illegal activity” (quoting Clifton Ct. v. Williams, N.Y. L.J., May 27, 1998, at 28)); 220 W. 42 Assocs. v. Cohen, 302 N.Y.S.2d 494, 498 (N.Y. App. Term 1969) (“In the case of the tenant the illegal acts must be established by landlord, which must also show either participation or acquiescence by the tenant.”).

\textsuperscript{182} See 220 W. 42 Assocs., 302 N.Y.S.2d at 498.

\end{small}

Although strict liability eases enforcement and saves the cost of trying each case individually, it threatens \textit{all} tenants, even those who take action to eradicate the possibility of wrongdoing.\footnote{See Dep’t of Hous. \& Urban Dev. v. Rucker, 535 U.S. 125, 134 (2002) (‘‘Strict liability maximizes deterrence and eases enforcement difficulties.’’).} The innocent tenant is the one who suffers most directly by the strict liability standard. All of the tenants in \textit{Rucker}, it can be argued, were exemplary tenants in that they did not look the other way, but took action.\footnote{See supra Part I.B.1 (describing the plaintiffs in \textit{Rucker}).} Nevertheless, under the strict liability standard, this does not amount to much, and in all of their cases eviction proceedings were brought against them.\footnote{See \textit{Rucker}, 1998 U.S. Dist. LEXIS 9345.}

\subsection*{B. Provide Legal Services}

While the strict liability standard may be easily remedied through Congressional action, public housing tenants are not a group exercising much political clout, so the realistic possibility of Congress actually responding may be remote.\footnote{See Richard H. McAdams, \textit{New and Critical Approaches to Law and Economics (Part II) Norms Theory: An Attitudinal Theory of Expressive Law}, 79 OR. L. REV. 339, 360-61(2000) (discussing public choice theory and “rent-seeking” where “lobbying groups influence legislators with campaign contributions and other favors”); \textit{see also} Jody Freeman, \textit{The Private Role In Public Governance}, 75 N.Y.U. L. REV. 543, 561 (2000) (“Public choice theory understands administrative decisions as the product of interest group pressure brought to bear on bureaucrats seeking rewards such as job security, enhanced authority, or the favor of powerful legislators upon whom the agency depends.”).} In light of this, the local housing authorities, which have discretion to bring eviction proceedings, are urged to ensure that housing managers and housing court judges are properly trained to administer the laws
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justly by requiring them to consider mitigating circumstances.\footnote{By justly, I mean carefully applying the factors set forth in 24 C.F.R. § 966.4 (2003). Those factors are: PHA termination of tenancy for criminal activity or alcohol abuse . . . . Consideration of circumstances. In a manner consistent with such policies, procedures and practices, the PHA may consider all circumstances relevant to a particular case such as the seriousness of the offending action, the extent of participation by the leaseholder in the offending action, the effects that the eviction would have on family members not involved in the offending activity and the extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action. Id.}

Few decisions can be truly just and fair where the tenant being evicted lacks the resources to challenge the eviction. One of the surest ways to prevent these often-unjust evictions and lend them a degree of legitimacy is to provide the indigent tenants with legal services, which are often lacking in civil matters.\footnote{Jonathan L. Hafetz, Homeless Legal Advocacy: New Challenges and Directions for the Future, 30 FORDHAM URB. L.J. 1215, 1254-55 (2003) (arguing that legal advocacy can help prevent homelessness resulting from eviction proceedings brought in housing court’s across the country, and that while the landlords have legal representation, the majority of tenants do not).} While this would increase the administrative burden, it is a burden we ought to bear in light of the seriousness of the issue—homelessness.\footnote{See supra notes 10, 161, & 164 (discussing the shortage of affordable housing).}

In \textit{Brown v. Popolizio}, for instance, Cozyella Coe, an innocent tenant, had termination proceedings brought against her when her twenty-year-old son was arrested on project grounds for unlawfully possessing cocaine with intent to sell.\footnote{569 N.Y.S.2d 615, 617-19 (N.Y. App. Div. 1991).} Ms. Coe contacted a legal services organization to represent her, but they were unable to do so, and after one adjournment, the judge decided to go forward with the case.\footnote{Id. at 618. After receiving the termination notice, Ms. Coe contacted a community legal services organization, however they were unable to assist her because they were understaffed. \textit{Id.} at 617. The matter was adjourned and the organization later took her case, however the volunteer attorney was unable to prepare for the case due to her inexperience and limited schedule. \textit{Id.} at 617-18.}
nor did she cross-examine witnesses, present witnesses, testify on her own behalf or present a closing argument. Nonetheless, the hearing officer recommended termination of tenancy. On appeal, the appellate division held the housing authority’s imposition of the maximum penalty, eviction, to be excessive. This result demonstrates that pursuing such senseless evictions is a waste of judicial resources and is disruptive to the family by putting it in serious jeopardy of becoming homeless.

C. Institute Second-Chance Policy

While evicting only the criminal actor may be better than evicting the whole family, even evicting the actor when he engages in low-level criminal activity splits the family unit. The break-up of the family may be a factor in furthering criminal activity and may perpetuate the cycle of violence in the public housing communities. A more sensible approach that would still allow the housing authorities to take action to protect residents and at the same time preserve the family unit would be a second chance policy when non-violent crimes are at issue. The focus would be more on rehabilitation and less on punishment. Again, while this may create more of an administrative burden and increased costs, they are costs that should be borne in order to enhance the stability of families, which will in turn benefit communities by reducing the

Counsel for the housing authority refused to consent to another adjournment and the matter proceeded despite Ms. Coe’s lack of counsel and inability to represent herself. Id. at 618. When asked if she was prepared to represent herself Ms. Coe said “no” but the Hearing Officer proceeded in any event because she was unable to suggest a way she might obtain an attorney. Id.

Id. at 618.

Id.

Id. at 621-22.

See supra Part III.C (discussing the policy of permanent exclusion as a condition to continued occupancy).

likelihood of criminal activity occurring.\footnote{Preventing Youth Violence And Crime: The Role of Families, School and Government: Hearing Before the Subcomm. on Early Childhood, Youth and Families of the Comm. on Education and The Workforce, 106th Cong. 106-54 (1999) (statement of Dr. Darnell Jackson, Director, Office of Drug Control Policy, Michigan Department of Community Health), available at \url{http://commdocs.house.gov/committees/edu/hedcew6-54.000/hedcew6-54.htm} (last visited Nov. 18, 2003). Dr. Jackson stated:

I think we need a clearer recognition that government alone cannot possibly be a surrogate parent for every troubled youth. Nothing can replace the role of communities, churches, faith, and family. Not surprisingly, a University of Maryland study released last month confirms children of parents who keep close tabs on their whereabouts and have knowledge of who their friends are, are less likely to use alcohol, get involved in drug usage, and more likely to be peer leaders in their groups; so clearly the most important role in deterring antisocial behavior of youth is with the parents.} For example, if someone is caught using drugs the offender should have the option to participate in a state mandated program of rehabilitation or job training—a tactic similarly employed by community courts.\footnote{See Center for Court Innovation, Demonstration Projects Midtown Community Court, at \url{http://www.courtinnovation.org/demo_01mcc.html} (last visited Nov. 12, 2003). Midtown Community Court sentences low-level offenders to pay back the neighborhood through community service while at the same time offering them help with problems that often underlie criminal behavior. Residents, businesses and social service agencies collaborate with the Court by supervising community service projects and by providing on-site social services, including drug treatment, health care and job training.} The court could focus on whether the tenant is complying as a measure of whether the tenant should be entitled
to continued occupancy of the premises. If it is shown that the tenant is not complying with the program or is repeatedly offending, then the privilege of opting to participate in the program can be revoked and eviction proceedings instituted. If the offense involves the selling of narcotics on housing grounds, the court should give the tenant one chance, but also sentence the tenant and require community service to be performed inside the housing community.

D. Community Based Crime Reduction and Prevention Strategies

A final suggestion is merely to encourage public housing authorities to continue community-based crime reduction and prevention strategies that have already significantly reduced crime in housing communities.200 Among the effective strategies employed by housing authorities which experienced declining crime rates were partnerships with the police department to provide additional security and investigative services in targeted communities, a community policing program utilizing foot patrols, crime prevention demonstrations and screening of new applicants’ backgrounds.201 In light of the success of these alternative strategies employed to reduce crime, there is not a need for the strict no-fault eviction policy of section 1437d(l)(6). These methods of crime prevention demonstrate that safety can be achieved without innocent tenants forfeiting the security of their home.

CONCLUSION

While the government has taken steps to protect tenants living in public housing, the policy of strict liability negatively affects

200 IN THE CROSSFIRE, supra note 8, at 10. In Birmingham, Alabama, assaults in public housing developments fell 27 percent, from 533 in 1992 to 389 in 1996. Id. Similarly, in Forth Worth, Texas, violent crime in public housing was reduced by 37 percent, from 536 in 1993 to 340 in 1997. Id. at 11.

201 IN THE CROSSFIRE, supra note 8, at 10-11.
law-abiding tenants by subjecting them to eviction. Where housing is scarce, as it is in many of our large urban centers, subjecting these innocent and often elderly tenants to homelessness is as big a threat as any drug dealer. Congress is unlikely to rewrite the Provision soon in light of the lack of political clout public housing residents possess due to their minority and poor status. 202 Thus, the burden is upon the local housing authorities to exercise care and discretion in handling eviction proceedings. Housing authorities have a duty to ensure that families and elderly persons are not displaced for the actions of third parties, over which they had no control. We need not choose between protecting the individual rights of tenants and ensuring their safety.

202 See supra note 187 (discussing public choice theory).
RELIGION IN NEW YORK PUBLIC SCHOOLS? GOD FORBID: PROPER APPLICATION OF THE PUBLIC FORUM DOCTRINE

Hae Jin Lee*

INTRODUCTION

Since 1988, federal courts in New York have struggled with the statutory interpretation and application of New York Education Law section 414 ("section 414"), which authorizes New York public school boards to implement regulations governing the community’s use of school facilities.¹ Even though section 414 authorizes the use of public school facilities by community residents, New York school districts have denied religious groups, including a wide spectrum of student groups, community groups, and churches, access to those facilities.² Religious groups contend

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¹ N.Y. EDUC. LAW § 414 (enacted 1910; McKinney 2002). See language of the statute infra note 21 and explanation of the statute infra Part I.A.

that free speech rights protected by the First Amendment have been violated. New York school districts contend that they have the authority to regulate private speech. The Second Circuit has supported school districts’ policies and practices, holding that section 414 created only a limited public forum from which religious speech could be excluded. Twice, the United States Supreme Court granted certiorari and reversed the Second Circuit’s decisions. Nonetheless, New York school districts continue to deny religious groups access to school facilities, which are otherwise open to the community.


See infra Part I.B.1 (explaining limited public forum); see also infra Part III.B (discussing limited public forum).

See, e.g., Bronx Household of Faith, 226 F. Supp. 2d at 403. A school district denied a local church access to the public school facility for the Sunday worship and meeting after the Supreme Court granted a Christian youth organization access to the public school for the weekly meetings, which
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The Supreme Court has recognized that the Constitution’s protection of religious speech limits a school board’s authority to deny non-student groups’ access to public school facilities.\(^8\) Religious speech is fully protected by the First Amendment of the Constitution.\(^9\) The Second Circuit, however, has struggled to reconcile religious groups’ freedom of speech in public school facilities with school boards’ Establishment Clause claims, which operate to keep religious speech out of public school facilities.\(^{10}\)

consisted of singing praise songs, listening to Bible lessons, and memorizing verses of scripture in *Good News Club*. Id. (internal citation omitted).

\(^8\) *Lamb’s Chapel*, 508 U.S. at 384 (holding that by opening its facilities to other groups discussing family issues and child rearing, the school board created a limited public forum and could not prohibit religious groups discussion of their viewpoint on the subject). See Charles J. Russo & Ralph D. Mawdsley, *And the Wall Keeps Tumbling Down: The Supreme Court Upholds Religious Liberty in Good News Club v. Milford Central School*, 157 EDUC. L. REP. 1, 2 (2001) (reviewing the history of the dispute between the Second Circuit and the Supreme Court).

\(^9\) U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . .”). See *Rosenberger*, 515 U.S. at 835 (holding that the University cannot justify discrimination based on viewpoint for groups seeking allocation of funds because of scarcity of resources); Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (reviewing precedent which established that private religious speech is “as fully protected under the Free Speech Clause as secular private expression”); *Lamb’s Chapel*, 508 U.S. at 395 (holding that the school district’s denial of the use of its facilities for a film series sponsored by a church did not violate the Establishment Clause because, under the circumstances, there was little danger that it would appear that the films and the religion expressed within them were endorsed by the school district); Widmar v. Vincent, 454 U.S. 263, 277 (1981) (holding that the university policy of excluding religious groups from the university’s open forum policy violated the fundamental principle that a state regulation of speech should be content-neutral when the university failed to justify its exclusions with a compelling state interest). Religious worship and discussion “are forms of speech and association protected by the First Amendment.” Id. at 269.

\(^{10}\) *Good News Club*, 202 F.3d 502; *Bronx Household of Faith*, 127 F.3d 207; *Lamb’s Chapel*, 959 F.2d 381. See *Bronx Household of Faith v. Bd. of Educ. of the City of New York and Cmty. Sch. Dist. No. 10*, 331 F.3d 342, 355 (2d Cir. 2003). While upholding the lower court’s decision to grant an injunction
Reconciliation of these principles requires an understanding of the relationship between the Free Speech Clause and the Establishment Clause of the First Amendment. The competing principles manifest where a non-student religious group requests use of public school facilities. The Supreme Court has settled “the question of whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech.” In *Good News Club v. Milford Central School*, the Supreme Court ruled that religious speech, including religious worship, should be allowed in a limited public forum. Unfortunately, even after *Good News Club*, the application of free speech doctrine to public forums in favor of a local church on the Free Speech Clause ground, the Second Circuit also expressed its hesitation to follow the Supreme Court precedent in the future. *Id.*

11 U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . .”). *See* Rena M. Bila, Note, *The Establishment Clause: A Constitutional Permission Slip for Religion in Public Education*, 60 Brook. L. Rev. 1535 (1995) (examining Establishment Clause decisions and analyzing the defects in courts’ analysis of the Establishment Clause and their failure to protect the rights of the religious and nonreligious equally); Ralph D. Mawdsley, *Religious Worship in Public School Facilities: New York’s Section 414 and Closing the Gap between Free Speech and the Establishment Clause*, 178 Educ. L. Rep. 19, 32 (2003) (arguing that the refusal to allow the use of school facilities during non-school hours for religious uses when it is permitted for secular purposes cannot be termed anything but hostility towards religion).


