TOXIC TORTS: THE DEVIL IS IN THE DOSE

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SUMMARY

Dose is a central concept in toxicology—"the dose makes the poison" is the oldest maxim in the field.1 The judicial system nevertheless appears uncomfortable in dealing with dose issues and instead prefers reductionist approaches which overly simplify decision-making about general and specific causation in toxic tort cases to the detriment of both plaintiffs and defendants. Contrasting this approach, scientific enquiry is moving toward a more systems based, holistic approach to incorporating a broad range of scientific evidence. This is particularly true for the examination of chemical causation of disease. Longstanding science-based processes evaluating the weight of evidence have increased the extent to which they incorporate scientific data from multiple disciplines, including toxicological studies exploring dose-related

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“Dose” is defined as concentration multiplied by frequency or duration. Thus exposure to 10 parts per million (“ppm”) in air for one hour to a pollutant is a dose of 10 ppm-hours. Exposure to 1 ppm in air for 10 hours also results in a dose of 10 ppm-hours. In the first example the dose rate is higher than the second example, but the total dose is the same.
mechanisms of disease. This runs counter to recent judicial decisions that more narrowly define the evidence acceptable in a toxic tort case.²

I. INTRODUCTION

The interface of science and law is central to toxic tort litigation. The challenge of eliciting valid and pertinent expert opinions in toxic tort cases has led to changes in the role of the judge and to what is admissible in court.³ Daubert v. Merrell Dow Pharmaceuticals, Inc.⁴ and other cases have had a major impact upon toxic tort litigation at a time when the science is also changing rapidly.⁵ This article explores the role of the central toxicological concept of dose in toxic tort litigation. Additionally, this article contends that science and law are going in opposite directions—in science towards a more systems-based holistic approach to

² This article focuses upon environmental cases. Litigation concerning pharmaceuticals and medical devices may raise different issues because of the role of the FDA. See infra text accompanying notes 27–31.

³ See sources cited infra note 5.


⁵ I will not delve into the legal arguments concerning whether the intention of the Supreme Court in Daubert was to liberalize the rules of scientific evidence. The proposition that in fact the opposite has occurred has been advanced by legal scholars and by scientists. See Lisa Heinzerling, Doubting Daubert, 14 J.L. & POL’Y 65 (2006) (discussing the “mess that has followed in the wake of Daubert”); Ronald L. Melnick, A Daubert Motion: A Legal Strategy to Exclude Essential Scientific Evidence in Toxic Tort Litigation, 95 AM. J. PUBLIC HEALTH S30 (2005) (discussing difficulties for plaintiffs to prevail in Daubert motions); CARL F. CRANOR, Judge-Jury Responsibilities and the Right to a Jury Trial, in TOXIC TORTS: SCIENCE, LAW, AND THE POSSIBILITY OF JUSTICE 70–71 (2006) (noting that, under Daubert, plaintiffs have to “win twice”). This proposition is consistent with my argument that courts have generally become reductionist in their approach to toxic torts. The potential impact on toxic torts of changes in science arising out of molecular biology and increased understanding of the human genome have been discussed by Gary Marchant and by Jamie Grodsky. Gary E. Marchant, Toxicogenomics and Toxic Torts, 20 TRENDS IN BIOTECH. 329 (2002); Jamie A. Grodsky, Genomics and Toxic Torts: Dismantling the Risk-Injury Divide, 59 STAN. L. REV. 1671 (2007).
understanding the revealed complexity of human biology and of cause-and-effect relations, while in law towards a more reductionist and overly simplistic approach. I use examples to demonstrate how a reductionist approach inappropriately excludes animal toxicology and mechanistic information of pertinent value in evaluating a toxic tort.

II. **The Science of Toxicology**

Toxicology is the science of poisons. It is an ancient science, reflecting the trial and error approaches of our ancestors in selecting nutritious components of an otherwise highly toxic natural world. The use of known poisons to kill animals or enemies reflects this same experimentation. Toxicologists accept Paracelsus—a 16th century alchemist and a bit of a charlatan—as their ancestor and credit him with the first law of toxicology—that the dose makes the poison. In the present review, I focus primarily on issues related to dose, although I will also discuss aspects of the two other major maxims that are the basis for modern toxicology: 1) that chemicals are specific in their biological effects, which has been credited to Ambrose Pare; and 2) that humans are animals.

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6 Bernard D. Goldstein & M.A. Gallo, *Paré’s Law: The Second Law of Toxicology*, 60 TOXICOLOGICAL SCI. 194–95 (2001). Paré told the King of France that he had wasted his money in purchasing what was claimed to be an antidote to all poisons. Paré reasoned that each poison had its own specific mechanism of action and that a universal antidote did not exist. The king put Paré’s reasoning to the test. The king’s apothecary gave a man condemned to be hung a poison followed by a so-called universal antidote. The condemned man died anyhow, thereby proving Paré’s point. *Id.*
A. The Maxims of Toxicology

1. The Dose Makes the Poison

Depending upon dose, everything is poisonous, including such essentials as water and salt. Dose is defined as concentration multiplied by frequency or duration—it is not just the exposure level at any one point in time. Understanding how dose affects response is central to the science of toxicology. Dose-response curves are a classic means of illustrating this relationship, and developing a dose-response curve through direct observation or through extrapolation is an essential element of the function of toxicologists. Extrapolation may be from high to lower doses, from one group of humans to another, or between species.

Toxicologists generally posit two main dose response curves: those that have a “threshold” and those that do not. Certain chemicals produce no effects at low doses. The highest dose at which no effect is observed for these chemicals is known as the threshold. The presumption that a chemical has a threshold is of obvious importance to toxic torts in that it permits the argument

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7 These maxims also underlie the four-part risk assessment paradigm: hazard identification, dose-response analysis, exposure analysis, and risk characterization. Dose-response analysis is clearly based on the dose makes the poison; specificity is the basis for hazard identification; and both depend heavily on extrapolating from animal studies. Bernard D. Goldstein & Russellyn Carruth, Toxicology: Scientific Status, in MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 149 (Faigman et al. ed., vol. 3 2007).


9 The technical and more appropriate term is a “no-observed effect level,” or NOEL. Goldstein & Henifin, supra note 8, at 407.
that a dose was too low to cause a particular plaintiff's injury. As dose increases, so does response, until eventually there is a dose which has maximal effect—perhaps the death of the organism.

The second general type of a dose response curve is one that is considered to have no threshold. The most important example for toxic torts is that of cancer. The underlying cause of many cancers is a persistent genetic mutation allowing the unbridled growth of a cell which then results in a clone of cancer cells. As any one molecule can theoretically cause this persistent mutation, no threshold exists below which the risk is zero. The dose response curve relating the level of a cancer causing chemical to the risk of cancer is usually considered to be roughly linear; e.g., if the risk of cancer for a dose of 100 units is X, then the risk of cancer for a dose of 200 units is likely to be about twice the amount of X and the risk of cancer for a dose of 50 units only one-half X.

This form of a dose-response curve is not only scientifically acceptable but easily understood by a layperson. The smallest residue of a ground-up baby aspirin tablet is useless for treating an adult headache, but an overdose of aspirin can be fatal.

Normally, a progenitor cell, such as a cell at the base of our skin, divides into two other cells: another progenitor cell and a cell that will mature and die. Put very simply, cancer is caused by a genetic mutation leading the progenitor cell to form two progenitor cells, which themselves continue to divide to form other progenitor cells. As a mutation can be caused by a chemical or physical agent producing a single small change in the DNA constituents of a gene, it is at least theoretically possible that any one molecule of a chemical, or packet of radiation, capable of changing DNA can lead to a cancer-causing mutation. Note that most mutations are silent, kill the cell, or do something other than cause cancer. Stable mutations of germ cells can similarly lead to inherited disorders. Cancer is usually a more complex process than a single mutation.

Dose-response estimation for carcinogens is somewhat more complex in its use than this reasonable approximation, particularly in the usual situation in which extrapolation is needed from high to low dose or from animals to humans. There are also carcinogens that clearly have thresholds. See, e.g., infra notes 64 and 65 concerning saccharin. However, in essence, the “burden of proof” is on industry to prove that a carcinogen has a threshold. The question of whether a different dose-response approach should be used for non-genotoxic carcinogens remains under debate.
2. Specificity of Effects

Chemical and physical agents have specific effects related to both the inherent physiochemical properties of the agent and the biological niche in which it functions. For example, benzene can cause leukemia and asbestos can cause lung cancer, but not vice versa. The concept of specificity—that an agent affects certain biological systems but not others—is a clearly established principle of toxicology. It is also intuitively understood by lay persons. For example, anyone may take aspirin for a headache and a laxative for constipation, but the medicines are not interchangeable. Pharmaceutical drug development to a large extent depends upon working out the relation between chemical structure and both the specificity of a desired effect and the avoidance of undesired effects. Small changes in chemical structure can have a major impact on toxicity in terms of both specificity (general causation) and the extent of human susceptibility to the agent.

3. Humans are Animals

Much of modern toxicology is based on the study of laboratory animals. There is a commonality of biological function across species. All biological systems must obtain energy, build structure and release waste. The similarity in cellular and organ function is particularly strong among mammals such that extrapolation of effects from one species to another is accepted by the scientific community as a means of evaluating the toxicity of external agents. In terms of general causation, the specificity of toxic effects on organs is relatively similar across mammals, e.g., a kidney poison in

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13 Somewhat confusing is that the legal equivalent to toxicological specificity is general causation; while specific causation in a toxic tort suit is related to dose rather than toxicological specificity.

14 For example, n-hexane, the six carbon straight chain hydrocarbon component of gasoline, is toxic to nerves, while the closely related 5 and 7 straight chain hydrocarbons, n-pentane and n-heptane, have no such toxicity. This is because of a specific biological niche within the neuron that spatially allows chemical interaction by a metabolite of n-hexane but not the slightly smaller metabolite of n-pentane or the slightly larger metabolite of n-heptane.
one species is likely to be a kidney poison in another, although there are certainly exceptions. There is more variability among species in dose-response due to differences in absorption, distribution, metabolism, excretion, function and target organ susceptibility. As extrapolation of dose-response from animals to humans is central to deciding appropriate regulatory protection, there is a wealth of research data focusing upon these pathways. Although extrapolation can be complex, there is sufficient information to permit reliable extrapolation in many situations.

A lay person reading the scientific literature might conclude, erroneously but understandably, that human responses most often differ from other mammals. This misconception is a by-product of a publication bias. In fact, there is a commonality of response among mammals, including humans. A difference between humans and animals is worth pursuing scientifically as such a difference can be exploited to understand human physiology and response and it is also readily publishable in a good scientific journal. This means that review of the overall literature comparing animals and humans will be biased toward differences rather than similarities.

Standard safety assessment for chemicals is based totally on

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15 Physiologically based pharmacokinetic models ("PBPK") are increasingly used in risk assessment. These models provide linkages between initial exposure to eventual disposition of a chemical and its metabolites, including levels at target organs within the body. For a recent review and an example assessing the cancer risk of chloroform, see Kai H. Liao et al., *Bayesian Estimation of Pharmacokinetic and Pharmacodynamic Parameters in a Mode-of-Action-Based Cancer Risk Assessment for Chloroform*, 27(6) RISK ANALYSIS 1535 (2007).