13 *Good News Club*, 533 U.S. at 105. “Limited public forum” is an area of public property that the government has opened for limited purposes of expressive activity. Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983) (defining three types of forums). A few examples of a limited public forum are school facilities used by student clubs after school hours, school facilities used for school board meetings, municipal buildings used for a concert, and school grounds used for community groups bazaar. *Id.* *See infra* text accompanying notes 67-70 (explaining the concept of limited public forums).

14 *Good News Club*, 533 U.S. at 106-27.
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remains unclear. Therefore, it is imperative that the public forum doctrine be clarified to facilitate proper application of section 414 so as to ensure that the free speech rights of religious groups in New York are appropriately protected.

This note examines the application of the public forum doctrine with regard to New York public school districts’ policy and practice of opening facilities to the community while excluding religious groups. Part I reviews the Free Speech Clause and the Establishment Clause of the First Amendment. In addition, it examines the statutory interpretations of New York state law and the policy of the New York City Board of Education with regard to the public forum doctrine. Finally, it reviews the Establishment Clause doctrine and argues that the Establishment Clause does not constitute a compelling state interest for the purpose of public forum analysis. Part II examines the major free speech and public forum doctrine cases. Part III reconsiders the public forum and free speech analysis in light of the cases discussed in Part II. Analyzing the application of the public forum doctrine, four recommendations are presented to facilitate resolution of the recurring issue of prohibition of religious groups from New York public schools.

I. STATUTORY INTERPRETATION

New York school districts have interpreted section 414 to justify an exclusion of religious groups from access to public


Good News Club repeats and reinforces the earlier teaching of the Supreme Court in Lamb’s Chapel that when public authorities create a public forum of some nature, it is unconstitutional under the Free Speech Clause of the First Amendment to discriminate on the basis of religious viewpoint. This lesson has not been entirely welcome in some quarters, and its radiating implications have stirred reconsideration of the adequacy of past definitions of public forums, the claims of religious instruction and worship as protected speech interests, and the appropriate reach of the Establishment Clause into the realm of private expressions on public property.

Id.
school facilities.\textsuperscript{16} The exclusion is codified in the New York City Board of Education’s Community Use Policy.\textsuperscript{17} This section interprets section 414 and the New York City School Board’s Community Use Policy.\textsuperscript{18}

In addition, the New York school districts have also used an Establishment Clause claim to justify their policy of excluding religious groups.\textsuperscript{19} This section explores the relationship between the Free Speech Clause and the Establishment Clause with respect to the protection of religious speech in public schools.

\textit{A. New York Education Law Section 414 and New York City Board of Education’s Community Use Policy}

The State of New York authorizes New York public school boards to implement regulations governing the community’s use of public school facilities.\textsuperscript{20} In particular, section 414 enumerates

\begin{footnotesize}
\begin{enumerate}
    \item Standard Operating Procedures for Schools and FMCs, EDUC. Topic 5 (October 2001, revised) [hereinafter Community Use Policy].
    \item N.Y. EDUC. LAW § 414 (McKinney 2002); Community Use Policy.
    \item N.Y. EDUC. LAW § 414 (McKinney 2002). See infra note 21 (language of the statute); see, e.g., Good News Club, 533 U.S. at 102. New York public schools are traditionally nonpublic forums because they are government property; see also 68 AM. JUR. 2d Schools § 94 (2003). Thus, they are generally not open for public uses unless the state intends to open the school facilities for purpose of expressive activities. See Int’l Soc’y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680 (1992) (stating that “[t]he government does not create a [designated] public forum by inaction or by permitting limited discourse, but
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several purposes for which local boards may permit the public to use school facilities outside regular school hours. The statute only by intentionally opening a nontraditional public forum for public discourse); Widmar v. Vincent, 454 U.S. 263, 264 (1981) (stating that in order to create a designated public forum, the state must intend to make the property generally available for expressive activity).

21 N.Y. Educ. Law § 414 (McKinney 2002). New York Education Law § 414 provides the trustees or board of education of the district the control and supervision over the school facilities. Id. Use of schoolhouse and grounds. 1. Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. The trustees or board of education may adopt reasonable regulations for the use of such schoolhouses, grounds or other property, all portions thereof, when not in use for of such schoolhouses, grounds or other property, opinion of the trustees or board of education use will not be disruptive of normal school operations, for such other public purposes as are herein provided; except, however, in the city of New York each community school board shall be authorized to prohibit any use of schoolhouses and school grounds within its district which would otherwise be permitted under the provisions of this §. Such regulations shall provide for the safety and security of the pupils and shall not conflict with the provisions of this chapter and shall conform to the purposes and intent of this § and shall be subject to review on appeal to the commissioner of education as provided by law. The trustees or board of education of each district may, subject to regulations adopted as above provided, permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for any of the following purposes: (a) For the purpose of instruction in any branch of education, learning or the arts, (b) For public library purposes, subject to the provisions of this chapter, or as stations of public libraries, (c) For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public, (d) For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive
provides for non-student groups from the community to use school facilities for various purposes. The statute allows for broad uses such as “instruction in any branch of education, learning or the arts.” The statute’s language, that schools may be used for “social, civic and recreational meetings and entertainments and other uses pertaining to the welfare of the community,” suggests a broad legislative intent. Specifically, section 414 does not contain any explicit language denying religious clubs or other religious groups access to public school facilities, nor does it explicitly make the enumerated purposes exclusive. Section 414 also does not specify which groups may take advantage of the opportunity to conduct “social, civic and recreational meetings and entertainments [or] other uses pertaining to the welfare of the community,” nor does it bar certain groups from such uses.

Although the statute gives the Board of Education the discretion to prohibit some uses, this discretion is not without limit: section 414 is bound by the Constitution, which does not allow a categorical exclusion of all religious groups. New York control and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization other than organizations of veterans of the military, naval and marine service of the United States and organizations of volunteer firefighters or volunteer ambulance workers . . . (f) For civic forums and community centers . . . .

Id.

22 Id.
23 § 414.1(a) (emphasis added).
24 § 414.1(c) (emphasis added).
25 See § 414; see also supra note 21 (language of the statute).
public school districts, however, have made three kinds of arguments from the language of section 414 to justify a bar to religious groups’ access to school facilities: (1) Religious purposes are not included in section 414’s enumerated list of permitted uses; (2) Subparagraph (d) specifically prohibits use by religious

of Educ. of N.Y., 852 F.2d 676 (2d Cir. 1988). As this note will argue, however, this categorical exclusion does not satisfy the Constitution. See discussion infra Part III.D (proposing that New York’s Community Use Policy should be struck down as facially unconstitutional because it categorically singles out religious speech from a public forum); cf. Christopher P. Coval, Student Symposium, Good News for Religious Schools and the Freedom of Speech, 83. B.U. L. Rev. 705, 706 (2003) (agreeing with the Supreme Court’s interpretation that a “categorical exclusion of religious schools from voucher programs in which private, secular schools are entitled to participate violate[s] the Free Speech Clause” of the Constitution); Rebecca G. Rees, Note, If We Recant, Would We Qualify?: Exclusion of Religious Providers from State Social Service Voucher Programs, 56 Wash. & Lee L. Rev. 1291, 1338 (1999) (arguing that “[a] categorical exclusion of all religious social service providers from state voucher programs” would convey the message that those providers are collectively “inferior by nature of their religious viewpoint” regardless of the characteristics or contents of their religious viewpoint). Even if school voucher programs constitute limited public forums, such a categorical exclusion of religious schools, “simply because they are religious,” violates the Constitution. Coval, supra, at 706. If all religious social service providers are collectively excluded from state voucher programs, “when all others are eligible,” then it effectively creates a class of outsiders to the program in violation of the Constitution. Rees, supra, at 1338.

See, e.g., Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (banning a community-based Christian youth organization from holding a weekly meeting on the school facilities on the ground that the New York Education Law § 414 did not list religious purposes for which a school may be used); Bronx Household of Faith, 127 F.3d at 215 (prohibiting a church from holding a Sunday worship service and fellowship meeting on the ground that New York Education Law § 414 did not allow religious purposes for which a school may be used); Deeper Life Christian Fellowship, 852 F.2d at 678 (denying a church access to school facilities to exhibit a film series portraying family and child-rearing issues for public viewing on the ground that the New York Education Law § 414 did not enumerate religious purposes for which a school may be used); Trietley v. Bd. of Educ. of Buffalo, 65 A.D.2d 1, 5-6 (N.Y. App. Div. 1978) (prohibiting a student Bible club from meeting on school premises on the ground that the New York Education Law § 414 did not include religious purposes in the enumerated purposes for which a school may be used).
groups; and (3) school boards have preserved school facilities as limited public forums available only to non-religious speech by establishing the policy and practice not to ever open the forum to religious groups or to close the forum to religious groups, which used to be available to them. The only place where section 414 explicitly mentions the term “association or organization of a religious sect or denomination” is under subparagraph (d). Contrary to the school districts’ argument, the language of the statute only prohibits religious groups in settings where admission fees are charged; it does not categorically exclude religious meetings. Thus, subparagraph (d) refers to commercial activities, whose proceeds are applied for purposes other than educational or charitable purposes. Subparagraph (d) reflects intent to maintain the integrity of the public forum by preventing profit-seekers from usurping the public forum. If activities or meetings by a religious sect require an admission to cover the overhead cost and/or to make profits, the school board can invoke subparagraph (d) to restrict access. The religious groups and churches that have brought free speech

29 Deeper Life Christian Fellowship, 852 F.2d at 678. See N.Y. EDUC. LAW § 414.1(d) (McKinney 2002).

For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination . . . .

Id.

30 Good News Club, 533 U.S. at 107 n.2.

31 N.Y. EDUC. LAW § 414.1(d) (McKinney 2002).

32 § 414.1.

33 § 414.1(d). Generally, only those groups that apply the proceeds of their functions to educational or charitable purposes are considered public charities. 26 U.S.C. § 501(c)(3); 26 U.S.C. § 170. See generally 51 A.L.R. 2d 1290 (1957) ("One of the distinguishing features of a public charity is that it confers its benefits on the public at large, or some portion thereof, or upon an indefinite class of persons . . . .").

34 Id.
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claims, however, do not charge admission fees and, consequently, are not governed by the subparagraph (d).35

Pursuant to section 414, the Board of Education instituted a “Community Use Policy,” which governs the use of school facilities in its jurisdiction.36 Each school district within the Board of Education may elect to adopt it.37 The Community Use Policy has been used as a basis for school districts to deny religious groups use of public school facilities outside regular school

35 See, e.g., Good News Club, 533 U.S. at 107 n.2; Deeper Life Christian Fellowship, 852 F.2d at 678; Trietley, 65 A.D.2d at 5-6.
37 Community Use Policy. This policy is entitled “Standard Operating Procedures: Topic 5: Regulations Governing the Extended Use of School Facilities” and is also called “Community Use Policy.” Id.

Applicants are responsible for adhering to all applicable provisions of this chapter, including the regulations set forth below . . . . 5.2. The use of school facilities must be in accordance with federal law, New York State law, local law and Board of Education policies. 5.3. The primary use of school premises must be for Board of Education programs and activities . . . . 5.5. After Board of Education programs and activities, preference will be given to use of school premises for community, youth and adult group activities. 5.6. In addition to the use described in items 2.11, 5.3. and 5.5, school premises may also be used for the following purposes: 5.6.1. For the purpose of instruction in any branch of education, learning or the arts; examinations; graduations; 5.6.2. For holding social, civic and recreational meetings and entertainment, and other uses pertaining to the welfare of the community; but such uses shall be non-exclusive and open to the general public; 5.6.3. For polling places for holding primaries, elections and special elections for the registration of voters; 5.6.4. For conducting candidate forums, provided all candidates are invited to participate. Permit applications for such forums must include a written representation that all candidates have been invited to participate. Once approved by the school and the superintendent, the Permit must be submitted to the Office of Community School District Affairs for approval; 5.6.5. For civic forums and community centers in accordance with applicable law; 5.6.6. For recreation, physical training and athletics, including competitive athletic contests of children attending nonpublic, nonprofit schools; and 5.6.7. For such other uses as may be authorized by law.

Id.
hours.38 School boards adopted a list of permitted uses of school facilities, including any kind of meeting related to the welfare of the community.39 Section 5.11 of the Community Use Policy states:

[N]o outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.40

The Community Use Policy would exclude from school premises any religiously-motivated group on the basis of the content of their speech.41 With the Community Use Policy, school boards have created a forum for expressive activities related to learning and welfare of the community, and have defined learning and welfare to exclude activities by religious groups such as religious services and instruction.42 School districts have attempted to distinguish between “verbal acts of worship and other verbal acts.”43 The Supreme Court, however, noted three difficulties with any attempt to distinguish between protected religious speech and a new class of religious speech activity that constitutes worship: (1) lack of “intelligible content,” because activities such as singing religious songs, reading religious doctrines and studying religious principles are all forms of speech and do not “become unprotected

38 See Good News Club, 202 F.3d 502; Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, 1996 WL 700915 (S.D.N.Y. 1996), aff’d, 127 F.3d 207 (2d Cir. 1997); see also Community Use Policy, supra note 37. “No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school.” Id.


40 Community Use Policy § 5.11.


42 Community Use Policy, supra note 37.

ensuring free speech in public forums

worship” despite their religious subject matter;\(^{44}\) (2) lack of judicial expertise to administer the distinction because of diversity of faiths and circumstances; and (3) no purpose for the different treatment “for religious speech designed to win religious converts than for religious worship by persons already converted.”\(^{45}\) Thus, attempts to single out forms of speech constituting worship from other forms of religious speech results in hostility toward religion.\(^{46}\)

B. First Amendment Rights

The First Amendment of the Constitution of the United States contains two clauses that relate to religious speech in a public

\(^{44}\) Id. at 270 n.6.

\(^{45}\) Id. See Jay Alan Sekulow, James Henderson & John Tuskey, Proposed Guidelines for Student Religious Speech and Observance in Public Schools, 46 MERCER L. REV. 1017, 1018 (1995) (arguing that the government and public school officials should “treat religious speech” the same as it treats other types of private speech).

\(^{46}\) Some Supreme Court Justices would agree that New York School Board of Education’s Community Use Policy results in hostility rather than neutrality. E.g., Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 845 (1995) (reviewing the university’s regulation to deny the right of free speech of student publications containing religious viewpoints, Justice Kennedy’s majority opinion stated, “[t]he viewpoint discrimination inherent in the University’s regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief . . . [and] would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires”); Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 248 (1990) (reviewing the school board’s prohibition of religious meetings on school premises, Justice O’Connor’s majority opinion observed, “if a State refuse[s] to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion”); see also Dunsford, supra note 15, at 592 (pointing out that if taken literally, the New York school district policy “would seem pointedly hostile toward religion”); Russo & Mawdsley, supra note 8, at 13 (reflecting on the Supreme Court’s response to the Second Circuit in Good News Club that “rejected the Second Circuit’s suggestion that the principle prohibiting hostility toward religion undergirding the Equal Access Act does not appear to extend to after-school religious groups under the Free Speech and the Establishment Clause”).
forum: the Establishment Clause and the Free Speech Clause.\textsuperscript{47} The Supreme Court has examined the tension between these clauses and determined they complement each other in protecting individual freedom of religion and speech.\textsuperscript{48}

1. \textit{Free Speech Clause and Public Forum Doctrine}

The First Amendment guarantees every individual the fundamental right to speak and express thoughts and ideas on public property.\textsuperscript{49} The government may regulate individuals’ free

\textsuperscript{47} U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . .”). Discussion of the Free Exercise Clause is deliberately omitted from this note to focus on the public forum doctrine analysis in light of the Free Speech Clause. Nonetheless, the Free Exercise Clause of the First Amendment is another valid support for the religious speech on the public forum. \textit{See} Paul J. Batista, \textit{Balancing the First Amendment's Establishment and Free Exercise Clauses: A Rebuttal to Alexander & Alexander}, 12 J. LEGAL ASPECTS SPORT 87 (2002) (commenting that the Supreme Court and other federal courts have properly reaffirmed that the First Amendment guarantees and protects students’ freedom to engage in religious activities in the public schools); Bila, \textit{supra} note 11, at 1597-98 (discussing the balancing of competing concerns between the Free Exercise and Establishment Clauses of the First Amendment); Recent Development, \textit{Tearing Down the Wall:} Rosenberger v. Rector of the University of Virginia, 19 HARV. J.L. & PUB. POL’Y 587, 594 n.57 (1996) (“The Supreme Court has refused to define the ‘centrality’ of worship activities in the Free Exercise context because such a definition would entail too great an examination into the tenets of particular religions.”).

\textsuperscript{48} \textit{Mergens}, 496 U.S. at 250. “[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” \textit{Id. See} Mawdsley, \textit{supra} note 11, at 33 (stating the gap between the Free Speech Clause and Establishment Clause has been closed by the recognition that religious worship can be protected by the Free Speech Clause in limited public forums).

\textsuperscript{49} U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . . .”). \textit{See}, \textit{e.g.}, Cohen v. California, 403 U.S. 15, 16-17 (1971) (reversing a California court’s conviction based on written words on a jacket protesting the draft on the grounds of free speech); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969) (explaining that fear or
speech rights only if it shows “that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”

Traditionally, a three-prong analysis applies to an alleged violation of the First Amendment right of free speech: (1) whether the speech at issue is protected; (2) whether the forum at issue is a public forum; and (3) whether restrictions imposed upon the speech are appropriate to a particular forum. The three prongs of the free speech analysis have been disputed by religious groups seeking to utilize school district facilities and the New York public school districts that bar such use. Disputes over the second and the third prongs are still unsettled.

To prove a violation of religious groups’ free speech rights, apprehension of disturbance due to passive expression of opinion by the wearing of armbands “is not enough to overcome the right to freedom of expression”). The free speech right includes non-verbal expression such as wearing black armbands as an anti-war expression and writing certain statements on a jacket. Id. See also Richard J. Ansson, Jr., Drawing Lines in the Shifting Sand: Where Should the Establishment Wall Stand? Recent Developments in Establishment Clause Theory: Accommodation, State Action, the Public Forum, and Private Religious Speech, 8 TEMP. POL. & CIV. RTS. L. REV. 1, 4 (1998) (“Private individuals . . . do have a First Amendment guarantee to speak on government property that has been denoted as a public forum . . . .”).

Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983) (delineating three types of forums and establishing the public forum doctrine). See Ansson, supra note 49, at 4 (discussing that the First Amendment guarantees private individuals freedom of speech on government property unless the government can show a compelling state interest).


religious speech must be protected speech. Religious speech is protected speech in a variety of contexts. In resolving the tension between the Establishment Clause and the Free Speech Clause, the Supreme Court declared that discrimination against private religious speech and speakers “demonstrate[s] not neutrality but hostility toward religion.” This is so because permitting a private individual’s religious speech in a public forum does not constitute governmental endorsement of religion in violation of the First

54 See Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 835 (1995) (holding that the state university violated the Free Speech Clause when it denied funds for an organization, which published magazines from a religious editorial viewpoint); Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (holding that the state did not violate the Establishment Clause by permitting a private party to display an unattended cross on the ground of the state capitol); Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993); Widmar v. Vincent, 454 U.S. 263, 267 (1981). Religious worship and discussion “are forms of speech and association protected by the First Amendment.”


56 Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 248 (1990) (invalidating the public secondary school’s Establishment Clause claim when the school denied the students’ request to form a Christian club, which would have the same privileges and requirements as other student groups). See McDaniel v. Paty, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in the judgment). But see Widmar, 454 U.S. at 285-86 (White, J., dissenting). Justice White, the only dissenter, rejected the majority’s free speech analysis by criticizing the majority’s proposition that religious worship is like any other protected speech. Widmar, 454 U.S. at 285-86. He argued the importance of distinguishing between “verbal acts of worship and other verbal acts” in order to avoid the result that might force the majority to uphold the university’s right to “offer a class entitled ‘Sunday Mass’ . . . indistinguishable from a class entitled ‘The History of the Catholic Church.’” Id. This argument does not meet the constitutional standard.
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Amendment. The public forum doctrine determines the existence of a right of access to public property for expressive activities and sets standards to evaluate governmental regulations of such activities. The public forum doctrine developed because the First Amendment cannot practically guarantee every individual an absolute right to speak on publicly owned property. In *Perry Education Association v. Perry Local Educators’ Association*, the Supreme Court delineated three types of forums: the traditional public forum, the nonpublic forum and the designated public forum. The “quintessential public forum[s]” or traditional public forums are spaces that “by long tradition or by government fiat have been devoted to assembly and debate.” In a traditional public forum, the government’s ability to restrict expressive activity is extremely limited because the government must show

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57 See Alan E. Brownstein, *Prayer and Religious Expression at High School Graduations: Constitutional Etiquette in a Pluralistic Society*, 5-FALL NEXUS 61, 74 (2000) (asserting that public forums, whether traditional or designated, “where numerous private speakers are provided access for expressive activities of all kinds under neutral criteria is the paradigm example of public property where the religious speech of private individuals does not constitute an unconstitutional endorsement of religion”).

58 *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 39 (1983). In *Perry*, a rival union brought an action challenging a provision in the collective bargaining agreement between the school district and its union, granting the union exclusive access to teachers’ mailboxes and the interschool mail system. *Id.*


61 *Perry*, 460 U.S. at 44-45. These include streets and parks that have traditionally been used for the use of the public and for purposes of assembly, communicating ideas, and discussing public questions. *Id. See also Cornelius*, 473 U.S. at 800 (“[A] principal purpose of traditional public for[rums] is the free exchange of ideas . . . .”).
that the restriction is narrowly drawn to achieve a compelling state interest.\textsuperscript{62} The government may regulate the time, place and manner of expression only if the regulations are content-neutral, narrowly tailored to achieve a compelling government interest and provide sufficient alternative means of communication.\textsuperscript{63}

Nonpublic forums are spaces which are not, “by tradition or designation,” spaces for the general public’s expressive activities.\textsuperscript{64} In such spaces, the government has broader authority to restrict private individuals’ expressive activity because the state is considered a private property owner that controls the forum for its lawfully reserved use.\textsuperscript{65} The standard of review in a nonpublic forum is reasonableness and viewpoint neutrality.\textsuperscript{66}

A designated public forum is an area of public property that the

\textsuperscript{62} Perry, 460 U.S. at 44-45 ("For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."). See Carvey v. Brown, 447 U.S. 445, 461-62 (1980) ("When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized.").

\textsuperscript{63} Perry, 460 U.S. at 45. See Consol. Edison Co. v. Public Service Comm’n, 447 U.S. 530, 535-37 (1980) (holding that government could not prohibit inserts which advocated the use of nuclear power for the purpose of protecting the privacy of utility customers); Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) (concluding that the government failed to show a compelling interest to justify the antipicketing ordinance in front of a school); Cantwell v. Connecticut, 310 U.S. 296, 304-07 (1940) (concluding that the state statute violated the First Amendment when the statute empowered a state authority “to determine whether the cause [of solicitation] is a religious one” and to grant a permit for solicitation of aid for religious views upon his determination).

\textsuperscript{64} Perry, 460 U.S. at 46-47 (including the school mailboxes and interschool delivery facilities, which are intended for secure communication with teachers, not for the use by the general public).

\textsuperscript{65} Id.

\textsuperscript{66} Id. at 46. “In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.” Id.
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The government has opened to the public for purposes of expressive activity. The Constitution forbids a state to enforce certain exclusions in a forum generally open to the public even if it was not required to open the forum in the first place. A public forum that is “created for a limited purpose such as use by certain groups [like students groups] or for the discussion of certain subjects [like school board business]” is a designated forum. Courts have referred to this kind of designated public forum as a “limited” public forum. Whether the state intended to open the premises for expressive activity can be ascertained by examining the policy and practice of the government. A designated public forum is established when the state allows “general access for a class of speakers” rather than “selective access for individual speakers.” In designated public forums, similar to traditional public forums,

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67 Id. at 45.
69 Perry, 460 U.S. at 46 n.7. See Int’l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992). A designated public forum is property that the government has “opened for expressive activity by or on behalf of the public.” Id. “[T]he government does not create a [designated] public forum by inaction” nor by permitting access by the public, but only by “intentionally opening a nontraditional public forum for public discourse.” Id. at 680 (quoting Cornelius v. NAACP Legal Def. and Educ. Fund, Inc. 473 U.S. 788, 802 (1985)). If the government excludes a private speaker who falls within the class to which a designated public forum is made available, its exclusionary action is subject to strict scrutiny. Id. at 679. See also United States v. Kokinda, 497 U.S. 720, 726-27 (1990) (stressing that government-owned property is not de facto property open to use as a public forum).
70 See infra notes 232-35 and accompanying text; see also discussion of a “limited” public forum infra Part III.B-C.
71 Cornelius, 473 U.S. at 802.
72 Ark. Educ. Television Comm’n v. Forbes, 523 U.S. 666, 679 (1998); Widmar, 454 U.S. at 264. To create a designated public forum, the state must intend to make the property generally available for expressive activity. Id.
strict scrutiny applies. Thus, the power of the state to restrict expressive activity is extremely limited.

2. Establishment Clause Doctrine

School districts have defended their policy of excluding religious groups from school facilities by reference to the Establishment Clause. The districts argue that a school would violate the Establishment Clause if it granted a religious group’s application to use school facilities because the Establishment Clause requires it to censor religious speech from the school premises. The Supreme Court has, however, consistently rejected

73 Perry, 460 U.S. at 45-46.
Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.

Id. (internal citations omitted).

74 Id.; Kokinda, 497 U.S. at 726-27 (per curiam). “If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny.” Id.


76 E.g., Lamb’s Chapel, 508 U.S. at 394 (discussing that the school district objected to church’s use of school “on the ground that to permit its property to be used for religious purposes would be an establishment of religion forbidden by the First Amendment”); Hsu v. Roslyn Union Free Sch. Dist. 85 F.3d 839, 867 (2d Cir. 1996) (denying to recognize a student religious club by arguing that if there is an internal dispute within a club, then the school would have to mediate the dispute, which would constitute excessive government entanglement with religion); Deeper Life Christian Fellowship, 852 F.2d at 681 (contending that granting a religious group access to school facilities “will have the primary effect of advancing religion and will also foster excessive government entanglement with religion”); Bronx Household of Faith, 226 F. Supp. 2d at 425 (contending that a religious group’s meeting on Sunday would so dominate the
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the Establishment Clause defense in free speech and public forum doctrine cases. The school districts, though, continue to claim Establishment Clause defenses.

The relationship between government and religion is controversial. Courts often require governmental neutrality toward religion under the First Amendment; however, “neutrality” is a legal term of art that has never been adequately or practically defined. In the first major Establishment Clause decision, *Everson v. Board of Education*, the Supreme Court reviewed the history of the First Amendment and concluded that the school facilities that the students would perceive it as endorsement of a particular religion by the school).

We have no more trouble than did the *Widmar* Court in disposing of the claimed defense on the ground that the posited fears of an Establishment Clause violation are unfounded. The showing of this film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The District property had repeatedly been used by a wide variety of private organizations. Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental.

Id.


McCarthy, *supra* note 12, at 123-24 (determining the governmental relationship with religion has generated substantial controversy in our nation). This may be in part because the Framers’ original intent cannot be ascertained. Id. at 123.

See McCarthy, *supra* note 12, at 123-24 (stating that “neutrality” has never been defined); John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 84 (1986) (stating that the Supreme Court has never offered a rigid definition of “neutrality,” and in fact, opposing justices have claimed neutrality as the basis for conflicting opinions). See cases cited supra notes 3-4.
Establishment Clause means:
Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . . No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance . . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and state.’

The separation between church and state has been supported by several rationales, including “protecting churches against coercive government authority, protecting government autonomy from...
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undue sectarian influences, and protecting the independence of both religious and government enterprises.\(^{82}\)

Establishment Clause doctrine has dramatically shifted from banning religious speech from government forums to barring prohibition against religious speech on school premises.\(^{83}\) In 1981, in \textit{Widmar v. Vincent}, the Supreme Court found no Establishment Clause violation when it struck down a prohibition on student religious groups’ access to a designated public forum at a state university.\(^{84}\) In 1990, the Court acknowledged “a crucial difference

\(^{82}\) McCarthy, \textit{supra} note 12, at 126-27. \textit{See also} John M. Bagyi, Note, Board of Education of Kiryas Joel v. Grumet: Misconstruing the Status Quo as a Neutral Baseline, 60 ALB L. REV. 541, 545 (1996) (discussing five trends which attempt to achieve a balance between the Establishment Clause and the Free Exercise Clause: separation, nonendorsement, accommodation, coercion, and neutrality); Bila, \textit{supra} note 11, at 1535-44 (noting that in spite of the goals of the Establishment Clause to limit the intermingling of government and religion, the Supreme Court has been inconsistent in defining the parameters of the Clause); Symposium, \textit{Religious Liberty as Liberty}, 7 J. CONTEMP. LEGAL ISSUES 313, 319 (1996) (emphasizing that the most powerful reason for the separation of government and religion is to prevent religion from invoking the government’s coercive power and to prevent the government from being able to coerce any religious act or belief).