16 Another major reason for the attention paid to differences between animals and humans is that details affecting the extrapolation of animal data to humans can affect regulatory agency conclusions about the risk potency of the agent. Small differences in the estimated potency can mean major differences in the extent of regulatory burden borne by the affected industry. In contrast to a continuous variable, i.e., which of a wide range of numbers should be used to set a regulatory standard, a toxic tort case in essence leads to a binary decision based upon the underlying need of the plaintiff to meet the “more likely than not” standard of tort law. Thus the details of animal/human differences, which can have major implications for regulation, often are of trivial significance for a toxic tort case, only serving to obfuscate the value of animal toxicology. See Silbergeld, *supra* note 8, at 374–78.
animal and in vitro studies. A battery of such tests, chosen for their ability to predict toxicity to humans or the environment, is performed on new chemicals. Extending animal and in vitro testing to existing chemicals has been a major societal goal in recent years as evidenced by the international agreement to test high production volume chemicals and the European Union’s recent enactment of the Registration, Evaluation, Authorisation, and Restriction of Chemicals Act (“REACH”). This extensive new legislation to regulate chemicals requires intensive toxicological testing of essentially all new and existing chemicals, including components of mixtures. It relies heavily on risk based approaches to establish priorities for testing, including a reliance on production volume as a surrogate for human dose.

17 The reliance of standard safety assessment on testing chemicals in animals is illustrative of the similarity in response between humans and animals. It also reflects the fact that these are mostly new unmarketed chemicals so there has been no human exposure, and experimentally exposing humans raises ethical issues.


19 The new EU legislation, the Registration, Evaluation and Authorization of Chemical Substances, known as REACH, lays a very heavy burden on industry to provide extensive toxicological testing on both new and existing chemicals, including components of mixtures. A committee of the U.S. National Research Council has recently proposed a greater emphasis on understanding the mechanism of toxicity through advances in molecular biology as a means of toxicity testing. NATIONAL RESEARCH COUNCIL, TOXICITY TESTING IN THE 21ST CENTURY: A VISION AND A STRATEGY (National Academy Press 2007).

III. DOSE ISSUES RELATED TO GENERAL CAUSATION

General causation for cancer can be a particularly contentious issue in toxic tort litigation. While dose considerations are usually considered to be pertinent to specific causation, dosage is also central to the general causation issue of whether a specific chemical or physical agent can cause a specific disease. Not surprisingly given the public and economic interest, weight of evidence approaches have been most thoroughly developed for the identification of carcinogens. However, it should be noted that the same considerations apply to diseases other than cancer.

A. Weight of Evidence

Regulatory agencies and scientific organizations routinely use “weight of evidence” processes to assess the relationship between a specific chemical or physical agent and a specific adverse outcome. These processes generally consist of an assemblage of both the available evidence and a carefully selected internal or external expert body to review this evidence and to develop a consensus view.


21 See, e.g., Joiner v. General Electric Co., 78 F.3d 524 (11th Cir. 1996) (discussing whether PCBs are a human carcinogen); In re Agent Orange Product Liability Litigation, 373 F. Supp. 2d 7 (E.D.N.Y. 2005) (discussing whether Agent Orange and its dioxin contaminants are human carcinogens).

22 The evidence to be considered may be restricted, for example, to peer-reviewed publications.

23 The contrast between a consensus conference and a toxic tort proceeding epitomizes the difficulty expert scientists have serving at the interface between science and law. Assume a reasonably mature topic with a large amount of scientific evidence developed by many scientists. One can usually describe the individual opinions of the scientist as to the weight of this evidence as falling within a bell-shaped curve—some scientists giving more overall weight, some less, but most toward the middle. The organization conducting the consensus effort, e.g., the EPA Science Advisory Board or the National Academies of
Two well-known organizations that are charged to assess the issue of whether specific chemicals or workplace situations cause cancer are the International Agency for Research on Cancer (“IARC”) of the World Health Organization, and the U.S. National Toxicology Program (“NTP”). In their deliberations, IARC and NTP have routinely incorporated both epidemiological and toxicological evidence to categorize the extent to which a chemical is likely to be a carcinogen. Both have in recent years specifically broadened the use of basic laboratory science related to understanding the mechanism of action of a potential carcinogen to help improve their categorization of carcinogens.\(^{24}\)

The IARC process results in a formal vote of the assembled experts as to whether a specific agent is toxic. The consensus approach first occurs within four expert groups: epidemiology, animal toxicology, exposure data, and mechanistic information. Science, will attempt to assemble a relatively small subgroup of these experts with the aim of covering the specific disciplinary expertise needed and balancing any known biases. The group dynamics among scientists usually lead to the participants coming up with a relatively centrist opinion. Scientists tend to be conservative because of the high cost associated with being identified as mistaken. In contrast, the ethical and well-trained lawyer will search the field of legitimate experts to find those at their end of the bell-shaped curve and recognizes that the opposing lawyer will be doing the same. The dynamics of the litigation process greatly inhibit discussion among the experts (and the appellate process precludes scientific discussion). It is of course true that scientific opinion does not always fit a bell shaped curve, and not all scientific experts are unbiased. It is nevertheless almost inherently impossible for the confrontational approach that characterizes tort litigation to discover that there is a consensus. This is a rationale for having judges select their own experts.\(^{24}\)

\(^{24}\) Vincent J. Cogliano et al., *Use of Mechanistic Data in IARC Evaluations*, 49(2) ENVTL & MOLECULAR MUTAGENS 100 (2008). Note that the regulatory goal underlying IARC and NTP often frustrates the needs of the toxic tort process to have a clear understanding of general causation. Once a chemical is concluded to be a known human carcinogen for a specific cancer endpoint, there is relatively little interest in evaluating whether it causes a different tumor. Either way it will be regulated as a carcinogen. An example is benzene, a known cause of human acute myelogenous leukemia. It is highly probable that it is also a cause of other hematological cancers, but this evidence is unlikely to be considered by IARC or NTP who are moving forward with limited resources to consider the weight of evidence about other potential, but not known, human carcinogens.
Although IARC is only concerned whether the carcinogen will cause cancer, rather than with the potency of the carcinogen, dose issues are crucial in each of the working groups. Not surprisingly, the animal toxicology and mechanistic information groups look for evidence of dose response before accepting an individual report within the literature. This is also true for the epidemiology working group for which there needs to be congruence both within a given study and among all studies.

Dose-response is one of Bradford Hill’s criteria for accepting an epidemiological association as causal. This is pertinent to interpreting an individual study, e.g., workers with higher exposure within a workplace are expected to have a higher level of any causally-related adverse outcome. However, often overlooked is that this criterion for interpreting epidemiological studies is not limited to interpreting individual studies; rather, it applies when evaluating the totality of the pertinent epidemiological studies. For example, a group of epidemiological studies concerning a specific agent can be stratified by dose in the individual studies, thereby providing a means to interpret the relevance of these studies to a cause and effect relationship. IARC committees often prepare a table listing all of the epidemiological studies reviewed, arranged from highest to lowest exposure. It is unlikely that a committee will accept that a chemical is known to cause cancer if there is not a reasonably strong, although not necessarily exact, relation between the extent of exposure and the observed excess risk.

Bradford Hill was a physician and epidemiologist who developed a number of criteria for accepting causality. Austin Bradford Hill, The Environment and Disease: Association or Causation?, 58 PROC. OF THE ROYAL SOC’Y OF MED. 295–300 (1965).

I am personally familiar with toxic tort cases in which the plaintiffs have alleged that exposure to benzene, a known cause of cancer of the blood system, was responsible for causing kidney cancer. The plaintiffs put forward a number of broad epidemiological studies in which there was an association between benzene-containing solvents and an increased risk of kidney cancer. Such solvents usually contain 0.1% benzene or less. However, because benzene is a known cause of blood cancers, and literally millions of workers are exposed to pure streams of benzene, a relatively large number of epidemiologic studies have been performed evaluating the mortality of these workers. As these high dose studies have not found a statistically significant increase in kidney cancer, it is
IV. DOSE ISSUES RELATED TO SPECIFIC CAUSATION

Dose issues are central to specific causation in a toxic tort case involving exposure to chemicals at the workplace or the environment. There are two issues related to dose: 1) based upon the dose-response evaluation, what is the dose at which the adverse effect would be expected, and 2) what is the dose to the plaintiff. Approaches to these dose issues in toxic tort cases are often guided by prior judicial decisions that, to one versed in toxicology, seem uninformed about dose concepts.

Perhaps these misguided judicial approaches are the result of much of the relevant case law having been developed around pharmaceutical products or devices. One major difference between pharmaceutical agents and chemical toxins is that the dose of a pharmaceutical agent such as Vioxx or Bendectin is assumed to be that on the drug label, and someone either has or does not have a silicon breast implant or a medical device. Here, the problem is that courts attempt to transfer dose concepts from pharmaceutical products or devices to their evaluation of toxins; the inherent difference in the extent of variation in dose among those using a pharmaceutical product and a toxin makes such a transfer inappropriate.

Another major difference between environmental chemicals and pharmaceutical agents is the extent of available pre-marketing information. For a new drug, the FDA requires a clinical trial after a series of studies in laboratory animals; thus, there is a reasonably substantial amount of animal toxicology and human epidemiological data already available before the drug is marketed. This is not true for a chemical not intended for use as a drug. EPA’s pre-marketing requirements under the Toxic Substances Control Act are relatively minimal by comparison. Further, as discussed below, the epidemiological gold standard of a randomized double-blind not consistent with usual dose assumptions to propose that the epidemiological studies of workers exposed to much lower benzene doses are indicative of a causal relation. Note that there are at least two reasons why some epidemiological studies show an association between exposure to solvents containing low levels of benzene and kidney cancer: chance variations, and a causal effect of some other component of the solvent mixture.
controlled epidemiological study cannot be achieved in epidemiological studies of the potential adverse consequences of chemical or physical agents present in the workplace or community.

For many epidemiological studies of toxic agents, dose is a binary—yes or no—determination instead of a quantitative expression. Nevertheless, in toxic tort cases involving non-pharmaceutical chemicals present in the workplace or general environment, estimation of the dose experienced by the plaintiff, and positioning that estimate on the appropriate dose response curve for the individual plaintiff, are central to evaluating whether the plaintiff’s condition more likely than not was caused by the alleged exposure.

Below, I discuss two of the approaches that are commonly used to simplify or obfuscate dose issues, one by defendants and one by plaintiffs. From a legal standpoint, defense lawyers often would like to require that there be a direct or reconstructed quantitative estimation of the actual dose; while plaintiffs often want to consider only the exposure level but not the duration component of dose.

A. Non-Quantitative Estimation of Dose for a Toxic Tort Case

It is appropriate under certain circumstances to admit expert testimony about sufficiency of dose without quantifying such a dose. One such circumstance is an expert’s comparison of the alleged exposure of the plaintiff with that of the exposure of one or more cohorts of workers in whom there is epidemiologic evidence of an effect. The argument in essence is similar to the right of a police officer travelling at 65 mph in a 55 mph zone to ticket the driver of a car that overtakes and passes the police vehicle without direct radar evidence of the speed. While the judge might be willing to accept a defense argument concerning the exact speed of the

27 This is particularly true for the initial studies identifying most known chemical carcinogens. These were often discovered in epidemiological studies of workers in which the surrogate for dose has been qualitative estimates of high and low exposure. Quantitative exposure evaluation was subsequently added.
driver, it is clear that the driver was going more than 65 mph.