\(^{83}\) \textit{See} Good News Club v. Milford Cent. Sch., 533 U.S. 98, 103 (2001); Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392-97 (1993); \textit{see also} McCarthy, \textit{supra} note 12, at 131. Elementary school districts have attempted to use Establishment Clause defenses. \textit{Good News Club}, 533 U.S. at 100. They claim that the school districts’ policy should be upheld to protect the integrity of the Establishment Clause because it involved impressionable children, who might perceive that the school was endorsing the religion when meetings were on school premises and also might feel compelled to attend them. \textit{Id.} at 114-20. However, this claim has been rejected by the Supreme Court, which reasoned that allowing religious groups on school premises ensured neutrality toward religion. \textit{Id. See also} Russo & Mawdsley, \textit{supra} note 8, at 13 (agreeing with the Supreme Court’s response to the Second Circuit in \textit{Good News Club} that “rejected the Second Circuit’s suggestion that the principle prohibiting hostility toward religion undergirding the Equal Access Act does not appear to extend to after-school religious groups under the Free Speech and the Establishment Clause”).

\(^{84}\) \textit{Widmar v. Vincent}, 454 U.S. 263 (1981) (holding that the university policy of excluding religious groups from the university’s open forum policy violated the fundamental principle that state regulation of speech should be
between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.\textsuperscript{85} Subsequently, the Court found no Establishment Clause violation in allowing a church to have access to a public school.\textsuperscript{86} The church was addressing certain topics from religious perspectives, and the activities “would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members.”\textsuperscript{87} Furthermore, the Supreme Court has rejected the idea that the Constitution requires the government, in a public forum, to permit religious speech but prohibit religious worship in a public forum.\textsuperscript{88}

content-neutral when the university failed to justify its exclusions with a compelling state interest). The Supreme Court concluded that the university had established an open forum and therefore, any restriction of religious speech on campus must be supported by a compelling state interest. \textit{Id.} at 267-70. All members of a registered religious group at a state university brought an action, challenging the university’s policy and claiming violation of the First Amendment. \textit{Id.} at 265-66. University facilities were generally available for activities of university student groups. \textit{Id.} at 265. The university, however, adopted a regulation prohibiting the use of university facilities for purposes of religious worship or religious teaching. \textit{Id.} Finding the university to be an established open forum, the Court affirmed the decision of the Court of Appeals for the Eighth Circuit, holding that the university regulation is an unconstitutional content-based discrimination against religious speech and that the Establishment Clause does not justify the discrimination. \textit{Id.} at 277.


\textsuperscript{86} \textit{Good News Club}, 533 U.S. at 105; \textit{Lamb’s Chapel}, 508 U.S. at 395. See J. Kevin Jenkins, \textit{Equal Access to Public School Facilities by Religious and Other Non-Curricular Groups}, 170 ED. LAW. REP. 439, 455 (2002) (noting that the Establishment Clause defense is unavailing in “use of facilities” cases before the Court).

\textsuperscript{87} \textit{Lamb’s Chapel}, 508 U.S. at 395.

\textsuperscript{88} \textit{Widmar}, 454 U.S. at 269 n.6. The Supreme Court summarized the invalidity of the school district’s argument in \textit{Capitol Square Review Board v. Pinnette}: “[I]ndeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a Free Speech Clause without religion would be Hamlet without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing, or even acts of worship” (citations omitted). Capitol
II. PUBLIC FORUM DOCTRINE

The Supreme Court and the Second Circuit have reconciled their differences with respect to the public forum doctrine analysis. Nonetheless, understanding the differences is instructive. This section presents examples of the different approaches to the question of whether religious speech is permissible on school premises. The Second Circuit created a new category of speech by treating religious groups collectively regardless of the subject matter of their speech. In its examination of the Second Circuit’s analysis, the Supreme Court rebuked the appellate court for allowing the school district to limit speech in a way it determined was a violation of religious groups’ freedom of speech.

A. Deeper Life Christian Fellowship v. Board of Education of the City of New York

In 1988, the Second Circuit decided its first free speech and public forum case, *Deeper Life Christian Fellowship v. Board of Education of the City of New York*. The Deeper Life Christian Fellowship (“Deeper Life”), a Christian church, was granted a permit to use an elementary school building in District 27 in Queens on four consecutive Sundays. When Deeper Life applied for renewal of its permit, the school board denied the application

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90 *See supra* note 27 and accompanying text; *see also* discussion *infra* Part III.D.

91 *See infra* text accompanying note 176.

92 852 F.2d 676 (2d Cir. 1988). Deeper Life Christian Fellowship, plaintiff and appellee, is a nonprofit corporation and a Christian church in Richmond Hill, New York within the public school district overseen by defendant and appellant, District 27 Community School Board. *Id.* at 677. *See supra* Part I.A.1 (discussing the standards of review).

93 *Deeper Life Christian Fellowship*, 852 F.2d at 677.
on the ground that the Deeper Life’s activities, which included worship services, children’s church services and a Sunday school at the public school, violated New York State Education Law section 414, especially subparagraph (d).\textsuperscript{94} Deeper Life brought a claim against the school board alleging that the school board’s denial was an unconstitutional prohibition of free speech.\textsuperscript{95} Relying on \textit{Widmar v. Vincent}, the district court granted a preliminary injunction in favor of Deeper Life.\textsuperscript{96}

On appeal, the Second Circuit affirmed the injunction, but with erroneous reasoning.\textsuperscript{97} Unlike \textit{Widmar}, the Second Circuit’s holding was not because the school facility was a public forum and the school district’s prohibition was an unconstitutional violation of Deeper Life’s free speech right.\textsuperscript{98} Rather, its decision was solely because the school district had previously allowed Deeper Life and other religious organizations to use school facilities.\textsuperscript{99} Notwithstanding the history of permitting the use of school facilities by religious organizations, the Second Circuit would have

\textsuperscript{94} \textit{Id.} at 678-79; N.Y. EDUC. LAW § 414. \textit{See supra} Part I.A (discussing that subparagraph (d) refers to commercial activities, regardless of the nature of the hosting organization, whose proceeds are applied to serve the purposes other than educational or charitable purposes).

\textsuperscript{95} \textit{Deeper Life Christian Fellowship}, 852 F.2d at 679.

\textsuperscript{96} \textit{Id.} The \textit{Widmar} Court found that a state university had established an open forum when it made its facilities generally available for expressive activities. \textit{Widmar}, 454 U.S. at 267-70. The Court held that the university’s policy to ban a type of expressive activity, i.e., religious worship or religious teaching, did not satisfy a constitutional requirement of a strict scrutiny standard. \textit{Id.} Thus, the Court upheld the lower court’s decision that the university’s restriction constituted an unconstitutional discrimination against religious speech and that no Establishment Clause defense justified the restriction. \textit{Id.} at 277. \textit{See supra} note 84 (describing further the holding of \textit{Widmar}).


\textsuperscript{98} \textit{Deeper Life Christian Fellowship}, 852 F.2d at 680-81.

\textsuperscript{99} \textit{Id.}
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otherwise easily reversed the injunction.100

The Second Circuit determined that \textit{Widmar} did not control because public elementary schools did not possess forum characteristics similar to a state university, even though the school district created the forum generally open to district residents for expressive activities.101 Instead, the court found that section 414 created a limited forum and concluded that the state could exclude Deeper Life’s religious instruction, worship, and fundraising activities without strict scrutiny of the exclusion of private speech.102 The court further stated that “property remains a nonpublic forum as to all unspecified uses . . . and exclusion of uses—even if based upon subject matter or the speaker’s identity—need only be reasonable and viewpoint-neutral to pass constitutional muster.”103 Examining the activities of Deeper Life, the court determined that the church’s activities were not for the welfare of the community but for the church’s own benefit.104 Finding the church’s activities too self-benefiting to constitute “other uses pertaining to the welfare of the community” under

\begin{itemize}
  \item[100] \textit{Id.} at 680.
  \item[101] \textit{Id.} at 679. \textit{See supra} note 84 (describing further the holding of \textit{Widmar}). The Second Circuit found that the intended users of the public forum created on the public elementary school facilities were limited to the citizens residing within a school district whereas the intended users of the public forum created on the university facilities were a general community. \textit{Deeper Life Christian Fellowship}, 852 F.2d at 679. The Second Circuit found \textit{Widmar} irrelevant with a minimal distinction that public elementary schools have less broad users than state universities. \textit{Id.}
  \item[102] \textit{Id.} at 680-81.
  \item[103] \textit{Id.} at 679-80. This statement has been explicitly criticized by the Supreme Court. \textit{Lamb’s Chapel} v. \textit{Ctr. Moriches Union Free Sch. Dist.}, 508 U.S. 384, 393 (1993). \textit{See infra} Part III.C (discussing the improper standard created by the Second Circuit).
  \item[104] \textit{Deeper Life Christian Fellowship}, 852 F.2d at 680 (referring to activities such as increasing membership and raising money to renovate the church building). \textit{Contra} \textit{Good News Club} v. Milford Cent. Sch., 533 U.S. 98, 105 (2001) (finding that a community-based Christian youth organization’s meetings which consisted of singing praise songs, listening to Bible lessons and memorizing verses of scripture, pertain to the welfare of the community); \textit{infra} note 180 and accompanying text.
\end{itemize}
section 414, it concluded that the activities were unprotected speech and undeserving of constitutional protection on the school premises.105

B. Lamb’s Chapel v. Center Moriches Union Free School District

In 1988, Lamb’s Chapel, an evangelical Christian church, applied to the Center Moriches Union Free School District Board to use the high school auditorium for an evening for each of five weeks to show a film series.106 The film series portrayed family values and child rearing from a Christian perspective.107 The school district denied the application on the ground that allowing the use of school facilities for such purposes would violate section 414 and Rule No. 7 of the School District’s Rules and Regulations for Community Use of School Facilities (“Rule No. 7”).108 In 1990, Lamb’s Chapel brought an action against the school district for declaratory and injunctive relief, claiming the denial of the permit to show the film series violated the church’s free speech right.109 The district court denied the plaintiff’s request for a preliminary injunction and Lamb’s Chapel appealed to the Second

105 Deeper Life Christian Fellowship, 852 F.2d at 680.
107 Id. at 92 n.1.
108 Id. at 93-94.

Rule No. 7 provides that the school premises shall not be used by any group for religious purposes. The Rules and Regulations further provide that groups requesting to use the school facilities must be composed predominantly of residents and/or students from the school community, although an exception is made for outside not-for-profit organizations, but only if the applicant demonstrates that there is a benefit to the school community.

RULE NO. 7, cited in, Lamb’s Chapel, 770 F. Supp. at 93 n.3 (citation omitted). See also statute cited supra note 21 and accompanying text Part I.A.
109 Lamb’s Chapel, 770 F. Supp. at 92.
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Circuit.\textsuperscript{110} The appeal was withdrawn and the case was returned to the district court to reconsider in light of Board of Education of the Westside Community Schools v. Mergens.\textsuperscript{111}

The district court held that the facilities were properly barred to the plaintiffs since the intended use was not required under the New York Education Law and the school district’s own local rule.\textsuperscript{112} It also found no constitutional free speech right for religious groups on the school premises since similar speech had not been permitted there in the past.\textsuperscript{113} Analyzing Mergens, the district court factually distinguished Lamb’s Chapel’s case on the ground that the Mergens decision did not mandate the school district to “open its forum to [religious] use in the face of a policy, practice and in New York a state legislative enactment which specifically prohibits such use.”\textsuperscript{114} The district court determined that the school was a limited public forum because the school district—pursuant to state law and the district’s Rule No. 7, forbidding use “by any group for religious purposes”—did not permit groups similar to Lamb’s Chapel to use school facilities.\textsuperscript{115} The district court found in fact that the school district had always

\textsuperscript{110} Id.
\textsuperscript{111} Id. (explaining that the case was returned at the suggestion of the Staff Counsel for the Second Circuit for final disposition). See Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226 (1990). In Mergens, a group of high school students were denied permission to establish a Christian club that meets on school premises after hours by the school board. It asserted that the club would violate the Establishment Clause. Id. The students alleged that refusal to permit their club to meet at school violated the Equal Access Act, which prohibits public schools receiving federal assistance and that maintain a “limited open forum” from denying “equal access” to students who want to meet “within the forum” on the basis of “religious, political, philosophical, or their content” of the speech at such meetings. Id. In reversing the district court’s judgment for the school board, the Court of Appeals held that “the Act applied to forbid discrimination against respondents’ proposed club on the basis of its religious content, and that the Act did not violate the Establishment Clause.” Id. The Supreme Court affirmed the decision. Id. at 247, 258.
\textsuperscript{112} Lamb’s Chapel, 770 F. Supp. at 98.
\textsuperscript{113} Id.
\textsuperscript{114} Id. at 96.
\textsuperscript{115} Id. at 99.
prohibited religious activities. It held that there was no First Amendment violation in the school district’s denial of access because section 414 did not authorize the school district to permit religious uses of the school facilities. The Second Circuit found the list in section 414 exclusive and that religious use is “nowhere permitted in [the] enumeration.” Thus, the Second Circuit concluded that the school district’s Rule No. 7 forbidding the use “by any group for religious purposes,” complied with state law.

Finding that school facilities were limited forums not open to religious uses by policy or practice, the Second Circuit applied the public forum doctrine to examine the constitutionality of the exclusion. Although the Second Circuit recognized that the strict scrutiny standard applicable to a traditional public forum applied to both “limited” and “designated” public forums, it followed Deeper Life’s more lenient standard in a limited public forum, which merely requires that the restriction based on subject matter or the speaker’s identity be reasonable for unspecified uses. When the appellants challenged the use of the more lenient standard as an improper interpretation of Supreme Court precedent, the Second Circuit referred to its own precedents, Deeper Life and Travis v. Owego-Apalachin School District, without reference to Supreme Court precedent, to bar the challenge.