When investigating toxins, it is often difficult to come by quantitative evidence with which to prove causation. Employees who participate in epidemiological studies and experience adverse associations are generally part of a large work force; otherwise, it is difficult to observe adverse effects at the dose levels to which the workers have been subjected. A sufficiently large population that is heavily exposed can be difficult to find as large workforces tend to be well regulated through the enforcement of occupational health standards, inspections by OSHA, and the imposition of fines for failure to comply.28 Further, the legacy of past heavy exposures in large worker populations can be difficult to study if there is an extended latency period before the adverse effect occurs. For example, a mesothelioma may not become manifest until decades after the initial exposure to asbestos, at which time it is difficult to perform follow up on the original cohort of workers or determine their levels of exposure.29

Smaller workforces, including the individual contractor or subcontractor, are often at a greater risk.30 It is in these poorly regulated workforces that unusual and unsafe uses of chemicals tend to result in much higher individual exposures. But it is also these workforces in which exposure measurements are unlikely, and estimates of exposure are difficult to determine. Again, the passage of years between the exposure and the resultant health effect complicates estimation of specific work practices, or of the dilution factors related to ventilation of the workplace, or even the

28 A particularly problematic exception is the presence of subcontractors working among the industry’s own employees. These subcontractors may not receive the same safety training or protective equipment. Michael Gochfeld & Sandra Mohr, Protecting Contract Workers: Case Study of the U.S. Department of Energy’s Nuclear and Chemical Waste Management, 97(9) AM. J. PUB. HEALTH 1607–13 (2007).

29 While this is not the place to discuss the issue, the continued failure of some judicial jurisdictions to allow the latency period to affect a statute of limitations for bringing a toxic tort case is also a reductionist approach that rejects scientific knowledge. See CARL F. CRANOR, TOXIC TORTS: SCIENCE, LAW, AND THE POSSIBILITY OF JUSTICE 173 (2006).

30 The hobbyist working at home in an enclosed space similarly can have exposures well above those acceptable in the workplace.
extent of use of the putative causal agent.

Another complication is that there can be exposure situations in the poorly regulated workplace that are difficult to measure such as leaking valves at a particular site within the complex or the washing of hands or clothing in solvents. For example, workers are quick to observe that using an available solvent such as benzene can be an effective way to remove greasy substances from their hands or work clothes at the end of the work day, but this results in significant yet unmeasured transdermal exposure. This risky practice can and should be prevented by rigorous job training and precautionary approaches; unfortunately, these preventative measures are not usually employed at a poorly regulated work site or by a home hobbyist.

It is a reasonable approach for the expert reviewing a toxic tort case to compare the plaintiff’s exposure with that described in the epidemiology literature. Specifically, the expert can determine how the work practices described by the plaintiff compare with the work practices and resultant exposure of the cohorts of workers in which epidemiologic evidence of a cause and effect relationship has been reported. As an example, an individual working by him or herself in a confined workspace with an open vat of a volatile substance which splashes on their skin and clothes may have far more exposure than reported for workers in a cohort with an observed increase in cancer risk who worked in a large factory with much less opportunity for such high level exposure. A careful history of the plaintiff’s workplace practices can enable an expert to assess how the plaintiff’s exposure compared to that observed in cohorts in which an association between the exposure and the effect was reported.\footnote{Information about usual work practices requires expertise such as that found in practitioners of occupational medicine, occupational safety, or industrial hygiene. This expertise can be subject to usual judicial approaches to admissibility of expert opinion.}

Note that an indirect approach to estimation of dose can be of benefit to the defense as well as the plaintiff. For example, assume John Doe claims his leukemia was caused by chronic workplace exposure to benzene at a level of 10 parts per million (ppm) in air,
eight hours per day. Doe sues the manufacturer of a solvent mixture used in his work, alleging that it was the benzene in the solvent that caused his leukemia. Assume we know that the solvent mixture contains 0.1% benzene (1 part per thousand) and that the mixture and benzene have similar volatility. Doe’s claim can be readily disposed of by estimating what dose of solvent mixture would have been required to expose him to 10 ppm benzene. To get an exposure level of 10 ppm benzene, Doe’s exposure level for the solvent mixture could be approximated as 10,000 ppm, but this is well above the lethal dose of most solvents. Had he been exposed to that much solvent, Doe would have lost consciousness and died within a matter of minutes—long before he could have developed leukemia.

**B. The Potential Misuse of Dose-Based Regulatory Standards as Evidence in a Toxic Tort Case**

Exposure to a pollutant level that exceeds an environmental regulatory standard is often used as evidence in a toxic tort case to support the likelihood of a causal relation between the exposure and the effect. There are two major reasons why this assumption is contrary to the way dose is incorporated into regulatory standards. First, dose is concentration multiplied by duration. Occupational or environmental standards are rarely set for instantaneous exposure levels, but rather are for durations of time that are chosen to be pertinent to the health issue of concern.\(^{32}\) For cancer-causing chemicals, the usual duration of concern is lifetime. Thus, being

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\(^{32}\) An example of considerations related to the duration of the exposure is provided by the change in the averaging time of the ozone standard to eight hours after three decades of being at one hour. The change was based on the recognition that prolongation of the morning rush hour and travel of ozone precursors for long distances led to elevated ozone concentrations extending throughout daylight hours rather than just being a one hour peak following morning rush hour; that there were cumulative toxic effects of ozone exposure over multiple hours; and that children, who are particularly at risk to ozone, were likely to be out of doors and active for many hours during summertime high ozone days. P.J. Rombout et al., *Rationale for an Eight-Hour Ozone Standard*, 36 J. AIR POLLUTION CONTROL ASSOC. 913–17 (1986).
exposed for just a few hours to a level slightly above the concentration that would be allowed for a lifetime is of little risk consequence. Second, the dose chosen for a regulatory standard is based on societal goals for relatively low risk, usually far below the risk that would be equivalent to “more likely than not.” For cancer-causing agents, long term environmental risk goals are usually in the range of 1/10,000 to 1/1,000,000 lifetime, although higher risk levels are sometimes accepted in setting workplace standards. For non-carcinogenic agents causing acute and/or chronic toxicity, the allowable standard usually has built in safety factors to account for uncertainties in the data and to protect susceptible individuals. The extrapolation methods used for cancer or non-cancer endpoints depend upon an understanding of the toxicological mechanisms involved in the dose response relationship.

One can not directly compare a risk-related standard with “more likely than not” in that the former is based upon an absolute risk while the latter is a comparative risk. For example, the absolute risk standard might be set at one cancer among 100,000 individuals exposed for a lifetime. If the background risk was a 1% lifetime risk of this cancer among all Americans (i.e., 1,000 among 100,000 lifetime), then exposing 100,000 citizens lifetime to the minimum allowable level would lead to 1,001 cancers in this population. For any one of these individuals, the likelihood that their cancer was due to the allowable exposure level is 1/1,001—far below a “more likely than not” bright line. However, if this were a very rare cancer, such that the lifetime background incidence was only 1/100,000 Americans, then lifetime exposure at the allowable concentration would double the number of cases, one of which would be due to the chemical exposure. Risk assessors are rarely presented with the latter scenario because scientists would be unaware of the scenario even if it did exist.

Note that the goal of environmental health science is that all decisions about regulating synthetic chemicals should be based solely on animal or in vitro data. By definition, an epidemiological study demonstrating a cause-and-effect relationship in humans represents a failure of toxicology as a preventive science. Ideally, there should be enough information about a new chemical from safety assessment in laboratory animals, and enough strength in our public health infrastructure, such that no adverse consequences from exposure to this chemical ever occur in humans.
V. **SYSTEMS APPROACHES VS. REDUCTIONISM: ARE ENVIRONMENTAL HEALTH SCIENCE AND TOXIC TORT JURISPRUDENCE GOING IN DIFFERENT DIRECTIONS?**

Environmental health science and toxic tort law appear to be going in opposite directions. The various disciplinary components of environmental health sciences are increasingly complex and interrelated. Boundaries between these disciplines are becoming blurred. Systems approaches are increasingly recognized as the methods by which scientific reasoning will improve our understanding of causal relations. In contrast, the American judicial system appears to be responding to the increasing breadth and complexity of environmental health science by searching for simple unidimensional solutions for toxic tort issues which increasingly exclude modern scientific reasoning. The *Daubert*\(^\text{35}\) decision and its progeny, providing judges with the role of gatekeeper, has furthered this trend to reductionism.

The emphasis on systems approaches, in contradistinction to reductionism, is not restricted to environmental health sciences but is rather part of the scientific worldview of the early 21st Century. This reflects the maturation of the scientific community in recognizing that understanding our planet and its components requires approaches that transcend any single discipline.\(^\text{36}\) It also reflects the recognition by those responsible for the funding of science that there is a growing gap between scientific advances and the applicability of these advances for the public good.

The emphasis on multi-, inter- or trans-disciplinary science is increasing, as is the emphasis on translation of science to decision makers. The breadth and depth of this emphasis is evident in the new directions taken by major science funding organizations, such


\(^{36}\) Even as seemingly narrow a field as high energy physics has been evolving toward multidisciplinary research as the norm. NATIONAL RESEARCH COUNCIL, COOPERATIVE STEWARDSHIP: MANAGING THE NATION’S MULTIDISCIPLINARY USER FACILITIES FOR RESEARCH WITH SYNCHROTRON RADIATION, NEUTRONS, AND HIGH MAGNETIC FIELDS (National Academy Press 1999).
as the National Science Foundation (“NSF”) and the National Institutes of Health (“NIH”). Similarly, the translation of science to the public is receiving greater emphasis, particularly at NIH as Congress asks for evidence that the doubling of the institute’s budget has been of value to taxpayers. This relatively new pursuit of science translation emphasizes the involvement of multiple disciplines. Increasingly, funding of new scientific research by these organizations requires teams of scientists from a broad range of disciplines. The current head of the NIH has used funds taken from each of the NIH components for competitive new interdisciplinary centers.37

As the science becomes more complex, the judicial system appears, at least in part, to have become more reductionist in its approach. An example of this reductionist approach is the search for a bright line, such as a relative risk of 2.0, which some courts use as a measuring stick by which to evaluate toxic tort claims. It is a human trait to look for some simplifying concept that cuts through a confusing mass of detail to provide answers that can be phrased as yes or no, and this trait is magnified by the extent to which one is unfamiliar or uncomfortable with the tenets of the field.38

Perhaps one of the reasons courts are becoming more reductionist in their approach to evaluating toxic torts is that judges


38 See infra text accompanying footnotes 50–51 for three specific examples in which certain courts would automatically reject the scientific evidence supporting more than a doubling of risk (RR > 2.0) for an individual plaintiff.
are familiar with situations in which a bright line does exist, e.g., drunk driving statutes and speed limits. Even in these cases, however, judges recognize that there are imperfections in the measuring device.\textsuperscript{39} It is hard to imagine anyone getting fined for a blood alcohol level of 6.0 mg/100 ml (the inherent variability of the measurement is at least 0.1 mg). We also all know that we can with impunity drive 57 mph in a 55 mph speed zone. Similarly, a strictly applied bright-line rule is inappropriate in toxic tort cases as the technical precision of the determination of relative risk in an epidemiological study is usually far more imprecise than a blood alcohol determination or a radar gun.

As described above, “weight of evidence” is a relatively formal approach that attempts to encapsulate the scientific judgment of the broad scientific community using all of the evidence on hand. In a toxic tort case, the basis for the judgment of an individual expert witness is subject to intense review. Lawyers insist on the expert delineating the specific scientific publications or authoritative texts on which the expert’s opinion is based, and then subjecting each source to intense scrutiny. Any limitation is highlighted, and virtually all studies have limitations. The usual scientist’s hesitancy to be absolutely certain is exploited to the fullest.\textsuperscript{40} While a weight of evidence approach will consider the totality of the evidence, including limitations, the lawyer will attempt to discard every paper that is less than perfect—clearly a reductionist approach.\textsuperscript{41}


\textsuperscript{40} Note that a scientist has little to lose by being careful about an original observation. If the scientist turns out to be correct, he or she will get full credit. If incorrect, the hesitancy will protect the scientist’s reputation. As a corollary, a vociferous assertion that their interpretation must be right runs counter to the culture of science and is not a way to favorably impress one’s colleagues.