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116 Id. at 98. This fact was found even though the Lamb’s Chapel presented a list of religious organizations that had used the school facilities. Id. at 94 n.4.
117 Lamb’s Chapel, 959 F.2d at 389.
118 Id. at 387-89.
119 Id. at 386-87.
120 Id.
121 Id. at 388.
122 Id. at 387 (citing Deeper Life Christian Fellowship v. Bd. of Educ. of N.Y., 852 F.2d 676, 679-80 (2d Cir. 1988)).
123 Lamb’s Chapel, 959 F.2d at 387. See Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692 (2d Cir. 1991). In Travis, the Second Circuit held that “[i]n a limited public forum, government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre.” Id. at
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The Second Circuit found that none of the prior uses of the school facilities were religious when Lamb’s Chapel pointed out that the school allowed other organizations, such as the Salvation Army Youth Band, a “New Age” religious group known as the “Mind Center”, the Southern Harmonize Gospel Singers, and Hampton Council of Churches’ Billy Taylor Concert to use the same space. It stated that a program with an occasional use of religious terms or religious figures would not have religious purposes whereas a program with religious themes or a religious context would.

The Supreme Court reversed the Second Circuit’s decision and held that the Free Speech Clause was violated when the church was denied access to a school facility to publicly show a film series involving contemporary family and child-rearing issues. The Supreme Court stated, “There is no question that the district, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated.” On the other hand, the Court recognized that since the school district opened school facilities for two of the purposes under the state law, there was “considerable force” in the argument that the district

692. The Second Circuit dismissed the contention that its decisions were incompatible with Supreme Court precedent as “baseless.” Lamb’s Chapel, 959 F.2d at 388.

124 Lamb’s Chapel, 959 F.2d at 388.

125 Id.

126 Lamb’s Chapel, 508 U.S. at 389-94.

127 Id. at 390-91 (citing Cornelius v. NAACP Legal Defense and Educ. Fund, Inc. 473 U.S. 788, 800 (1985)); Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 46 (1983); U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns., 453 U.S. 114, 129-30 (1981) (finding that a federal statute which prohibited unstamped mailable matter from being deposited in a mailbox was not a First Amendment issue because the prohibition was not regarding the content of the matter in the mailbox); Greer v. Spock, 424 U.S. 828, 836 (1976) (holding that there is no right in the Constitution to speak publicly or distribute leaflets on a military reservation); Adderley v. Florida, 385 U.S. 39, 47 (1966) (holding that students’ rights of freedom of speech, press, assembly, and petition were not violated when, after several warnings, they were arrested for blocking the jail driveway while protesting prior arrests and city segregation policies).
should be “subject to the same constitutional limitations as restrictions in traditional public forums such as parks and sidewalks.”

Applying the principle that the First Amendment prohibits governmental regulation of speech to suppress some viewpoints or ideas, the Court disagreed with the Second Circuit’s analysis that “the total ban on using district property for religious purposes could survive a First Amendment challenge only if excluding this category of speech was reasonable and viewpoint neutral.” Instead, the Court found that the film series exhibition dealt with a subject matter that was permissible under the school policy, and “its exhibition was denied access solely because the series dealt with the subject from a religious standpoint.”

C. Rosenberger v. Rector and Visitors of the University of Virginia

In 1995, the Supreme Court granted certiorari to deal with a challenge to a university’s denial of funding to an on-campus organization. The University of Virginia had initiated a program to support students’ extracurricular campus activities. According to university guidelines, student groups could apply for financial support if their activities were not religious. The guidelines

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128 Lamb’s Chapel, 508 U.S. at 391.
129 Id. at 393. See City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (affirming the general principle that “the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others”). “[T]here are some purported interests—such as a desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas—that are so illegitimate that they would immediately invalidate the rule.” Id.
130 Lamb’s Chapel, 508 U.S. at 394.
132 Id. at 823-24. The program included two methods: (1) by allowing any group with Contracted Independent Organization (“CIO”) status, which comprises the majority of its membership with students and follows certain procedural rules, access to the university facilities and (2) by permitting some CIO groups to apply for funds from the Student Activities Fund (“SAF”). Id.
133 Id. at 825. Prohibited activities include “religious activities,
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defined religious activities “as any activity that ‘primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.’”

Petitioner Rosenberger formed an organization, Wide Awake Productions (“WAP”), whose purpose was publishing “a magazine of philosophical and religious expression, facilitat[ing] discussion foster[ing] an atmosphere of sensitivity to and tolerance of Christian viewpoints and provid[ing] a unifying focus for Christians of multicultural backgrounds.” WAP obtained status as a student group and requested funds to cover its publication’s printing costs. The university denied the application on the ground that the WAP publication fit its definition of religious activities. WAP filed a suit claiming that the university’s refusal to fund the publication was based solely on the religious editorial viewpoint, and that the refusal violated WAP’s freedom of speech.

The district court held for the university on the ground that the university’s Establishment Clause concern over WAP’s activities sufficiently justified the denial of funding support. On appeal, the Fourth Circuit affirmed the district court’s decision. Despite the finding that the university guidelines were content-based speech discrimination against WAP, the Fourth Circuit still held that the Establishment Clause concern was a compelling state

philanthropic contributions and activities, political activities, activities that would jeopardize the University’s tax-exempt status, those which involve payment of honoraria or similar fees, or social entertainment or related expenses.”

134 Id. at 825 (citation omitted).

135 Rosenberger, 515 U.S. at 825-26 (citation omitted). In its first few publications, WAP featured articles and stories about racism, homosexuality, crisis pregnancy, stress, eating disorder, Christian missionary work, music reviews, and interviews with professors.

136 Id. at 826-27.

137 Id. at 827.

138 Id.

139 Id. at 827-28.

140 Id. at 828.
interest to justify the discrimination.\footnote{141}{Rosenberger, 515 U.S. at 828.}

The Supreme Court held that the denial of funds was a violation of free speech.\footnote{142}{Id. at 835-37.} The Court recognized two dangers in the university’s regulation of private speech: it effectively authorized the state to examine the content of publications and resulted in the chilling of individual speech.\footnote{143}{Id. at 834.} The Supreme Court noted the distinction between “content discrimination, which may be permissible if it preserves the purposes of [a] limited forum, and . . . viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum’s limitations.”\footnote{144}{Id. at 829-30.} See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641-43 (1994) (distinguishing content-based discrimination, which favors or disfavors speech depending on the subject matter of the speech expressed therein, from content-neutral discrimination, which regulate speech regardless of the subject matter); City of Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (explaining the First Amendment precedent as forbidding the government from favoring some viewpoints or ideas about a permissible subject matter at the expense of others, absent a significant and legitimate state interest).

\footnote{145}{Rosenberger, 515 U.S. at 830. See Turner, 512 U.S. at 641-43; Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993); R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992) (holding that the city ordinance, banning display of symbols including burning cross was facially invalid under the First Amendment); Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983). Although SAF is a metaphysical forum rather than a physical forum, the Court found that it is governed by the same principle as a limited public forum. Rosenberger, 515 U.S. at 830.}

\footnote{146}{Rosenberger, 515 U.S. at 828-34.}
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the university excluded “religion not as a subject matter but select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints.”147 The Court also emphasized that even though the state is not required to subsidize an individual’s exercise of free speech, the state must maintain a viewpoint-neutral position.148

D. Good News Club v. Milford Central School

In 1996, the Good News Club (“Club”), a community-based Christian youth organization, applied to use the Milford Central School facilities to hold weekly meetings.149 The meetings consisted of singing praise songs, listening to Bible lessons and memorizing verses of scripture.150 Finding that the proposed use by

147 Id. at 830-31. SAF denied WAP’s request for the funding because the publication “promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality.” Id. at 827 (citation omitted).

148 Id. at 834. The Court noted that a university has authority to make academic judgments when allocating resources. Id. at 833. This is because the speaker is the state itself. Id. The state, however, may not regulate content when the speaker is a private individual. Id. at 834.


150 Id. at 154. Milford requested information from the club to clarify the nature of the Club’s activities. Good News Club v. Milford Cent. Sch., 202 F.3d 502, 507 (2d Cir. 2000), rev’d, 533 U.S. 98 (2001). The Club sent a set of materials used and distributed at the meetings with the following description of its activities attached:

The Club opens its session with Ms. Fourier taking attendance. As she calls a child’s name, if the child recites a Bible verse the child receives a treat. After attendance, the Club sings songs. Next[,] Club members engage in games that involve, inter alia, learning Bible verses. Ms. Fournier then relates a Bible story and explains how it applies to Club members’ lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and the Bible verses for memorization.

Id. From the given materials, McGruder and Milford’s attorney concluded that the kinds of activities proposed by the Good News Club could not be characterized as “a discussion of secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself.” Id.
the Club was “the equivalent of religious worship . . . rather than
the expression of religious views or values on a secular subject
matter,” the Milford school board denied the Club’s request based
on its “Community Use School Facilities Policy” (“Community
Use Policy”). 151 In 1997, the Club brought a claim against the
school district alleging that Milford’s denial of its application
violated the Club’s free speech rights. 152

In April 1997, the district court granted a preliminary
injunction, allowing the Club to hold its weekly meetings in the
school during after-school hours. 153 However, in October 1998, the
district court vacated the injunction and granted Milford Central
School’s motion for summary judgment. 154 The district court
upheld the school district’s denial on the ground that the subject
matter of the Club’s activities “is decidedly religious in nature, and
not merely a discussion of secular matters from a religious
perspective that is otherwise permitted under the District’s use
policies.” 155 Explicit in the district court’s judgment are the notions
that state law allows public use of school facilities only for
specifically enumerated purposes, and that religious activities,
including religious worship, instruction and fundraising, are not
permitted purposes. 156 The district court also concluded that the

151 Good News Club, 21 F. Supp. 2d at 149 n.3. The Community Use Policy
states “school facilities may be used by district residents for holding social, civic
and recreational meetings and entertainment events and other uses pertaining to
the welfare of the community, provided that such uses shall be nonexclusive and
shall be open to the general public.” Id. at 150. The district court concluded it to be
“consistent with all applicable state law.” Id. See Community Use Policy,
supra note 37; supra Part I.A.; infra Part III.D (discussing unconstitutionality of
Community Use Policy).


153 Good News Club, 21 F. Supp. 2d at 150.

154 Id. at 161.

155 Id. at 154.

156 Id. at 158. The district court found that the state law “evidences the
intent of the legislature to create a limited public forum in its public schools by
permitting use of public school buildings by the general public for specific
purposes.” Id. at 152. The district court further concluded that “Notably,
religious worship, instruction, and fundraising is not among these enumerated
purposes.” Id. See also N.Y. EDUC. LAW § 414 (McKinney 2002); supra Part
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school district complied with the requirements of section 414 of the Education law in adopting the Community Use Policy.\footnote{I.A (discussing New York Education Law § 414).}

Both parties agreed that the Milford Central School was a limited public forum.\footnote{Good News Club, 21 F. Supp. 2d at 152, 154.} The district court properly defined the forum and the applicable strict scrutiny standard.\footnote{Id. at 153.} Nevertheless, the standard the court actually applied was a rational basis standard.\footnote{Id. “Limited public forums are ‘created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.’” Id. (quoting Cornelius v. NAACP Legal Defense and Educ. Fund, Inc. 473 U.S. 788, 802 (1985)). “When a state opens a forum to the general public, the state is “bound by the same standards as apply in a traditional public forum.” Id. (quoting Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 46 (1983)). “Accordingly, while the First Amendment permits reasonable time, place, and manner regulations, it forbids the state to enforce content-based exclusions unless narrowly drawn to serve a compelling state interest.” Id. (quoting Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692 (1991)).} The district court recognized that the school is open to various community groups, such as Boy Scouts, Girl Scouts, and the 4-H Club.\footnote{Good News Club, 21 F. Supp. 2d at 158-59.} However, it found that these groups’ activities were a different type of secular subject matter than that of the Club, and thus concluded that the school district’s denial of access based on the general subject matter was reasonable.\footnote{Id. at 158-60.}

After the Boy Scouts is designed to provide “effective character, citizenship, and personal fitness training” for children. . . . While the Boy Scouts teach reverence and a duty to God, it is only a part of its overall
scrutinizing the content of the Club’s speech, the court distinguished Lamb’s Chapel on the ground that “Good News is a religious youth organization whose proposed use [of the facility] deals specifically with religious subject matter—and not, as plaintiffs contend, merely a religious perspective on secular subject matter.”

In 2000, a divided panel of the Second Circuit affirmed the district court’s decision. First, the court held that Milford Central School’s prohibition on religious instruction in its facilities was not unreasonable because it would be proper for Milford to avoid its identification with a particular religion. Second, it held that Milford’s exclusion of the Club was constitutional subject discrimination. The court found that the Club’s activities were unprotected speech and that “for those who seek to speak on a topic or in a manner not contemplated by the public entity in opening the limited public forum ‘there is no fundamental right of freedom of speech.’” After considering the Club’s activities, the court held that the exclusion was not viewpoint discrimination because the “quintessentially religious” subject matter of the Club’s activities fell outside of the limited purpose of the forum and the Club’s activities did not constitute purely moral and character development.

purpose which is the personal growth and development of leadership skills . . . . The purpose of the Girl Scouts “is to inspire girls with the highest ideals of character, conduct, patriotism, and service [so] that they may become happy and resourceful citizens.” . . . The Girl Scouts are “based on ethical values . . . .” The 4-H Club is a youth organization whose purpose is to “enable youth to develop knowledge, skills, abilities, attitudes, and behaviors to be competent, caring adults.”

_id.

163 Id. at 160. The Lamb’s Chapel Court determined that a religious film series could not be barred from school. Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 389-94 (1993).

164 Good News Club, 202 F.3d 502.

165 Id. at 510-11.

166 Id. at 508-11.

167 Id. at 510, 514 (citing Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, 127 F.3d 207, 217 (2d Cir. 1997)).

168 Good News Club, 202 F.3d at 510-11.
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In dissent, Judge Jacobs criticized the majority’s application of the standard of review for regulations that restrict speech in a limited public forum.\textsuperscript{169} He expressed his view that “when the subject matter is moral and character, it is quixotic to attempt to draw a distinction between religious viewpoints and religious subject matters.”\textsuperscript{170} Referring to Rosenberger, Judge Jacobs emphasized that the distinction between subject matter and viewpoint, especially where a religious viewpoint is in question, is delicate and dangerous partly because of the reference to a deity for answers to moral questions.\textsuperscript{171} He stated that the moral values shaped by a deity constitute a viewpoint even if answers to moral questions are expressed in religious terms and moral values expressed in religious activities.\textsuperscript{172} He noted that the Supreme Court has refused to create a separate speech category solely for religious speech but has recognized religious perspective as a viewpoint over a wide range of subject matters.\textsuperscript{173}

The Supreme Court held that Milford’s restriction violated the Club’s free speech rights, and that Milford’s Establishment Clause argument did not justify that violation.\textsuperscript{174} The Supreme Court criticized the Second Circuit’s divergence from Supreme Court

\textsuperscript{169} Id. at 512-15 (Jacobs, J., dissenting).