\textsuperscript{41} Using the technique of going into minute detail about every study underlying the weight of evidence, with the intention of discarding the foundation for an otherwise sound scientific conclusion, has been called “corpuscularization” when applied to regulatory law or toxic torts. Thomas O. McGarity, On the Prospect of “Daubertizing” Judicial Review of Risk Assessment 66 L. & CONTEMP. PROBS. 155, 155, 157 (2003); Thomas O.
There is justification for attempting to simplify science in a toxic tort case. A legal decision cannot wait for a complex scientific issue to become clarified. Further, many of the questions faced in toxic tort cases may be one of a kind—is it more likely than not that this specific exposure situation led to this specific adverse outcome in this specific individual? The judicial system certainly needs to make decisions in a timely fashion based upon the evidence at hand. However, the current process is not achieving this goal in a manner that is based on the best possible science and, accordingly, the process is unfair for both the plaintiff and defendant. Further, this attempt at simplification does not excuse the almost total disregard of the scientific discipline of toxicology.

I now discuss two examples of the law’s search for simplification of environmental science and give examples of dose issues that seem to be ignored in this search.\(^\text{42}\)

\textit{A. The Havner Rule As A Trend Toward Simplification}

The Havner Rule in Texas reflects the trend toward simplification when courts determine whether an epidemiological finding of more than doubling of a relative risk (RR 2.0) satisfies the “more likely than not” evidentiary rule employed in tort litigation.\(^\text{44}\) The Havner Court found for the defendant and ruled

\textit{McGarity, Our Science is Sound Science and Their Science is Junk Science: Science-based Strategies for Avoiding Accountability and Responsibility for Risk-producing Products and Authorities, 52 U. KAN. L. REV. 897, 921–22 (2004).}

\textit{I was an expert for the plaintiff in a case in which the jury’s verdict was overturned by a Havner appeal, Exxon Corp. v. Makofski, 116 S.W.3d 176 (Tex. 2003), and I provided an opinion concerning summary judgment for the plaintiff in the Parker case. My involvement in toxic tort cases through the years, and currently, has been roughly equal for defendants and for plaintiffs.}

\textit{Merrell Dow Pharmas. v. Havner, 953 S.W.2d 706, 716 (Tex. 1997).}

\textit{Several authors have written about the issue and the shortcomings of using RR > 2.0 as a surrogate for the “more likely than not” standard. See, e.g., Sander Greenland, Relation of Probability of Causation to Relative Risk and Doubling Dose: A Methodologic Error That Has Become a Social Problem, 89 AM. J. PUB. HEALTH 1166 (1999); Sander Greenland & James M. Robbins, Epidemiology, Justice, and the Probability of Causation, 40}
that the expert evidence submitted by the plaintiffs was not scientifically reliable to prove that the birth defect suffered by their child was due to the drug Bendectin. The court established a benchmark for general causation of at least two published epidemiological studies in which there was a statistically significant relative risk greater than 2.0.

The reasoning used by the Havner Court is straightforward. If in a given population of exposed individuals, ten individuals were expected to suffer from a specific disease without any exposure, and an epidemiological study shows that in fact there were nineteen diagnosed with the disease (a RR of 19/10 = 1.9), then for any one of these individuals it is more likely than not (10 to 9) that they belong in the group who would have contracted the disease for a reason unrelated to the exposure. However, if the epidemiological study finds that 21 were diagnosed with the disease (RR 21/10 = 2.1), then for any one of these individuals it is more likely than not (11 to 10) that they belong in the group who have contracted the disease from the exposure rather than the group who would have developed the disease without the exposure. In addition to the RR 2.0 threshold, the Havner rule requires that each of the two studies showing a RR > 2.0 be statistically significant at the 95% level.\footnote{Havner, 953 S.W.2d at 727 (“[A] single study would not be viewed as indicating that it is ‘more probable than not’ that an association exists.”).}

\begin{itemize}
\item This includes a study by my colleague Russellyn Carruth that charts the extent to which this bright line is being used for general or specific causation and considers the scientific and public health problems posed. Russellyn S. Carruth & Bernard D. Goldstein, Relative Risk Greater than Two in Proof of Causation in Toxic Tort Litigation, 41 JURIMETRICS 195 (2001). Among these problems is the healthy worker effect. Workers are much healthier than the general population for many causes of death (e.g., a major cause of lymphoma is HIV/AIDS. Intravenous drug addicts at high risk for HIV/AIDS are far less likely to be part of a chemical or petrochemical industry work force). If the workforce has a 25% lesser likelihood of dying of a specific disease than the general population (i.e., RR = 0.75), introduction of a chemical that doubled this risk would lead to RR = 1.5 compared to the general population. There are also issues related to the biological model chosen. J. Beyea & Sander Greenland, The Importance of Specifying the Underlying Biologic Model in Estimating the Probability of Causation, 76(3) HEALTH PHYS. 269 (1999).
\end{itemize}
The Havner requirement for more than one study with a RR > 2.0 also appears to take out of context epidemiologists’ skeptical rule of thumb concerning risks that are not very high above normal levels. This skepticism is warranted by three common and related problems in epidemiology: the vagaries of statistical variation, the cluster fallacy, and “publication bias.” However, this rule of thumb is primarily applicable to initial unconfirmed reports that do not fit into scientific expectations based upon the totality of the information available. In applying this rule of thumb, scientists are in essence weighing the preponderance of evidence. The Havner

The “cluster fallacy” is inherent in how the choice is made as to what is to be studied. For example, of 200 elementary schools in a city, the normal statistical distribution of childhood leukemia implies that 190 schools have levels of leukemia within the 95% statistical distribution; 5 schools have less than this 95% expectation and 5 schools have more leukemia during a specific time period. It is not unlikely that parents in one of the schools with a high incidence of leukemia will raise the alarm to public health authorities (and to newspapers). The public health authorities will do an epidemiological study confirming that the observed incidence indeed exceeds the 95% expectation, but there is no likelihood that the parents in the low incidence school will ask for a study because the lower incidence of leukemia among their children would not be noticed. Recognition of disease clusters has been the basis for discovery of new and unexpected causal relationships, such as hepatic angiosarcoma and vinyl chloride, but most clusters turn out to be chance associations. “Publication bias” is related to clustering in the sense that career considerations lead epidemiologists to prefer to pursue data that at least preliminarily show an association rather than those that do not. In part, this is due to the importance of publishing in better scientific journals and the natural reluctance of editors of these competing journals to publish negative data. If at first look there does not appear to be a publishable finding, the observation is not pursued and no scientific paper results. An overview of the issues presented by cluster investigations can be found in D. Wartenberg, Should We Boost Or Bust Cluster Investigations?, 6(6) EPIDEMIOLOGY 575–76 (1995).

Havner, 953 S.W.2d at 716. As one example, Dimitrios Trichopoulos, a Harvard epidemiologist, reacted negatively to being quoted in an article about epidemiological evidence as saying that only a fourfold increase in risk should be taken seriously. In his letter he stated, “This is correct, but only when the finding stands in a biological vacuum or has little or no biological credibility.” Dimitrios Trichopoulos, The Discipline of Epidemiology, 269(5229) SCIENCE 1326 (1995). He then went on to cite such epidemiological findings as the 3% difference in births of males as compared to females. Id.
rule and other jurisdictions that rely solely on epidemiology strip away the animal and in vitro studies that form such a large part of the preponderance of evidence about toxic agents.

It is understandable that judges want to provide a simplified way to interpret the maze of science related to toxic agents. There are good reasons to do so, particularly given the crowded court calendars and high cost of toxic tort litigation. Extrapolation among scientific findings can be difficult, but the reductionism involved in the Havner rule goes well beyond what is needed to prevent obfuscation by experts waving scientific evidence as a flag rather than weighing it as an aid in the understanding of judges and juries.

Below are three hypothetical examples that are fully consistent with either the “more likely than not” or “preponderance of proof” rationale for a doubling of a relative risk, but such examples would be excluded from consideration in Texas because of the failure to exceed either the RR > 2.0 or the 95% statistical significance test. Two of the examples refer to dose, which, as noted earlier, is defined as concentration multiplied by the duration of exposure.48

As another example, the relation of cigarette smoking to cancers other than lung cancer is often characterized by statistically significant relative risks less than 2.0. The risk of bladder cancer in European men after 20 years of smoking is reported by World Health Organization scientists as an odds ratio of 1.96 with a 95% confidence interval of 1.48 to 2.61. P. Brennan et al., Cigarette Smoking and Bladder Cancer in Men: A Pooled Analysis of 11 Case-Control Studies, 86(2) INT. J. CANCER 289 (2000).

One can derive another hypothetical from the latter study similar to Example 2 below. Assume that in this study of bladder cancer and cigarette smoking the average extent of smoking was one pack a day for the 20-year period. Also assume a plaintiff with bladder cancer could demonstrate that he smoked two packs a day for 20 years; that, as well known, other effects of smoking were roughly twice as high in those who smoked two packs as compared to one pack a day; and that there was ample literature demonstrating that the more one smoked, the more carcinogens are found in the urine having first passed through the bladder. Further, the plaintiff had no other competing causes of bladder cancer and the plaintiff’s age-related risk was no different than reported in the study. From a toxicologist’s viewpoint, based on this set of facts it is obvious that a two pack a day smoker for twenty years has more than a doubling of risk of bladder cancer. Notwithstanding, this case would be precluded in a jurisdiction requiring RR > 2.0 for general causation.

48 The difference in how toxicological scientists and the Texas Supreme
The third example relates to statistical significance.\(^{49}\)

**Example 1. Dose Dependency: The Effect of Duration**

Assume that there is a common workplace process that consistently exposes workers to 10 parts per million (ppm) of chemical XYZ in the air throughout the workday, and that chemical XYZ is supplied by a chemical company that allegedly should have communicated about XYZ’s potential for risk. XYZ is found to produce a specific adverse effect in laboratory animals in a dose dependent fashion. These findings in laboratory animals lead to two studies of cohorts of exposed workers which show that there is an 80% higher incidence of this adverse effect than expected (i.e., RR 1.8), and that in each study the increase in risk is statistically significant at the 95% level. The average duration of exposure in the workers is fifteen years. In subsets of workers exposed for periods greater than thirty years, there is, as expected, twice the relative risk than observed in those exposed for fifteen years (i.e, a 160% Court view dose is evident from *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007), a recent Texas Supreme Court decision extending *Havner*. In this decision the court repetitively referred to the “dose makes the poison” as a major rationale for reversing a lower court finding in favor of a plaintiff exposed to asbestos while working on brake lining. *Id. at 770. See also Parker v. Mobil Oil Corp.*, 793 N.Y.S.2d 434 (N.Y. App. Div. 2005), *aff’d*, 857 N.E.2d 1114 (N.Y. 2006), *reh’g denied*, 861 N.E.2d 104 (N.Y. 2007); *but see Chapin v. A&L Parts, Inc.*, 732 N.W.2d 578 (Mich. Ct. App. 2007); Laura S. Welch, *Asbestos Exposure Causes Mesothelioma, But Not This Asbestos Exposure: An Amicus Brief to the Michigan Supreme Court*, 13 INT’L. J. OCCUPATIONAL & ENVTL. HEALTH 318 (2007). As noted by John S. Gray, “*Some* is No Longer Enough in Texas Toxic Tort Cases, 45 HOUSTON LAW. 54 (2007), the Texas court in *Borg-Warner Corp. v. Flores* required that there be epidemiological findings specifically for brake lining workers. 232 S.W.3d at 7. They further require that if there are multiple defendants contributing to the asbestos levels, only those whose dose is a substantial factor can be held liable. *Id. at 4; see also Richard O. Faulk & Joy E. Palazzo, Texas High Court Heightens Scientific Evidence Standards*, 22 LEGAL BACKGROUND 1 (2007).

\(^{49}\) What is unrealistic about these examples is the absence of any mechanistic data about XYZ that would help interpret the epidemiologic data. Such data would exist, or be rapidly obtained after XYZ was reported to be a potential human toxin, but would not be admissible in these instances.
higher incidence which is equivalent to RR 2.6, i.e., more than a doubling of risk), but because the groups are small, the findings are not statistically significant for these subsets. Under Havner, the workers with the longer exposure would not be able to sue, despite the evidence from laboratory animals of dose dependency and the reasonable expectation that doubling the duration of exposure would double the risk such that it would be greater than 2.0.

**Example 2. Dose Dependency: The Effect of Concentration**

Assume that chemical XYZ had been found to be particularly useful by a small business owner specializing in restoring antique cars. He has used XYZ almost every work day for fifteen years in his poorly ventilated shop before developing the specific adverse effect now shown in epidemiological and animal studies to be causally related to chemical XYZ. An expert industrial hygienist has estimated that daily workplace exposure averaged 100 ppm, which is ten times higher than that in the much larger workplaces on which cohort studies are based. A physician toxicologist reviewing the dose-response data is prepared to testify that in keeping with this dose response data, the risk for an individual exposed at the workplace to 100 ppm daily for fifteen years is ten times higher than the 80% increase observed in the cohort of workers exposed to 10 ppm for an average of fifteen years (as a simplification, this would be equivalent to an 800% increase in risk or RR 9.0).

If the exposure and the dose response estimations are correct, it is far more likely than not that this individual is suffering from the adverse effect due to exposure to XYZ. Notwithstanding this scientific determination, the plaintiff cannot present his claim before a jury in a Texas state court or in any other jurisdiction that requires dose-specific epidemiological evidence of RR > 2.0 for general causation.50

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50 An individual’s anachronistic exposure to a very high chemical dose is often the basis for human harm, but is usually too rare for an epidemiologic study.
Example 3. Statistical Inconsistency

Assume that there are only two epidemiologic studies on chemical XYZ in cohorts of workers. The first study, in a large cohort, reported a statistically significant RR > 2.0. The second study, despite a relative risk of 6.3, has a smaller cohort size and 95% confidence intervals of 0.9–16.8, (i.e., it is not statistically significant at the 95% level). The plaintiff’s claim would fail the Havner test as there would be only one study that is statistically significant at the 95% level. A researcher could calculate a 50% confidence limit as well as a 95% confidence limit from the data in the second study, however. A 50% confidence limit is basically the range within which 50% of the likely outcomes would fall. If the lower limit of the 50% confidence limit was above 2.0, it is consistent with “more likely than not” (i.e., more than half the expected outcomes are above a relative risk of two). Requiring a plaintiff present scientific evidence with RR > 2.0 and statistical significance at the 95% level is in reality more strict than “more likely than not,” even if one were to accept that an epidemiological finding of RR > 2.0 is an appropriate criterion. It also seems contradictory to insist that the science used in a toxic tort case should conform to a nineteen to one ratio of certainty (which essentially is a 95% confidence level), while at the same time focusing on “more likely than not.”

B. The Parker Rulings: Struggling With Chemical Risk

The Parker litigation is an example of decisions from two levels of the New York State judiciary that appear to run counter to how toxicological scientists consider dose issues in cause and effect relationships, although the higher court overruled the lower court on one of these issues. Both the trial court and the appellate

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52 Id.
court implement reductionist approaches in the sense that neither court permits an expert to bring to court the full range of scientific evidence that would appropriately and logically be used in forming an expert opinion. In Parker, the plaintiff had worked for seventeen years as a gas station attendant and claimed that he had a particularly high level of exposure to gasoline due to his work practices which led to his developing acute myelogenous leukemia.\textsuperscript{53} Gasoline is a blend of chemicals that in its usual formulation always contains benzene. There was no argument on general causation as benzene is a known cause of this disease. The Appellate Division of the New York Supreme Court granted a motion from the defendants to dismiss the complaint, primarily because the plaintiff’s expert reports had failed to quantify the exposure beyond claiming it was higher than that observed in cohorts of petroleum refinery workers. On appeal, the New York Court of Appeals rejected the Appellate Division’s requirement that the amount of exposure must be quantified exactly.\textsuperscript{54} Notably, the Court of Appeals nonetheless found for the defendants based on the failure of the plaintiff to show epidemiological evidence that exposure to gasoline causes leukemia.\textsuperscript{55}

If the court’s finding was carried to its logical conclusion, one could never assign causation to any benzene source except to pure benzene and to a specific benzene-containing mixture for which there is already epidemiological evidence. Industry would be able to market any benzene mixture for which there is now no epidemiological evidence without fear of toxic tort litigation because the specific mixture had not been studied.\textsuperscript{56}

Benzene exposure leading to health effects historically has been to benzene in mixtures. This is in part because commercial grade benzene usually had substantial amounts of related hydrocarbon solvents that traveled with benzene during the crude refinery processes of the past. Thus, in the past, compounds such as

\textsuperscript{53} Id. at 442.
\textsuperscript{54} Id. at 438.
\textsuperscript{55} Id. at 438–39.
\textsuperscript{56} Gasoline is a blend that contains various amounts of benzene; usually 1-2\% in the United States but up to 5\% in other countries.
toluene, ethyl benzene, xylenes and cumene—none of which cause leukemia—were often heavily contaminated by benzene. The extent of contamination in the past led to the erroneous belief that toluene was also a cause of bone marrow damage—the hallmark of benzene toxicity. In addition to the vagaries of the refinery processes, the level of benzene in these aromatic mixtures also depended on commercial needs. For example, removal of toluene from benzene becomes more commercially viable during wartime when toluene is used as a base for the production of trinitrotoluene ("TNT").

There was never any question that Parker was exposed to benzene, and there was never any question that benzene is a cause of acute myelogenous leukemia. Instead of considering whether the dose of benzene was sufficient under the circumstances of Parker’s work practices, the court acknowledged that benzene was a medically probable cause of his leukemia but nevertheless enforced a requirement for epidemiology that cannot conceivably be performed under the circumstance in which the plaintiff alleges he was exposed.\(^{57}\) There simply are not enough individuals with this particular work practice to ever be sufficient for an epidemiological study.\(^{58}\)

\(^{57}\) “Key to this litigation is the relationship, if any, between exposure to gasoline containing benzene as a component and AML.” Parker v. Mobil Oil Corp., 857 N.E.2d 1114 (N.Y. 2006) (emphasis in original). The court in Parker cited two other cases recognizing that an expert may not need to establish an exact number for the dosage at which a substance is toxic and the amount of exposure the plaintiff experienced. \textit{Id.} at 1121 (citing McClain v. Metabolife Intl., Inc., 401 F.3d 1233, 1241 n.6 (11th Cir. 2005); Wright v. Willamette Indus., Inc., 91 F.3d 1105, 1107 (8th Cir. 1996)).

\(^{58}\) I am not arguing that exposure to benzene in gasoline is or is not a reasonable medical probable cause of blood cancers. My short letter opinion on the Parker case was solely limited to whether the defense’s request for summary judgment was justified. I did not opine on whether it was more likely than not that the plaintiff’s exposure was the cause of his leukemia. My three arguments in favor of letting the case go to a jury were that the description of the plaintiff’s exposure, including dermal exposure, would lead him to have higher exposure than observed among gasoline refinery workers; that there was at least some epidemiological evidence of a more than doubling of risk in these workers for which I cited one study; and that the plaintiff was relatively unique in having a
While recognizing that I am arguing as a toxicologist and not a legal expert, it nonetheless seems that the burden of proof should be on the defense to argue that, per unit dose, benzene in gasoline is any less likely to be a cause of leukemia than benzene in any other mixture. Instead the burden of proof is now on the plaintiff to demonstrate epidemiological evidence that benzene in a specific mixture is a cause of leukemia, despite the fact that benzene itself is fully accepted as a cause of leukemia. In essence, the action of the court was to replace a scientific argument concerning dose and specific causation. The court did so with a requirement for an epidemiological study to prove general causation before being able to consider specific causation. 59

VI. THE EXCLUSION OF ANIMAL TOXICOLOGY AND MECHANISTIC INFORMATION FROM TOXIC TORTS: LEGAL REDUCTIONISM

To a toxicologist, the reductionist tendency of the law that is most difficult to understand is the often seemingly dismissive attitude of toxic torts jurisprudence to the science of poisons. The failure to consider toxicology does a disservice to defendants as well as plaintiffs. It is quite possible to construct a large reference list of agents that have been epidemiologically associated with history of radiation exposure. Atom bomb survivors who developed leukemia are reportedly more likely to have workplace benzene exposure than those who did not develop leukemia. Toranosuke Ishimaru, Occupational factors in the epidemiology of leukemia in Hiroshima and Nagasaki, 93(3) AM. J. EPIDEMIOLOGY 157–65 (1971).

59 This is similar to arguing that there is a need for an epidemiologic study demonstrating that a Chevrolet can cause trauma if it runs into a pedestrian if prior studies only involved Fords. When it comes to damaging a human, automobiles are automobiles, and benzene is benzene. Both products have the potential, but the extent of damage, if any, depends upon the circumstances. In this case the court prevented the jury from hearing the circumstances. Two authors that take up the issue of jury exclusion are CARL F. CRANOR, Judge-Jury Responsibilities and the Right to a Jury Trial, in TOXIC TORTS: SCIENCE, LAW, AND THE POSSIBILITY OF JUSTICE 70, 70–71 (2006) and Michael H. Gottesman, From Barefoot to Daubert to Joiner: Triple Play or Double Error?, 40 ARIZ. L. REV. 753, 776 (1998).
virtually any disease, and these lists are readily accessible to the plaintiffs’ bar.

The body of studies associating specific agents with a number of different diseases reflects the many epidemiological studies that attempt to uncover previously unobserved relationships by searching for associations among large databases. These are often called “hypothesis generating” studies. Such studies are highly appropriate in that they contribute to developing further studies aimed at specifically exploring the possible cause and effect relationship generated in the initial study. However, hypothesis generating studies have the inherent weakness that some statistically significant association will occur when there are enough questions being asked. For example, a common approach is to start with the diagnoses in a given hospital population, or the causes of mortality stated on death certificates in a given geographical location, and relate these to the occupation of the hospital patient or the potential environmental factors associated with a geographical location. There are many different diseases, many different occupations, and many different localized environmental factors. Using a standard statistical approach in which in essence one chance variation out of 20 is reported as statistically significant, it is inevitable that some associations of some disease with some chemical will be noted.