\textsuperscript{170} Id.

\textsuperscript{171} Id. at 514.

\textsuperscript{172} Id. See Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995). “[D]iscrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination. And, it must be acknowledged, the distinction is not a precise one.” Id. at 830-31.

\textsuperscript{173} Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 390-92 (1993); Good News/Good Sports Club v. Sch. Dist. of City of Ladue, 28 F.3d 1501, 1506-07 (8th Cir. 1994) (following the Supreme Court precedent which rejects a separate speech category for religious speeches and instead recognizes religious perspectives as one of numerous viewpoints on a variety of secular matters).

jurisprudence:

We find it remarkable that the Court of Appeals majority did not cite Lamb’s Chapel, despite its obvious relevance to the case. We do not necessarily expect a court of appeals to catalog every opinion that reverses one of its precedents. Nonetheless, this oversight is particularly incredible because the majority’s attention was directed to it at every turn.175

Applying Lamb’s Chapel, the Court first found that the school district’s exclusion of the Club constituted viewpoint discrimination with respect to the Club’s speech and thus violated the Free Speech Clause.176 The Court found the activities of Lamb’s Chapel and those of the Club indistinguishable, with only an inconsequential difference in mode of speech and concluded that both activities employ a religious viewpoint to teach morals and character.177 Because the school district in Good News Club opened its facilities to any “us[e] pertaining to the welfare of the community,” the Court found that the Club’s activities met the purpose of the limited public forum.178 The Court further found

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175 Good News Club, 533 U.S. at 109 n.3. On the other hand, Judge Jacobs of the Court of Appeals for the Second Circuit was correct when he concluded that the school’s restriction constituted viewpoint discrimination under Lamb’s Chapel. Good News Club, 202 F.3d at 511-14 (Jacobs, J., dissenting).

176 Good News Club, 533 U.S. at 109. The Court began its analysis based on the premise that the school is a limited public forum. Id.


178 Good News Club, 533 U.S. at 108-09.

In short, any group that “promotes the moral and character development of children” is eligible to use the school building [under Milford’s policy]. Just as there is no question that teaching morals and character development to children is a permissible purpose under Milford’s policy, it is clear that the Club teaches morals and character development to children. For example, no one disputes that the Club instructs children to overcome feelings of jealousy, to treat others well regardless of how they treat the children, and to be obedient, even if it
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that the Club’s activities are not “any more ‘religious’ or deserve any less First Amendment protection than did the publication of Wide Awake in Rosenberger.” Agreeing with Judge Jacobs’ dissent, the Court pointed out that for the purposes of the Free Speech Clause, there is “no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism” by other groups such as the Boys Scouts.

The school district argued that even if its restriction constituted viewpoint discrimination, the Establishment Clause compelled the school district to exclude religious instruction and justified content-based discrimination. The Court, however, found that the school had no valid Establishment Clause interest. That is, the Establishment Clause cannot be used to justify exclusion of religious groups from public school facilities. The Court does so in a nonsecular way.

Id. at 108 (citation omitted). Justice Scalia in his concurring opinion asserted that shaping the character development of children “pertains to the welfare of the community.” Id. at 124 (Scalia, J., concurring).

179 Id. at 110. See Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995); supra note 135 (discussing the details of the publication of Wide Awake).

180 Id. at 111. See Good News Club, 202 F.3d at 512-15 (Jacobs, J., dissenting). The Supreme Court further pointed out that “[i]t is apparent that the unstated principle of the Court of Appeals’ [for the Second Circuit] reasoning is its conclusion that any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a ‘pure’ discussion of those issues.” See Good News Club, 533 U.S. at 111.

181 Id., 533 U.S. at 112-13.

182 Id. at 113.

[Here, plaintiff’s] Establishment Clause defense fares no better. As in Lamb’s Chapel, the Club’s meetings were held after school hours, not sponsored by the school, and open to any students who obtained parental consent, not just to Club members. As in Widmar, Milford made it forum available to other organizations. The Club’s activities are materially indistinguishable from those in Lamb’s Chapel or Widmar. Thus, Milford’s reliance on the Establishment Clause is unavailing.

Id.

183 Id. See Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226,
concluded that allowing the Club access “to speak on school grounds would ensure neutrality, not threaten it” because “[t]he Good News Club seeks nothing more than to be treated neutrally and given access to speak about the same topics as are other groups.”

In a concurring opinion, Justice Scalia agreed that the school district engaged in viewpoint discrimination. He further noted, though, that how the exclusion was characterized was not important because whether the discrimination was based on the speech’s viewpoint or subject matter, exclusion of speech only “because it’s religious” fails to meet First Amendment scrutiny. Comparing the Supreme Court’s and Second Circuit’s free speech analyses, Justice Scalia pointed out that the courts’ disagreement was not “whether the Good News Club must be permitted to

250 (1990) (holding that public schools could not ban meetings of student religious clubs and that equal access cases should be decided on the basis of freedom of speech, not the Establishment Clause that the Second Circuit persistently has used); Widmar v. Vincent, 454 U.S. 263, 277 (1981) (holding that equal access cases should be decided on the basis of freedom of speech, not the Establishment Clause); Roemer v. Maryland Pub. Works Bd., 426 U.S. 736 (1976) (holding that a Maryland statute authorizing aid in the form of an annual subsidy to colleges affiliated with the Roman Catholic Church did not violate the Establishment Clause when the colleges were not “pervasively sectarian” and the aid extended only to the “secular side”); Hunt v. McNair, 413 U.S. 734 (1973) (holding that a South Carolina statute authorizing a proposed financing transaction involving the issuing of revenue bonds benefiting a Baptist-controlled college did not violate the Establishment Clause since the purpose of the statute was secular, did not have the effect of advancing or inhibiting religion and did not foster an entanglement with religion); Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (holding that two of five amendments to the New York Education and Tax Laws violated the Establishment Clause on the basis that the propriety of a legislature’s purpose may not immunize from further scrutiny a law that either has a primary effect that advances religion or fosters further church-state entanglements).

184 Good News Club, 533 U.S. at 114.
185 Id. at 122 (Scalia, J., concurring).
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present religious viewpoints on morals and character” in a limited public forum nor “whether some of the Club’s religious speech fell within the protection of Lamb’s Chapel.” The disagreement, rather, focused on the part of the Club’s activities “that are not ‘purely’ ‘discussions’ of morality and character from a religious viewpoint.” Justice Scalia explained that the Court had invalidated a similar viewpoint restriction where a school district allowed the Boy Scouts to support their teaching of morally upright and clean lives by offering good reasons to do so. Here, on the other hand, the Club was not allowed to offer good reasons to foster morally upright clean lives, where its reasons were God’s will and desire, becoming a righteous person or imitating Jesus Christ. Noticing the inability of the Justices to categorize the activities of the Club, Justice Scalia reiterated that the Supreme Court has “previously rejected the attempt to distinguish worship from other religious speech, saying that ‘the distinction has [no] intelligible content,’ and further, no ‘relevance’ to the constitutional issue.” He noted, in conclusion, that even if the

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187 Good News Club, 533 U.S. at 122 (Scalia, J. concurring). This is because the answer to both of these questions must be yes. Id.
188 Id. at 123-24 (Scalia, J., concurring). Those reasons were the parents’ will and desire, becoming a more successful person or imitation of admired past Scouts. Id. These activities are that the Club encourages the participating Christian children to pray to God for the strength and the desire to obey Him, and the participating non-Christian children to believe that the Lord Jesus is their Savior. Good News Club v. Milford Cent. Sch., 21 F. Supp. 2d 147, 156 (N.D.N.Y. 1998), aff’d, 202 F.3d 502 (2d Cir. 2000), rev’d, 533 U.S. 98 (2001).
189 Good News Club, 533 U.S. at 124 (Scalia, J., concurring).
190 Id.
191 Id. at 126. See Widmar v. Vincent, 454 U.S. 263, 269 n.6 (1981) (rejecting the dissent’s attempt to distinguish between protected and unprotected religious speech because the distinction is unintelligible, irrelevant and likely beyond judicial competence to draw); Murdock v. Pennsylvania, 319 U.S. 105, 109 (1943) (refusing to distinguish evangelism from worship). It is important to note the inability to categorize the activities of the Good News Club. This inability reflects problems in allowing characterization of speech to be used to exclude speech. For example, Justice Stevens categorized the activities of the Good News Club as speech “aimed principally at proselytizing or inculcating belief in a particular religious faith,” and Justice Souter called the activities of Good News Club “essentially an evangelical service of worship.” Good News
federal judiciary were competent in making determinations about theological activities, it would still require state monitoring of private religious speech with a degree of pervasiveness that the Court has previously found unacceptable.192

E. Bronx Household I and II

In 1995, the Bronx Household of Faith (“Bronx Household”), an evangelical Christian church, brought a Free Speech Clause action (“Bronx Household I”) challenging a school district’s denial of its application to rent space in the public school for meetings including religious worship.193 The school district argued that the restriction was permissible discrimination pursuant to its Community Use Policy and section 414.194 The district court denied the Bronx Household’s motion for summary judgment and held that the school district’s regulation was reasonable, in light of the legitimate state concern to “preserv[e] and prioritiz[e] access to the middle school primarily for educational purposes and, secondarily, for nonexclusive public and community activities.”195

On appeal, the Second Circuit affirmed the district court’s decision.196 Finding the school a limited public forum, the Second Circuit held that it was reasonable for a state, by its policy and practice, to exclude a church from school facilities to “avoid the identification of a middle school with a particular church.”197 Analyzing Lamb’s Chapel and Widmar, the Second Circuit conceded that worship, “the ultimate in speech from a religious viewpoint”, as well as religious instruction, are protected speech, Club, 533 U.S. at 125-27.


194 Id. See supra Part I.A (language of the policy and the state law).


197 Id. at 214.
which cannot be prohibited in an open forum. Nonetheless, it found that the Bronx Household’s speech could be distinguished from other forms of speech from a religious perspective and therefore, could be prohibited because the school district had never permitted access for the purpose of worship and religious instruction. In 1998, the Supreme Court denied certiorari.

In 2001, the Bronx Household refiled to rent the middle school in light of *Good News Club*. After the school district denied the application, the Bronx Household filed a suit (“Bronx Household II”) with the same complaint as Bronx Household I, claiming that the *Good News Club* decision, in effect, reversed the Second Circuit’s decision in *Bronx Household I*. The district court granted a permanent injunction for the Bronx Household and ordered the defendant school district to allow the Bronx Household to use the public school auditorium for religious worship. Reviewing *Bronx Household I* and *Good News Club*, the district court held that plaintiffs met their burden for the grant of a preliminary injunction. It found that *Good News Club* controlled

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198 *Id.* at 214-15.
199 *Id. *
203 *Id.* at 401.
204 *Id.*. Plaintiffs demonstrated that they would suffer irreparable harm because exclusion from school facilities deprived them of free speech rights; demonstrated substantial likelihood of success on the claim that the school district’s denial of access to school facilities for religious worship violated their free speech rights; defendants lacked a compelling state interest to exclude plaintiffs from the school; and established substantial likelihood of success on the merits of their claim that the school district’s policy violated the Establishment Clause. *Id.* *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 105 (2001); *Bronx Household of Faith*, 127 F.3d 207. A preliminary injunction is granted if the party seeking the relief establishes two elements: the party seeking relief will suffer “irreparable harm” and the party seeking relief is likely to succeed on the merits to make them a fair ground for sufficiently
because the school constituted a limited public forum.\textsuperscript{205} It concluded that the Bronx Household had a substantial likelihood of success on its free speech claim because its activities did not constitute “mere religious worship” and addressed the same subject matter as activities previously permitted in the forum.\textsuperscript{206} The court also concluded that even if the activities were labeled worship and addressed a different subject, a distinction could not be made between viewpoint and content discrimination when the subject matter includes prayer, morals, character, the welfare of the community, and worship.\textsuperscript{207} Furthermore, even if a distinction could be made, the state should still not dissect speech for the purpose of restricting such speech.\textsuperscript{208}

On appeal, the Second Circuit affirmed the district court’s decision, acknowledging that there was no basis to distinguish the activities in \textit{Good News Club} from the activities of the Bronx Household.\textsuperscript{209} It found that there was a substantial likelihood for the Bronx Household to successfully show that the school district’s exclusion policy was an unconstitutional violation of the Bronx Household’s free speech rights.\textsuperscript{210} Yet, it avoided the issues of whether a meaningful distinction could be made between worship and other kinds of religious speech since agreement with the district court’s determination would invalidate its own precedents.\textsuperscript{211} In addition, it did not explicitly reject the school serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tips decidedly in the favor of the party seeking relief. See Daily v. New York City Hous. Auth., 221 F. Supp. 2d 390 (E.D.N.Y. 2002); Lark v. Lacy, 43 F. Supp. 2d 449 (S.D.N.Y. 1999), vacated by 87 F. Supp. 2d 251 (S.D.N.Y. 2000).

\textsuperscript{205} \textit{Bronx Household of Faith}, 226 F. Supp. 2d at 413.

\textsuperscript{206} \textit{Id.}

\textsuperscript{207} \textit{Id.}

\textsuperscript{208} \textit{Id.} at 423-25. “The [Supreme] Court specifically held that, in its assumed limited public forum, Milford could not prohibit activities that, while “quintessentially religious,” were not “mere religious worship, divorced from any teaching of moral values.” \textit{Good News Club}, 533 U.S. at 111-12 & n.4.

\textsuperscript{209} \textit{Bronx Household of Faith}, 331 F.3d at 354.

\textsuperscript{210} \textit{Id.}

\textsuperscript{211} \textit{Id.} at 355. See Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 959 F.2d 381 (2d Cir. 1992), rev’d, 508 U.S. 384 (1993); Travis v. Owego-
board’s Establishment Clause argument.212

III. ANALYSIS

The Second Circuit recognized that regulation of speech in both a designated public forum and a limited public forum are subject to the same standard of review applied in a traditional public forum—strict scrutiny.213 Despite this holding, the court has applied a more lenient standard of review to a limited public forum.214 In both Lamb’s Chapel and Good News Club, in which the Supreme Court reversed Second Circuit decisions, the Supreme Court still allowed the more lenient standard of review for a nonpublic forum to be applied to a limited public forum.215 The Supreme Court’s vagueness leads to a categorization of the school districts’ exclusionary policy and practice that distinguishes between unconstitutional viewpoint discrimination and possibly, constitutional content discrimination.216 There is no principled

Apalachin Sch. Dist., 927 F.2d 688 (2d Cir. 1991); Deeper Life Christian Fellowship v. Bd. of Educ. of N.Y., 852 F.2d 676 (2d Cir. 1988).