Many studies retrospectively look at what has happened in the past. Testing the hypotheses generated in such studies can be done in a number of ways, including further epidemiological studies. A more probable response, which is far quicker and far less expensive, are toxicological studies in laboratory animals searching for the same effect, or mechanistic studies aimed at determining if there is a likely pathway by which the chemical causes the putative effect, rather than just a statistical association with no causality.60

60 An example of both a hypothesis-evaluating and hypothesis-generating study is the Agricultural Health Study, a large scale study of the health of farmers by the National Cancer Institute. M.C. Alvanja et al., *The Agricultural Health Study*, 104(4) ENVTL. HEALTH PERSP. 362 (1996). The study is aimed at testing the cancer risk of American farmers and follows a number of smaller studies that have reported an increased risk of non-Hodgkin’s lymphoma and other cancers. Over 80,000 farmers are being followed prospectively, with careful
It is appropriate to fully depend upon studies in humans if there is direct epidemiological evidence of the tort and there are no competing causes in the individual for exposure to the agent or risk factors for the disease. In most instances there is little or no direct epidemiological evidence related to the plaintiff’s exposure. Instead inferences that often depend upon an analysis of all of the pertinent information for scientific acceptability must be made from the existing epidemiological literature.

In epidemiology, the gold standard has long been the randomized double blind control trial. This standard, although difficult, can be achieved when testing drugs or other therapeutic approaches. However, it cannot be achieved in epidemiological studies of chemicals in the workplace or general environment. Inevitably, such studies are observational studies with various degrees of strengths, but all requiring some degree of inference or extrapolation. While it is true that animal toxicology always requires extrapolation across species, it is also true that animal toxicology can be rigidly controlled in a way that is not possible in epidemiological studies of the workplace or the general community.61

A classic cohort epidemiological study will often describe a

attention to present and past exposures to pesticides and other chemical and biological agents common to agricultural activities. A comprehensive health and exposure questionnaire has been developed that seeks information on multiple health endpoints. The prospective study should have ample power to test hypotheses related to farmers and cancer, but the questionnaire inevitably leads to hypothesis-generating studies. See George M. Gray et al., The Federal Government’s Agricultural Health Study: A Critical Review with Suggested Improvements, 6(1) HUM. & ECOLOGICAL RISK ASSESSMENT 47 (2000). For example, there are 800 possible associations in a study evaluating 20 different pesticides and 40 different health endpoints. It is inevitable that there will be statistically significant associations between a specific pesticide and a specific health endpoint that occur by chance alone. Statistical correction factors are used to approach this problem, but as the goal is the generation of hypotheses rather than the assignment of causation, it is not inappropriate that the association be reported and left for others to explore whether true causality exists. This will often depend upon animal toxicology and mechanistic studies.

relatively large number of workers of whom usually only a small percent suffer from the disease of interest. Further, not all of the cohort is substantially exposed to the agent of concern. This is in contrast to a drug trial in which everyone in the treatment group receives the same dose of a drug and everyone in the control group receives a placebo.

Toxicological research focusing on the mechanism of action of chemicals can also be useful in clarifying medical nomenclature—an issue that can present a problem to judges and juries. In the field of medicine, the nomenclature of disease is usually based on what is observable. One example is asthma, the diagnosis of which depends primarily upon whether an individual has the particular type of breath sound known as a wheeze. In essence, asthma is purely a descriptive term depending upon a physical sign. Wheezing reflects the narrowing of major airways within the lung and is a final common denominator of many different types of extrinsic causes and intrinsic susceptibilities.

Advances in molecular biology will allow us to discard the term asthma and use diagnostic terms that describe the direct intrinsic or extrinsic causes of lung disease that is accompanied by wheezing. The opposite occurs for other diseases, such as leukemia, for which

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62 Classic epidemiological studies evaluating the mortality of a petrochemical or chemical industry workforce can underestimate true effects at the work site both by including workers whose exposure is relatively minimal, e.g., those working in the cafeteria or in accounts payable, and by excluding those who may have high exposure but who work for subcontractors rather than the industry, e.g., maintenance workers who clean up after product spills, or as in a recent Delaware case, millwrights who replace leaky valves. Texaco to Pay Worker’s Widow $2.84 Million, DELAWARE ONLINE, 2007, available at http://www.delawareonline.com/apps/pbcs.d11/article?AID=/20071106/NEWS/711060390.

Some of the problems of cohort studies can be approached by nested case control studies. For example, in a study of refinery workers whose overall relative risk was slightly less than 1.0, a nested case control study found that for those who did develop leukemia there was more than a doubling of risk that they were exposed to higher rather than lower doses of benzene at the workplace. L. Rushton & M.R. Alderson, A Case-Control Study to Investigate the Association Between Exposure to Benzene and Deaths from Lukemia in Oil Refinery Workers, 43 BRIT. J. CANCER 77 (1981).
nomenclature tends to split diseases that are closely related. The recognition of different subtypes of leukemia is abetted by the ready availability of blood or bone marrow which allows microscopic observation of multiple samples as the disease progresses—something that, at least until recently, has been unusual for cancers of most other organs for which a biopsy is a relatively major procedure. Thus, differences in morphology could readily be related to differences in clinical course or outcome. Yet with the use of modern molecular biology, we find that there are overlapping molecular characteristics between such disorders as acute myelogenous leukemia, the form more commonly observed in adults, and acute lymphoblastic leukemia, the form more commonly observed in children. This is not surprising as both the lymphocytic and myelocytic cell series derive from a common pluripotential cell. If the mutation that leads to cancer occurs sufficiently early in the differentiation process, the cancer will have characteristics of both cell series.  

63 The medical literature also tends to be confusing for toxic tort litigation because of the organizational structure of medical specialties and their journals. For example, a relatively minor brain tumor type is a solitary lymphoma. The patient will usually present to a neurologist for the evaluation of symptoms related to a space-occupying lesion in the central nervous system. After biopsy demonstrating a lymphoma, and further evaluation that shows that the lymphoma is localized to the one location in the brain, the neurologist will identify the patient as suffering from a Primary Central Nervous System Lymphoma (“PCNSL”). In terms of nomenclature, PCNSL merely identifies the anatomical location of a tumor type. To a hematologist who might be called upon to prescribe the appropriate chemotherapy for this localized lymphoma, the primary concern will be which pathological subtype of lymphoma cells and organizational structure are present as this will guide treatment, e.g., B-cell or T-cell; follicular or diffuse, etc. Lymphomas are discussed or classified in the hematological literature in terms of pathological subtype. For example, see the Revised European-American Lymphoma Classification which lists about 40 lymphoma subtypes in terms of morphology, phenotype and genotype, without mentioning PCNSL. THOMAS J. KIPPS, WILLIAMS HEMATOLOGY 1316–17 (7th ed. 2006).

In terms of toxic torts, a hematologist convinced that benzene can cause lymphoma would reason that the location of the lymphoma is of little consequence as lymphocytes are diffusely present within the body, are known to move from organ to organ, and localized lymphomas are not unusual in almost
Also favorable to the defendant is the use of mechanistic understanding to discard a presumed cause and effect relationship. For example, saccharin has been downgraded by the National Toxicology Program from its previous listing as reasonably anticipated to be a human carcinogen. A major reason for this change was the finding of a mechanism to explain why bladder cancer was observed in laboratory animals exposed to saccharin. This mechanism was one that had a threshold, permitting regulators to move away from a no-threshold model for carcinogens. The dose to exceed the threshold was well above any reasonable expectation in humans consuming saccharin.

Another example of using mechanistic principles to downgrade an epidemiological finding comes from a recent IARC review of formaldehyde. A long term follow up of a formaldehyde-exposed cohort by an excellent group of epidemiologists found a statistically significant increase in leukemia incidence. However, based on mechanistic grounds, it was difficult to conceive of a mechanism by which exposure to formaldehyde could cause leukemia. Despite the “strong evidence” in human studies, IARC

any part of the body; although of particularly great consequence within the limited space of the skull. In contrast, a defense lawyer would take the reductionist approach of insisting that there be epidemiological evidence linking benzene specifically to PCNSL and would likely ask the court to discard any evidence linking benzene to lymphoma as not being sufficiently specific to the disease.


Joe G. Hollingsworth & Eric G. Lasker, in a review of Daubert avowedly from a defense lawyer’s perspective, claims that the downgrading of the saccharin decision shows the failure of toxicology to be borne out. Joe G. Hollingsworth & Eric G Lasker, The Case Against Differential Diagnosis: Daubert, Medical Causation Testimony, and the Scientific Method, 37(1) J. HEALTH L. 90 (2004). Indeed, the opposing opinion is much more accurate. The fact that a previous weakly positive epidemiological study was not replicated likely would not have been enough to overcome the usual regulatory resistance to downgrading a potential human carcinogen without the new information on mechanism. See L. B. Ellwein & S. M. Cohen, The Health Risks of Saccharin Revisited, 20(5) CRIT. REV. TOXICOL. 311–26 (1990).
classified the overall evidence that formaldehyde caused leukemia as “not sufficient.”66 Similarly, evidence of cancer in laboratory animal studies can be scientifically discounted as has occurred for the finding that exposure of male rats to gasoline causes kidney cancer through a mechanism not operative in humans.67

Mechanistic understanding also helps with interpreting latency periods between exposure and disease. The latency period is a particularly important point for understanding cancer caused by chemicals as such periods can be too short or too long to be consistent with the known biological processes involved in the causation of disease. Some examples are obvious because they are within the experience of a layperson. For instance, one can readily reject a plaintiff’s allegation that someone hit them in the eye two weeks before the plaintiff first noted a black eye. It would hardly be necessary for an expert to convince a jury by giving scientific testimony about the biological mechanisms that convert trauma into skin discoloration. In other situations, however, understanding of the mechanism underlying the disease process, coupled with the existing epidemiological literature concerning latency periods, is a


67 In yet another example of more inclusiveness of toxicology data, an Institute of Medicine (“IOM”) committee has recently recommended additional consideration of the non-epidemiological database and of dose in the evaluation process used to classify the scientific basis for presumptive disability decisions made by the Veterans Administration. This would be a change from the previous process in which the IOM classification was almost totally based upon epidemiological findings. INSTITUTE OF MEDICINE, COMMITTEE ON EVALUATION OF THE PRESUMPTIVE DISABILITY DECISION-MAKING PROCESS FOR VETERANS, IMPROVING THE PRESUMPTIVE DISABILITY DECISION-MAKING PROCESS FOR VETERANS (Jonathan M. Samet & Catherine C. Bodurow eds., 2008).
valuable part of evaluating a potential toxic tort.

CONCLUSION

Much of the legal commentary concerning science reflects the issue of how to fairly bring the state of the art into the courtroom. Supreme Court Justice Stephen Breyer commented, “A judge is not a scientist and a courtroom is not a scientific laboratory,” but judges “must aim for decisions that, roughly speaking, approximately reflect the scientific state of the art.” The core understanding of dose issues related to toxic torts reflects a scientific state of art that is at least 500 years old. Unfortunately, as judges attempt to simplify complex issues related to causality, there are too many instances in which relatively simple and straightforward scientific understanding concerning dose is being discarded or obfuscated.

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LESSONS LEARNED FROM THE FRONT LINES: A TRIAL COURT CHECKLIST FOR PROMOTING ORDER AND SOUND POLICY IN ASBESTOS LITIGATION

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THE CHECKLIST

A. CURB IMPROPER FORUM SHOPPING

• **Checklist Item #1:** Determine if the court’s jurisdiction is appropriate for the specific case given the jurisdiction’s connection to the alleged exposure(s), parties, and witnesses; enforce venue and *forum non conveniens* laws to transfer cases more appropriately heard in other jurisdictions. See page 609.

B. PRIORITIZE CLAIMS OF THE TRULY SICK

• **Checklist Item #2:** Require plaintiff to show credible evidence of asbestos-related impairment in order to bring or proceed with a claim. See page 613.