212 Bronx Household of Faith, 331 F.3d at 356.


215 See Good News Club, 533 U.S. 98; Lamb’s Chapel, 508 U.S. 384. See Ronnie J. Fischer, Comment, “What’s in a Name?”: An Attempt to Resolve the “Analytic Ambiguity” of the Designated and Limited Public Fora, 107 DICK. L. REV. 639, 668-70 (2003) (identifying that the Second Circuit found the limited public forum under the umbrella of designated public forum but applied both strict scrutiny and rational basis standards of review depending on the speaker’s class).

216 See Good News Club, 533 U.S. at 122 (Scalia, J., concurring); Good
basis, however, upon which to ascertain this distinction in analyzing the state’s exclusionary policy and practice of regulating private speech. The Supreme Court, unfortunately, allowed the categorization of exclusionary policy and practice for religious speech, whose distinction between subject matter and viewpoint is too thin to determine by employing the analysis of viewpoint discrimination separate from content discrimination. As a result, New York school boards’ exclusion of religious groups from school premises may continue to be tested under the improper standard of review. Moreover, the school boards may continue to use the improper standard, which is applicable only to a nonpublic forum, to exclude certain private speech on the ground that the Establishment Clause provides a reasonable state interest to “avoid the identification of a [public] school with a particular [religion].” Thus, the following approaches are recommended to resolve the recurring unconstitutional prohibition of religious groups from New York public schools.

*News Club*, 202 F.3d at 512-13 (Jacobs, J., dissenting).

217 See *Mawdsley*, *supra* note 11, at 27.

At the very least, Good News Club has blurred the distinction in Lamb’s Chapel between subject matter on one hand and viewpoint discrimination on the other; to the furtherest extent, the two concepts have merged. If viewpoints have been expanded to encompass any subject presented by any community group allowed access to public school facilities, then the two concepts, one could argue, represent a distinction without a difference.

*Id.*

218 See *Good News Club*, 533 U.S. at 122 (Scalia, J., concurring); *Good News Club*, 202 F.3d at 512-13 (Jacobs, J., dissenting). See also *Mawdsley*, *supra* note 11, at 27.

219 *Bronx Household of Faith*, 127 F.3d at 214. See *Bronx Household of Faith* v. Bd. of Educ. of the City of New York and Cmty. Sch. Dist. No. 10, 331 F.3d 342, 356 (2d Cir. 2003) (adding that although the Supreme Court found no Establishment Clause concern in *Good News Club* to justify the school district’s exclusionary policy and practice, a school district may still find a justifying Establishment Clause interest to exclude a religious organization from the school facilities open to the general public if its activities can be distinguished from *Good News Club* or *Bronx Household II*).
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A. New York Education Law Section 414 Creates a Designated Public Forum in New York Public Schools

The federal courts in New York have consistently held that section 414 creates a limited forum, allowing for the specific exclusion of religious groups, and have consistently rejected the claim that it was the state’s intent to create a designated public forum. Although in Lamb’s Chapel and Good News Club the Supreme Court found the lower courts’ holdings on the nature of the forum problematic, it did not reverse the lower courts’ holdings because the nature of the forum issue was not contested in the Supreme Court.

New York state law creates a designated public forum in New York public schools. Pursuant to the public forum doctrine, a nonpublic forum such as a public school becomes a designated public forum when “school authorities have ‘by policy or practice’ opened those facilities for ‘indiscriminate use by the general public’ . . . or by some segment of the public, such as student organizations.” Section 414 explicitly provides that community residents may use public school facilities for “social, civic and recreational meetings, entertainment events and other uses pertaining to the welfare of the community.” The statute also permits community groups to use public school facilities for instruction in any branch of education or learning, or as space for

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220 See, e.g., Bronx Household of Faith, 127 F.2d at 212-14; Lamb’s Chapel, 959 F.2d at 381.
221 Lamb’s Chapel, 508 U.S. at 391. The Supreme Court found the petitioner Lamb’s Chapel’s argument to have “considerable force” that the district should be “subject to the same constitutional limitations as restrictions in traditional public forums such as parks and sidewalks.” Id. However, the Supreme Court stated that it did not have to decide on the issue. Id.
224 N.Y. EDUC. LAW § 414 (McKinney 2002).
political meetings, civic forums and community centers. Subsections (a) and (c) of section 414 were adopted to intentionally create public forums in school facilities. Contrary to the Second Circuit’s conclusion, the statutory language creates a forum broadly available to the community.

The Second Circuit generally supported its conclusion that section 414 creates only a limited forum with two arguments. First, the statute does not explicitly include “religious speech” in its enumerated purposes. Second, the school districts’ policy explicitly excludes “religious service and instruction.” These arguments conflict with Supreme Court precedent, which concluded that a public university had created a public forum, where the exclusion of religious worship would constitute unconstitutional content-based discrimination of private speech.

225 Id.
226 This is reflected in the language of Community Use Policy. Community Use Policy, supra note 37. See supra Part I.A (discussing Community Use Policy).
228 Good News Club, 202 F.3d at 508; Bronx Household of Faith, 127 F.3d at 215; Deeper Life Christian Fellowship, 852 F.2d at 680.
229 N.Y. EDUC. LAW § 414 (McKinney 2002).
230 Id.
231 Widmar v. Vincent, 454 U.S. 263, 277 (1981) (holding that a public university had created a public forum for students by a policy that allowed “political, cultural, educational, social and recreational events”). See also Chess v. Widmar, 635 F.2d 1310, 1312 (8th Cir. 1980). The policy set forth in Widmar is similar to the language of section 414 of New York Education Law. N.Y. EDUC. LAW § 414.1(c)-(d), (f) (McKinney 2002); Widmar, 454 U.S. at 277. Other circuits have followed the Supreme Court ruling in Widmar that similar policies create public forums, not limited forums. The First Circuit held that the school district’s policy to open its facilities for meetings by youth groups, community, civic, and service organizations, government agencies, educational programs and cultural events create a public forum and thus the exclusion of a church is “censorship” and an “elementary violation” of the First Amendment. Grace Bible Fellowship v. Me. Sch. Admin. Dist. No. 5, 941 F.2d 45, 48 (1st Cir. 1991). The Third Circuit held that the school district’s policy to permit
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The only distinction between a designated public forum and a limited public forum is the scope of the purpose for which the forum is open to the public.\(^{232}\) If the purpose is to open the forum for the expressive activity of the “general public,” a designated public forum is created.\(^{233}\) If the purpose is to open the forum for the expressive activity of a specific group, such as student groups, or for the expressive activity of a specific subject matter, such as recreational sports, a limited public forum is created.\(^{234}\) Similarly, when the school district adopts the language of the statute to open the forum for the expressive activities of “social, civic and recreational meetings, entertainments, and other uses pertaining to the welfare of the community,” then a designated public forum has been created.\(^{235}\) The statutory language does not limit the purpose of the forum to a specific group, nor to a specific subject matter.\(^{236}\) In fact, religious teachings that are not divorced from morals and good character are related to the welfare of the community.\(^{237}\) The meetings by civic groups, cultural activities, resident service organizations, adult education classes and labor unions creates a public forum and prohibiting community groups from using the public forum “for religious services, instruction and/or religious activities” is unconstitutional. Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1372-73, 1378-79 (3rd Cir. 1990). The Fourth Circuit held that the school district’s policy to permit meetings by cultural, civic and educational groups as well as political organizations, create a public forum, and thus, it struck down the requirement that churches pay more to use the school facilities. Fairfax Covenant Church v. Fairfax County Sch. Bd., 17 F.3d 703, 704 (4th Cir. 1994). The Fifth Circuit held that the public library’s policy meetings of a “civic, cultural or educational character” creates a public forum and thus exclusion of a woman’s prayer group was unconstitutional. Concerned Women for America v. Lafayette County and Oxford, Miss. Pub. Library, 883 F.2d 32, 34 (5th Cir. 1989).


\(^{233}\) Cornelius, 473 U.S. at 802.

\(^{234}\) Perry, 460 U.S. at 46 n.7.

\(^{235}\) N.Y. EDUC. LAW § 414.1(c) (McKinney 2002) (emphasis added).

\(^{236}\) N.Y. EDUC. LAW § 414 (McKinney 2002).

Supreme Court and the District Court for the Southern District of New York have recognized, for example, that the activities of the Good News Club and the Bronx Household pertain to the welfare of the community.238

Even if section 414 creates a limited public forum, it still does not create a “religious-use free” limited public forum.239 In the face dissenting). “In my view, when the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters.” Id. For example, the activities of the Bronx Household included:

The Sunday morning meeting [which] is the indispensable integration point for our church. It provides the theological framework to engage in activities that benefit the welfare of the community. Those who attend the Sunday morning meetings are taught to love their neighbors as themselves, to defend the weak and disenfranchised, and to help the poor regardless of their particular beliefs. It is a venue where people can come to talk about their particular problems and needs. Over the years we have helped people with basic needs such as food, clothing, and rent. We have also provided, by means of counseling, friendship and encouragement, help for people to get out of the multi-generational welfare cycle, to lead productive lives, to leave a life of crime and/or drugs to become responsible citizens, and to counsel people whose personal finances are out of control. In one recent case we helped an individual who was about to get evicted. Church members helped him budget his income in order to meet his primary expenses, get rid of his excessive credit card debt and pay off overdue taxes. He now has a savings account of almost $1000.00. It is through the Sunday meeting where we directly or indirectly learn of these situations and where we can converse with the individuals involved in order to monitor the progress of the issue to be resolved . . . . In years past, the church meeting was a very important place for Cambodian Refugees to come in order for us to get to know them so that we could help them with food, clothing and to help them get acclimated to American society. Most of them were Buddhists.


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of the broad statutory language, the Second Circuit has held that the exclusion of one type of speech from a forum generally open to the public transforms the forum into a limited public forum.240 According to the Supreme Court’s forum jurisprudence, however, a public forum is created when the government has opened a space to the public for purposes of expressive activity and designated that space for a limited purpose.241 The Supreme Court’s forum jurisprudence does not imply that a limited forum is created when a single type of speech is excluded from the general uses available in the forum.

Pursuant to section 414, the purposes for which a forum is open can be limited, but the users within those limited purposes cannot be limited.242 Under the policy of opening a forum to student groups, the school district cannot select which student groups should be permitted to use the facilities.243 When a school district opens its forum to the public for the limited purpose of expressive activity “pertaining to the welfare of the community,” there is a requirement that “[such] uses shall be non-exclusive.”244 This

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240 Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 959 F.2d 381, 387 (2d Cir. 1992), rev’d, 508 U.S. 384 (1993); Deeper Life Christian Fellowship v. Bd. of Educ. of N.Y., 852 F.2d 676 (2d Cir. 1988). In Lamb’s Chapel, the Second Circuit held that the Center Moriches Union Free School was free to create a “limited public forum from which religious uses would be excluded.” Lamb’s Chapel, 959 F.2d at 387. See Brief of the Amici Curiae the Northstar Legal Center and Bronx Household of Faith in Support of Petitioners at 8, Good News Club v. Mildford Cent. Sch., 533 U.S. 98 (2001) (No. 99-2036).


242 See N.Y. EDUC. LAW § 414.1(c) (McKinney 2002) (“For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public”) (emphasis added). The plain language of the statute requires the uses within the purpose of the forum to be non-exclusive. Id.

243 The forum should be open to all student groups and the school district cannot use the policy as a disguise to deny, for example, a Jewish student group access to school facilities because it identifies the Jewish student group as a religious group rather than a student group.

244 N.Y. EDUC. LAW § 414.1(c) (McKinney 2002).
requirement applies whether the forum is called a designated public forum or a limited public forum.\textsuperscript{245} Therefore, when the activities of religious groups pertain to the welfare of the community, the school district cannot use section 414 and its policy as a disguise to deny their access on the basis of their religious conviction or viewpoint.\textsuperscript{246} Contrary to the Second Circuit’s holding, there is no special subcategory of a “religious-use free” public forum.\textsuperscript{247}

Administration of a “religious-use free” forum would require school officials and judges to screen private speech to determine how much of that speech has religious components to be excluded from the definition of “any uses pertaining to the welfare of the community.”\textsuperscript{248} Such discretion would require the kind of state monitoring of private religious speech that the Supreme Court has found unacceptable because the school district would be required to evaluate private speech, “discern [its] underlying assumptions respecting religious theory and belief” and make a determination whether that private speech is permissible discussion of religious material.\textsuperscript{249} To avoid such subjective monitoring, the school districts must concede that section 414 creates a designated public forum. They should also discontinue policies giving rise to a mutated forum that allows school facilities to be used exclusively for kinds of speech the school districts selectively consider to be

\begin{footnotes}
\item[245] Id.
\item[248] N.Y. EDUC. LAW § 414.1(c) (McKinney 2002). See, e.g., Good News Club, 533 U.S. at 122 (Scalia, J., concurring) (citation omitted).
\item[249] Good News Club, 533 U.S. at 127. See, e.g., Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 844-45 (1995); Widmar v. Vincent, 454 U.S. 263, 269 n.6 (1981). Such broad discretion undoubtedly creates a risk of impermissible discrimination amongst religious groups as well as between religious and non-religious groups. Justice Scalia, in his concurring opinion in Good News Club, pointed out this exact problem when he noted that the federal judiciary was not competent to make determinations about religious components of expressive activities. Good News Club, 533 U.S. at 127.
\end{footnotes}
furthering the welfare of the community.

B. Limited Forum Must Be Redefined

In public forum doctrine, “limited public forum” and “designated public forum” are synonymous.250 A public forum that is “created for a limited purpose such as use by certain groups [like students groups in Widmar] or for the discussion of certain subjects [like school board business]” is a designated forum, sometimes referred to as a limited public forum.251 The only practical difference between a designated public forum and a limited public forum is the scope of the purposes for which the forum is open to the public.252

Public forum doctrine does not recognize a separate category of limited public forum.253 Yet, courts often cite a footnote in Perry for the proposition that a limited public forum exists as a


251 Perry, 460 U.S. at 46 n.7.

252 Cf. Fischer, supra note 215, at 639-74 (claiming that often the outcome of a public forum doctrine case depends on the name of the public forum). Fischer’s claim corresponds to the solutions that this note recommends. The reason why “limited public forum” must be redefined is that the name means as much in the public forum doctrine analysis as Fischer argues. This note suggests, however, that it does not matter what the forum is called when the definition and the standard of review are misapplied among the courts and the experts.

253 See Int’l Soc’y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992). A designated public forum is property that the government has opened for expressive activity by part or all of the public. Id. If the government excludes a private speaker who falls within the class to which a designated public forum is made available, its exclusionary action is subject to strict scrutiny. Id. “[T]he government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse.” Id. at 680. See United States v. Kokinda, 497 U.S. 720, 726-27 (1990); Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37 (1983); see also supra Part I.B.1 (discussing the public forum doctrine).
separate category.\textsuperscript{254} This footnote does not define a limited public forum, though; rather, it gives an example of the narrow purposes for which a designated public forum could be created.\textsuperscript{255} In the end, whether New York public schools are called designated or limited public forums is insignificant as long as strict scrutiny review is applied.\textsuperscript{256}

The Second Circuit has maintained that as long as the government creates a limited public forum, any restrictions placed on speech are presumed content-neutral and will “pass the constitutional muster” as long as they are reasonable.\textsuperscript{257} This

\begin{footnotesize}
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\item \textsuperscript{254} 
\textit{Perry}, 460 U.S. at 46 n.7. “A public forum may be created for a limited purpose such as use by certain groups, \textit{e.g.}, (student groups), or for the discussion of certain subjects, \textit{e.g.}, (school board business).” \textit{Id.} (citation omitted).
\item \textsuperscript{255} 
\textit{Id.} at 45-46. The Court defined forums as that which “the state has opened for use by the public as a place for expressive activity. The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place.” \textit{Id.} (citation omitted). The first reference to limited public forum is found in \textit{Deeper Life Christian Fellowship}, which notes that “[u]nder the limited public forum analysis, property remains a nonpublic forum as to all unspecified uses.” \textit{Deeper Life Christian Fellowship v. Bd. of Educ. of N.Y.}, 852 F.2d 676, 679 (2d Cir. 1988) (citing \textit{Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.} 473 U.S. 788, 802 (1985) and \textit{Perry}, 460 U.S. at 48). However, the authority for this proposition explained that the government could elect to return a forum to a nonpublic status since the “government is not required to indefinitely retain the open character of the facilities.” \textit{Cornelius}, 473 U.S. at 802 (quoting \textit{Perry}, 460 U.S. at 48).
\item \textsuperscript{256} 

[S]ince we have rejected the only reason that respondent gave for excluding the Club’s speech from a forum that clearly included [such speech] (the forum was opened to any “use pertaining to the welfare of the community”), I do not suppose it matters whether the exclusion is characterized as viewpoint or subject-matter discrimination. Lacking \textit{any} legitimate reason for excluding the Club’s speech from its forum—“because it’s religious” will not do, respondent would seem to fail First Amendment scrutiny regardless of how its action is characterized.

\textit{Id.} (alteration in original).
\item \textsuperscript{257} 
\textit{E.g.}, \textit{Deeper Life Christian Fellowship}, 852 F.2d at 679.
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reasoning ultimately stops the free speech analysis at the point of determining the kind of speech allowed in a forum without reaching the question of whether the restriction is justified to suppress private speech. The Second Circuit did not insist on the same reasoning in *Bronx Household II.* In *Bronx Household II,* the Second Circuit conceded to the Supreme Court’s free speech analysis in *Good News Club,* which reversed the judgment and the reasoning of the Second Circuit. The Second Circuit, however, “decline[d] to review the trial court’s further determinations that, after the *Good News Club,* religious worship cannot be treated as an inherently distinct type of activity” and left room for future disputes of free speech analysis. This is an important determination that the Second Circuit must make for the third-prong of the free speech analysis in the future. Thus, as long as the name, limited forum, does not automatically lead to deficiency in free speech analysis, particularly for the third prong, its use is not objectionable.

C. The “Reasonable and Viewpoint Neutral” Standard Should Apply to Nonpublic Forums only

The state is subject to strict scrutiny when regulating private speech in traditional and designated public forums. The state may regulate the time, place and manner of private speech so long as the regulations “are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.” The state must show a

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259 Id.
260 Id. at 355.
261 See supra text accompanying note 52.
262 See discussion supra Part I.B.1. “The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place.” Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983).
263 Perry, 460 U.S. at 45-46.
264 Id. at 45.
compelling interest to regulate private speech based on its content.\textsuperscript{265}

Although the Second Circuit recognized that the traditional public forum standard applies to both “limited” or “designated” public forums,\textsuperscript{266} it distorted the standard applied in the limited public forum.\textsuperscript{266} The Second Circuit held that a limited public forum may “remain non-public except as to specified uses . . . , and exclusion of uses—even if based upon subject matter or the speaker’s identity—need only be reasonable and viewpoint-neutral to pass constitutional muster.”\textsuperscript{267} This holding is contrary to the standard set forth by the Supreme Court in \textit{Perry}.\textsuperscript{268} In \textit{Lamb’s Chapel}, the Supreme Court explicitly criticized the Second Circuit’s position.\textsuperscript{269} The Second Circuit applied the “reasonable and viewpoint neutral” standard again in \textit{Bronx Household I}, even though the same state law and district policy in question in \textit{Lamb’s Chapel} governed the school district.\textsuperscript{270} The Second Circuit applied the same standard yet again in \textit{Good News Club}, finding no fundamental right of free speech “for those who seek to speak on a topic or in a manner not contemplated by” the school district.\textsuperscript{271} Moreover, the school districts have utilized this lenient standard to justify their exclusionary policies on the ground that exclusion of unlisted content such as religious instruction is reasonable to preserve the intended purposes of the forum, where the purpose of

\textsuperscript{265} \textit{Id}.


\textsuperscript{267} \textit{Deeper Life Christian Fellowship}, 852 F.2d at 679-80. \textit{See, e.g.}, \textit{Lamb’s Chapel}, 959 F.2d at 387.

\textsuperscript{268} \textit{See supra} notes 68-74 and accompanying text.

\textsuperscript{269} \textit{Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.}, 508 U.S. 384, 393 (1993). The Supreme Court disagreed with the Second Circuit, which “appeared to recognize that the total ban on using District property for religious purposes could survive First Amendment challenge only if excluding this category of speech was reasonable and viewpoint neutral.” \textit{Id}.

\textsuperscript{270} \textit{Bronx Household of Faith v. Cmty. Sch. Dist. No. 10}, 127 F.3d 207, 214 (2d Cir. 1997).

\textsuperscript{271} \textit{Good News Club v. Milford Cent. Sch.}, 202 F.3d 502, 510 (2d Cir. 2000).
the forum is to exclude religious instruction. They have also argued that the exclusionary policy is a reasonable, if not compelling, means to comply with the Establishment Clause.

The distortion of the standard of review for a limited public forum started in *Deeper Life Christian Fellowship*. The Second Circuit supported its conclusion that the reasonable and viewpoint neutral standard applies by citing the portion of the *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.* decision where the Supreme Court was discussing the standard for “nonpublic forum.” The Supreme Court, however, is clear that the

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272 See supra Part I.B.2 (discussing school district’s arguments).

273 The government continues to argue that it has a strong interest to comply with the Establishment Clause to justify the exclusionary policy even though the Supreme Court has consistently struck down the Establishment Clause argument in free speech cases. See supra Part I.B.2.


275 *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). The *Cornelius* Court held that the Combined Federal Campaign, a charity drive aimed at federal employees, to voluntary, tax-exempt, nonprofit charitable agencies that provide direct health and welfare services to individuals or their families, is a nonpublic forum and applied a more lenient “reasonableness” test to decide whether the exclusion was constitutional. *Id.* at 805-06. Citing *Perry*, the Court affirmed its previous holding that the reasonable test should only be applied to nonpublic forum because controlling the access to a nonpublic forum, based on subject matter and the speaker’s identity is constitutional so long as the distinctions are reasonable in light of the purpose of the policy and are viewpoint neutral. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n.*, 460 U.S. 37, 49 (1983), cited in *Cornelius*, 473 U.S. at 806. “Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property.” *Id.* (emphasis added). The language of the *Cornelius* Court is noteworthy because it is the exact language that the Second Circuit has used to support its rationale for the standard of review for a limited public forum. *Cornelius*, 473 U.S. at 806.

Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. Although a speaker may be excluded from a
“reasonable and viewpoint neutral” standard applies only to nonpublic forums because private speech in a public forum, whether limited, designated or traditional, is protected from governmental regulation unless a compelling state interest outweighs the free speech interest. Referring to designated and limited forums, the Perry Court announced that “[a]lthough a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum.” Unless the Second Circuit holds that the reasonable and viewpoint neutral standard applies only to nonpublic forums, unconstitutional state regulation of private speech may continue to occur in school districts.

One of the arguments school districts have made to justify their exclusionary practice is that state law allows it. The public forum doctrine, however, provides that when it makes its facilities available for expressive activities, the government may not selectively exclude users solely on the basis of the religious content of their speech. In spite of this, the Second Circuit has upheld the argument that state law allows exclusion of religious instruction. Thus, restriction on access to school facilities is nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

Id. (emphasis added) (citations omitted).


277 Perry, 460 U.S. at 46.

278 See supra notes 28-30 and accompanying text.


280 Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 959 F.2d 381, 386-89 (2d Cir. 1992), rev’d, 508 U.S. 384 (1993); Deeper Life Christian Fellowship v. Bd. of Educ. of N.Y., 852 F.2d 676, 679-81 (2d Cir. 1988). Although it has affirmed the lower court’s decision granting a local church access to a public school for religious worship in Bronx Household II, the Second Circuit ruled on the First Amendment analysis and failed to rule on the
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facilitated by the lower federal courts’ refusal to strictly scrutinize school district policy and practice.

New York state law gives school boards the authority to adopt a policy to create public forums, but this authority is not without limit.281 School boards are still bound by the Constitution when they attempt to regulate private speech.282 Until courts apply the heightened scrutiny standard, school districts are able to implement policy and practice that selectively violate religious groups’ free speech rights.

D. The Community Use Policy Should Be Struck Down As Facially Unconstitutional

New York’s Community Use Policy is facially unconstitutional and should be struck down because it violates the First Amendment rights of religious groups by singling out religious speech from a public forum.283 The Community Use Policy draws a constitutionally flawed distinction between religious discussion, which it permits, and religious services and instruction, which it prohibits.284 The distinction stated in the Community Use Policy has resulted in decisions that have ultimately been reversed by the state law argument. Bronx Household of Faith v. Bd. of Edu. of the City of New York and Cmty. Sch. Dist. No. 10, 331 F.3d 342 (2003).

281 N.Y. EDUC. LAW § 414 (McKinney 2002).

282 Good News Club v. Milford Cent. Sch., 533 U.S. 98, 107 (2001) (“Because we hold that the exclusion of the Club on the basis of its religious perspective constitutes unconstitutional viewpoint discrimination, it is no defense for Milford that purely religious purposes can be excluded under state law.”).


284 Community Use Policy § 5.11.

[N]o outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.

Id.
Supreme Court. The distinction has also forced the courts to dissect the nature of religious groups’ speech. Although the Supreme Court held the school district’s exclusion policy against religious groups to be unconstitutional, New York school districts continue to rely on the Community Use Policy to violate religious groups’ free speech rights. For example, the Second Circuit in *Bronx Household I* allowed the school district to make a distinction to permit discussion of religious material and prohibit religious instruction. However, the district court in *Bronx Household II* properly struck down such practice because “the government may not, consistent with the First Amendment, engage in dissecting speech to determine whether it constitutes worship.” Thus, the Second Circuit should strike down the facially unconstitutional Community Use Policy and stop the school districts’ effort to single out private religious speech.

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286 In *Lamb’s Chapel*, the Second Circuit drew a distinction between religious references in Lamb’s Chapel’s film about family issues, on the one hand, and a number of other uses that are arguably at least equally religious, on the other. Thus, the court below concluded: a Salvation Army Band concert, complete with invocation and rendition of “Jericho Revisited” and “God Bless America,” was not religious; a Gospel Music Concert, replete with religious songs and hymns, was not religious; and a lecture series on parapsychology, Kundalini (a Far Eastern concept), and spiritual growth, was not religious. Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 959 F.2d 381, 388 (2d Cir. 1992), rev’d, 508 U.S. 384 (1993); Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 736 F. Supp. 1247, 1252-53 (E.D.N.Y. 1990), aff’d, 959 F.2d 381 (2d Cir. 1992), rev’d, 508 U.S. 384 (1993). See Ross Paine Masler, *Tolling the Final Bell: Will Public School Doors Remain Open to the First Amendment?*, 14 Miss. C. L. Rev. 55, 64 n.54 (1993).

287 Good News Club, 533 U.S. at 119; *Lamb’s Chapel*, 508 U.S. at 395.


290 There are a few cases in which the Second Circuit discussed the Community Use Policy. See, e.g., Bronx Household of Faith v. Bd. of Educ. of the City of New York and Cmty. Sch. Dist. No. 10, 331 F.3d 342, 359 (2d Cir.
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CONCLUSION

Remarkable changes have taken place in the New York district court between *Deeper Life Christian Fellowship* and *Bronx Household II*. In *Bronx Household II*, the Southern District of New York recognized that religious worship is not a separate speech category, distinction between viewpoint discrimination and content discrimination is unattainable, and dissecting private speech for the purpose of restriction is unconstitutional.291 This is an accurate analysis of the Free Speech Clause and the public forum doctrine and a correction of the distorted application of the doctrine. This is also a proper recognition of how section 414 should be applied within the constitutional boundaries. Section 414 provides the

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291 *Bronx Household of Faith*, 226 F. Supp. 2d at 418. The Supreme Court specifically held that, in its assumed limited public forum, Milford could not prohibit activities that, while “quintessentially religious,” were not “mere religious worship, divorced from any teaching of moral values.” *Good News Club*, 533 U.S. at 111-12 & n.4.
school boards the control and supervision over school facilities so that school facilities may continue to benefit the students and the community residents after school hours. It does not, however, provide the school boards unlimited power to discriminate against people with any religious views or to suppress the kinds of speech that they do not approve. Only when courts reshape the application of public forum doctrine and school boards recognize the constitutional limitation on their authority to regulate speech will the chilling effect on private speech stop in New York public school forums.