• **Checklist Item #3:** Establish the credibility of the diagnosis alleging injury by determining whether the claim was generated through a litigation screening or is supported by a report from a physician that has been implicated in fraudulent civil filings. See page 616.

C. APPLY TRADITIONAL TORT LITIGATION PROCEDURES

• **Checklist Item #4:** Do not consolidate dissimilar claims. See page 620.

• **Checklist Item #5:** Assure discovery rules are appropriate for each claim and defendant; if “form” discovery is used, make sure it is appropriate and not overly burdensome as applied in individual cases. See page 621.

• **Checklist Item #6:** Do not short-circuit trials. See page 622.
D. Only Allow Claims Against Defendants Where There Is a Legal Basis for Liability

- **Checklist Item #7**: Premises owners generally should owe no duty to plaintiffs alleging harm from off-site, secondhand exposure to asbestos. See page 624.
- **Checklist Item #8**: Maintain traditional tort law distinctions for when premises owners can be liable for injuries to contractors’ employees. See page 626.
- **Checklist Item #9**: Component part manufacturers should not be held liable for alleged asbestos-related hazards in external or replacement parts made, supplied, or installed by others and affixed post-manufacture. See page 628.

E. Only Allow a Defendant To Be Held Liable If Its Conduct or Product Was a Legal Cause of the Alleged Injury

- **Checklist Item #10**: Make gatekeeper decisions on expert testimony and assure that materials experts rely on actually support their claims. See page 631.
- **Checklist Item #11**: Adhere to traditional elements of substantial factor causation at summary judgment and provide clear jury instructions as to whether a particular defendant’s asbestos was a “substantial factor” in causing the alleged harm. See page 633.
- **Checklist Item #12**: Assure specific and adequate product identification by dismissing cases where product identification is not sufficient. See page 636.
- **Checklist Item #13**: Issue disease-specific causation requirements for mesothelioma, lung cancer and other asbestos-related cancers. See page 637.
F. ASSURE JURIES CAN FULLY COMPENSATE DESERVING PLAINTIFFS WHILE PRESERVING ASSETS FOR FUTURE CLAIMANTS

- **Checklist Item #14**: Permit discovery of settlement trust claims, as well as any pre-trial settlements, and declare intentions to file any future claims. See page 644.

- **Checklist Item #15**: Assure proper settlement credits and offsets at trial with monies paid by any entity to satisfy a legal claim directed at the injury alleged in accordance with state law. See page 647.

- **Checklist Item #16**: Allow collateral sources to be admissible so that jurors can consider and account for all collateral sources that provided compensation to the plaintiff for the alleged harm. See page 649.

- **Checklist Item #17**: Instruct jurors on the state’s joint and several liability rules. See page 650.

- **Checklist Item #18**: Sever or strike punitive damages claims. See page 652.

I. INTRODUCTION

The United States Supreme Court has described the asbestos litigation as a “crisis.”\(^1\) A hallmark of the litigation has been the mass filing of lawsuits by plaintiffs with little or no physical impairment and claims made by plaintiffs without reliable proof of causation, both of which have helped force scores of defendant companies into bankruptcy and have threatened payments to the truly sick.\(^2\) At times, courts have fueled the litigation by taking well-intentioned, but ill-suited, procedural shortcuts in an effort to

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get out from under the avalanche of claims. In pushing for efficiency, however, these courts put aside normal rules of discovery and procedure. Instead of decreasing dockets, experience has shown that these measures actually created incentives for personal injury lawyers to file more claims. In recent years, courts and legislatures in key asbestos jurisdictions that have appreciated these unintended consequences have begun restoring fundamental tort law principles to asbestos litigation. By doing so, they have helped root out many of the abusive practices and claims that had plagued the litigation. As a result, the overall asbestos litigation environment has shown signs of improvement.

Whether recent advances in the litigation will be lasting is a question yet to be answered. Asbestos litigation has a way of reinventing itself. As one legal observer explained, “the next asbestos is always asbestos, because the litigation always moves on.” Asbestos personal injury lawyers are creative in finding new tactics to expand liability. In addition, there has been a new migration of claims to jurisdictions where trial judges may not be experienced in managing asbestos dockets. These judges may not be aware of the issues, history and tactics particular to asbestos litigation.

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5 See id.


This article collects lessons learned from the past by courts with experience handling asbestos claims and translates them into a checklist of trial action items so that trial judges who may be new to this litigation can avoid some of the more serious problems of the past and better address the next evolution of claims.

II. A PRIMER ON THE ASBESTOS LITIGATION

A. The Number of Claims Explodes

The initial asbestos-related lawsuits were filed in the 1970s.\(^8\) By the 1980s, “what had once been a series of isolated cases turned into a steady flow,” which continued to increase over the next decade.\(^9\) By the early 1990s, courts and commentators recognized that the “elephantine mass” of asbestos cases that were then being filed created extraordinary problems.\(^10\) In 1991, the Federal Judicial Conference Ad Hoc Committee on Asbestos Litigation called the litigation “a disaster of major proportions.”\(^11\) The Ad Hoc Committee explained:

The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs


exceed the victims’ recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.\textsuperscript{12}

Even after this gloomy assessment, the litigation worsened “at a much more rapid pace than even the most pessimistic projections.”\textsuperscript{13} During the 1990s, the number of asbestos cases pending nationwide doubled from 100,000 to more than 200,000.\textsuperscript{14} By 2002, approximately 730,000 claims had been filed\textsuperscript{15} with more than 100,000 claims filed in 2003 alone—“the most in a single year.”\textsuperscript{16} In August 2005, the Congressional Budget Office estimated that approximately 322,000 asbestos-related claims were pending in state and federal courts.\textsuperscript{17}

\textbf{B. Most Plaintiffs Had No Physical Injury from Asbestos Exposure}

The primary reason for this explosion in claims was that by the early 2000s, the overwhelming majority of claims—up to 90 percent—were filed on behalf of plaintiffs who were “completely asymptomatic.”\textsuperscript{18} These claimants may have had some marker of

\textsuperscript{12} Id. at 2–3.


\textsuperscript{18} James A. Henderson, Jr. & Aaron D. Twerski, Asbestos Litigation Gone Mad: Exposure-based Recovery for Increased Risk, Mental Distress, and Medical Monitoring, 53 S.C. L. Rev. 815, 823 (2002); see also Roger Parloff,
exposure, such as changes in the pleural membrane of their lungs, but “are not now and never will be afflicted by disease.” In contrast, when asbestos litigation first arose in the 1960s, most claimants were “workers suffering from grave and crippling maladies.”

The key development was the use of mass screenings by plaintiffs’ lawyers and their agents to generate many of the unimpaired claimant filings. U.S. News & World Report described the claimant recruiting process:

Welcome to the New Asbestos Scandal, FORTUNE, Sept. 6, 2004, at 186 (“According to estimates accepted by the most experienced federal judges in this area, two-thirds to 90% of the nonmalignants are ‘unimpaireds’—that is, they have slight or no physical symptoms.”); Kathryn Kranhold, GE To Record $115 Million Expense for Asbestos Claims, WALL ST. J., Feb. 17, 2007, at A3 (GE reporting that more than 80% of its pending cases involve claimants “who aren’t sick”); Quenna Sook Kim, G-I Holdings’ Bankruptcy Filing Cites Exposure in Asbestos Cases, WALL ST. J., Jan. 8, 2001, at B12 (“[A]s many as 80% of [GAF’s] asbestos settlements are paid to unimpaired people.”); Alex Berenson, A Surge in Asbestos Suits, Many by Healthy Plaintiffs, N.Y. TIMES, Apr. 10, 2002, at A15.

19 Edley Testimony, supra note 14, at 67.


21 See Griffin B. Bell, Asbestos & The Sleeping Constitution, 31 PEPP. L. REV. 1, 5 (2003). Screenings have frequently been conducted in areas with high concentrations of workers who may have worked in jobs where they were exposed to asbestos. See Owens Corning v. Credit Suisse First Boston, 322 B.R. 719, 723 (D. Del. 2005) (“Labor unions, attorneys, and other persons with suspect motives have caused large numbers of people to undergo X-ray examinations (at no cost), thus triggering thousands of claims by persons who had never experienced adverse symptoms.”); In re Joint E. & S. Dist. Asbestos Litig., 237 F. Supp. 2d 297, 309 (E.D.N.Y. & S.D.N.Y. 2002) (asbestos claimants “are diagnosed largely through plaintiff-lawyer arranged mass screenings programs targeting possible exposed asbestos-workers and attraction of potential claimants through the mass media.”); Eagle-Picher Indus., Inc. v. Am. Employers’ Ins. Co., 718 F. Supp. 1053, 1057 (D. Mass. 1989) (“[M]any of these cases result from mass X-ray screenings at occupational locations conducted by unions and/or plaintiffs’ attorneys, and many claimants are functionally asymptomatic when suit is filed.”).
To unearth new clients for lawyers, screening firms advertise in towns with many aging industrial workers or park X-ray vans near union halls. To get a free X-ray, workers must often sign forms giving law firms 40 percent of any recovery. One solicitation reads: “Find out if YOU have MILLION DOLLAR LUNGS!”  

Many X-ray interpreters (called “B Readers”) hired by plaintiffs’ lawyers were “so biased that their readings were simply unreliable.” As one physician explained, “the chest x-rays are not read blindly, but always with the knowledge of some asbestos exposure and that the lawyer wants to file litigation on the worker’s behalf.”  

It is estimated that more than one million workers have undergone attorney-sponsored screenings. One worker explained, “[i]t’s better than the lottery. If they find anything, I get a few thousand dollars I didn’t have. If they don’t find anything, I’ve just

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23 Owens Corning, 322 B.R. at 723; see also ABA COMM’N REP., supra note 9 (litigation screening companies find X-ray evidence that is “consistent with” asbestos exposure at a “startlingly high” rate, often exceeding 50% and sometimes reaching 90%); Joseph N. Gitlin et al., Comparison of “B” Readers’ Interpretations of Chest Radiographs for Asbestos Related Changes, 11 ACAD. RADIOLOGY 843 (2004) (B Readers hired byplaintiffs claimed asbestos-related lung abnormalities in 95.9% of the X-rays sampled, but independent B Readers found abnormalities in only 4.5% of the same X-rays); John M. Wylie II, The $40 Billion Scam, READER’S DIGEST, Jan. 2007, at 74; Editorial, Beware the B-Readers, WALL ST. J., Jan. 23, 2006, at A16. As a result of its findings, the ABA Commission proposed the enactment of federal legislation to codify the evidence that physicians recognize is needed to show impairment. The ABA’s House of Delegates adopted the Commission’s proposal in February 2003. See Asbestos Litigation: Hearing Before the Sen. Comm. on the Judiciary, 107th Cong., Appen. A (Mar. 5, 2003) (statement of Dennis Archer, President-Elect, ABA).


lost an afternoon.”26 If not for the mass filing by the unimpaired, the asbestos litigation crisis may never have arisen.27

C. Most Defendants Had Little, If Any, Connection to the Alleged Exposure

At the same time that tens of thousands of unimpaired claims were being mass produced, many “traditional” asbestos defendants who manufactured, mined, or sold asbestos28 were seeking bankruptcy court protection.29 The pace of bankruptcies accelerated after 2000;30 it is now estimated that at least 85 companies have been forced into bankruptcy as a result of

28 As Judge Freeman who administers the asbestos docket in New York has explained,

[i]there are noteworthy differences between the bankrupt defendants and those that are still solvent. As a group, the bankrupt corporations can be characterized as ‘traditional’ asbestos defendants; they either mined asbestos, or manufactured, sold, distributed or required asbestos-containing products, including insulation, fire-proofing, construction materials, and boilers. Until recently, these ‘traditional’ defendants were the plaintiffs’ primary targets.

29 See In re Combustion Eng’g, 391 F.3d 190, 201 (3d Cir. 2004) (“[M]ounting asbestos liabilities have pushed otherwise viable companies into bankruptcy.”).
30 See Christopher Edley, Jr. & Paul C. Weiler, Asbestos: A Multi-Billion-Dollar Crisis, 30 HARV. J. ON LEGIS. 383, 392 (1993) (observing that each time a defendant declares bankruptcy, “mounting and cumulative” financial pressure is placed on the “remaining defendants, whose resources are limited”).
asbestos-related liabilities.\textsuperscript{31}

As a direct result of these bankruptcies, the net of liability “spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing.”\textsuperscript{32} One well-known plaintiffs’ attorney has described the litigation as an “endless search for a solvent bystander.”\textsuperscript{33} By 2004, more than 8,500 defendants were caught up in the litigation\textsuperscript{34}—up from the 300 defendants in 1983.\textsuperscript{35} This dramatic increase in claims has been possible because of “the erosion or elimination of standards of recovery, particularly causation and product identification.”\textsuperscript{36} At least one company in nearly every U.S. industry is involved in the litigation.\textsuperscript{37} Nontraditional defendants now account for more than half of asbestos litigation expenditures.\textsuperscript{38}

\textbf{D. Jurisdictions Were Targeted, Causing the Legal Systems to Crack}

Another key factor accelerating the asbestos litigation has been the concentration of claims in certain jurisdictions. RAND found that from 1998 to 2000, eleven states saw the brunt of asbestos filings: Texas (19%), Mississippi (18%), New York (12%), Ohio

\textsuperscript{32} Editorial, \textit{Lawyers Torch the Economy}, WALL ST. J., Apr. 6, 2001, at A14; see also Steven B. Hantler et al., \textit{Is the Crisis in the Civil Justice System Real or Imagined?}, 38 LOY. L.A. L. REV. 1121, 1151–52 (2005) (discussing spread of asbestos litigation to “peripheral defendants”).
\textsuperscript{37} AM. ACAD. ACTUARIES, \textit{supra} note 17, at 5.
\textsuperscript{38} See CARROLL ET AL., \textit{supra} note 15, at 94.
(12%), Maryland (7%), West Virginia (5%), Florida (4%), Pennsylvania (3%), California (2%), Illinois (1%), and New Jersey (1%). Sorting through the mass amount of claims against scores of peripheral defendants placed significant pressure on courts where asbestos claims were filed.\footnote{See id. at 62.}

Initially, some courts with thousands of lawsuits on their dockets began taking well-intentioned, but ill-fated, procedural shortcuts to usher the claims through the system. One such example was the joining of a significant number of dissimilar claims for trial. The largest single mass consolidation took place in West Virginia in 2002, where the trial court joined more than 8,000 plaintiffs suing more than 250 defendants.\footnote{Former Michigan Supreme Court Chief Justice Conrad L. Mallett, Jr. described the situation facing many judges with heavy asbestos caseloads in testimony before Congress. See The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary, 106th Cong. 6 (July 1, 1999) (statement of the Hon. Conrad L. Mallett, Jr.). He observed that trial court judges inundated with asbestos claims might feel compelled to shortcut procedural rules:}

Think about a county circuit judge who has dropped on her 5,000 cases all at the same time . . . . [I]f she scheduled all 5,000 cases for one week trials, she would not complete her task until the year 2095. The judge’s first thought then is, “How do I handle these cases quickly and efficiently?” The judge does not purposely ignore fairness and truth, but the demands of the system require speed and dictate case consolidation even where the rules may not allow joinder.\footnote{Id.}

The threat of massive liability, including punitive damages, without attention paid to individual claims and defenses, caused nearly every defendant to settle for reportedly huge sums of money.\footnote{See State ex rel. Mobil Corp. v. Gaughan, 565 S.E.2d 793, 794 (W. Va. 2002).} Other mass consolidations occurred in Virginia and Mississippi.\footnote{See Mobil Settles, Leaving Carbide as Lone Asbestos Defendant, ASSOC. PRESS STATE & LOCAL NEWSWIRE, Oct. 10, 2002.} These

consolidations “so depart[ed] from [the] accepted norm as to be presumptively violative of due process.” They often lumped together people with serious illnesses, such as mesothelioma or lung cancer, with claimants having different alleged harms or no illness at all. Work histories and exposure levels among plaintiffs varied widely.

In addition to fundamental unfairness and due process concerns, the aggregation of dissimilar claims turned out to be a bit like using a lawn mower to cut down weeds. The practice provided a temporary fix, but created more problems than it solved in the long run. Duke University Law School Professor Francis McGovern has explained,

[j]udges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam.

One West Virginia trial judge involved in asbestos litigation


45 See State ex rel. Mobil Corp. v. Gaughan, 565 S.E.2d 793, 794 (W. Va. 2002) (Maynard, J., concurring). Justice Elliott Maynard of the West Virginia Supreme Court of Appeals has explained that mass consolidations involve thousands of plaintiffs; twenty or more defendants; hundreds of different work sites located in a number of different states; dozens of different occupations and circumstances of exposure; dozens of different products with different formulations, applications, and warnings; several different diseases; numerous different claims at different stages of development; and at least nine different law firms, with differing interests, representing the various plaintiffs. Additionally, the challenged conduct spans the better part of six decades.

Id.

46 See id.
acknowledged this fact:

I will admit that we thought that [an early mass trial] was probably going to put an end to asbestos, or at least knock a big hole in it. What I didn’t consider was that that was a form of advertising. That when we could whack that batch of cases down that well, it drew more cases.\textsuperscript{48}

This phenomenon is due to the fact that in filing asbestos-related claims, there has been no relationship between the incidence of disease and the number of suits filed.\textsuperscript{49}

Consolidations and other procedural shortcuts, along with a few high-profile verdicts and well-developed litigation tactics by lawyers, forced defendants to settle claims, often en mass, rather than sort through them and only pay the meritorious ones. One particularly troubling tactic was the naming of scores, sometimes hundreds, of defendants in a single exposure case\textsuperscript{50} and then settling most of them for a modest amount (often less than $1,000) that collectively generated tens of thousands of dollars for uninjured claimants without having to show specific harm or causation against a named defendant.


David Austern, Trustee for the Manville Trust, has described the asbestos claim generation process as the economic model of claims filing as opposed to a medical model. \textit{See id.}

E. Payments to Truly Sick Became Threatened

Over the last few years, it has become clear that mass filings by unimpaired claimants have exhausted scarce resources that should go to “the sick and the dying, their widows and survivors.” The “very small percentage of the cases filed [with] serious asbestos-related afflictions . . . [were] prone to be lost in the shuffle.” For example, the Manville trustees reported that a “disproportionate amount of Trust settlement dollars have gone to the least injured claimants—many with no discernible asbestos-related physical impairment whatsoever.” The Trust is now paying out five cents on the dollar to asbestos claimants. Other asbestos-related bankruptcy trusts, such as the Celotex and Eagle-Picher Settlement Trusts, also have had to cut payments to claimants.

Some lawyers who represented the sick claimants have since joined with defendants and others in calling for a return of the rule of law in asbestos litigation. Here is what some of these lawyers

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51 In re Collins, 233 F.3d 809, 812 (3d Cir. 2000); see also Larson v. Johns-Manville Sales Corp., 399 N.W.2d 1, 9 (Mich. 1986) (“We believe that discouraging suits for relatively minor consequences of asbestos exposure will lead to a fairer allocation of resources to those victims who develop cancers.”); In re Joint E. & S. Dists. Asbestos Litig., 129 B.R. 710, 751 (E.D.N.Y. & S.D.N.Y. 1991) (“Overhanging this massive failure of the present system is the reality that there is not enough money available from traditional defendants to pay for current and future claims.”), vacated, 982 F.2d 721 (2d Cir. 1992); In re Asbestos Prod. Liab. Litig. (No. VI), MDL 875, Admin. Order No. 8, 2002 WL 32151574, at *1 (E.D. Pa. Jan. 14, 2002) (“Oftentimes these suits are brought on behalf of individuals who are asymptomatic as to an asbestos-related illness and may not suffer any symptoms in the future. Filing fees are paid, service costs incurred, and defense files are opened and processed. Substantial transaction costs are expended and therefore unavailable for compensation to truly ascertained asbestos victims.”).


54 Id.

have said:

- Matthew Bergman of Seattle: “Victims of mesothelioma, the most deadly form of asbestos-related illness, suffer the most from the current system . . . [T]he genuinely sick and dying are often deprived of adequate compensation as more and more funds are diverted into settlements of the non-impaired claims.”

- Peter Kraus of Dallas: Plaintiffs’ lawyers who file suits on behalf of the non-sick are “sucking the money away from the truly impaired.”

- Terrence Lavin of Chicago (and former Illinois State Bar President): “Members of the asbestos bar have made a mockery of our civil justice system and have inflicted financial ruin on corporate America by representing people with nothing more than an arguable finding on an X-ray.”

- Steve Kazan of Oakland: “The current asbestos litigation system is a tragedy for our clients. We see people every day who are very seriously ill. Many have only a few months to live. It used to be that I could tell a man dying of mesothelioma that I could make sure that his family would be taken care of. That statement was worth a lot to my clients, and it was true. Today, I often cannot say that any more. And the reason is that other plaintiffs’ attorneys are filing tens of thousands of claims every year for people who have absolutely nothing wrong with them.”

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III. THE TRIAL COURT CHECKLIST FOR FAIRLY MANAGING ASBESTOS LITIGATION

Over the last several years, courts and legislatures have begun restoring the rule of law to asbestos litigation, taking measures to rein in the most prevalent abuses in the litigation. These actions, which are set forth in the checklist below, have aided the fair treatment of both seriously injured asbestos claimants and defendants where the litigation has been most prolific. In particular, there is now greater recognition that it is unsound public policy to award damages to plaintiffs who have no current physical impairment from exposure to asbestos. Rather, it is best to prioritize the claims of those who are truly sick and preserve assets for those injured parties. Courts also have taken measures that allow claims to be determined more accurately, on their merits, and in appropriate jurisdictions. In addition, many courts are taking a much more thorough look at issues such as duty and the science of unsound causation claims by plaintiffs’ experts. Trial courts should use this checklist to heed the lessons of the past and produce sound asbestos litigation results in the future.

The categories and checklist items are as follows:

A. CURB IMPROPER FORUM SHOPPING

- **Checklist Item #1**: Determine if the court’s jurisdiction is appropriate for the specific case given the jurisdiction’s connection to the alleged exposure(s),

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60 See, e.g., Patrick M. Hanlon & Anne Smetak, Asbestos Changes, 62 N.Y.U. ANN. SURV. AM. L. 525, 531 (2007) (“[I]t is unreasonable to compensate hundreds of thousands of people exposed to asbestos, who may have physical markers of exposure, but who have no current impairment from a disease caused by asbestos exposure.”); Matthew Mall, Note, Derailing the Gravy Train: A Three-Pronged Approach to End Fraud in Mass Tort Litigation, 48 Wm. & Mary L. Rev. 2043, 2061–62 (2007) (“By limiting cases to those claimants suffering from actual, physical impairment, [medical criteria laws requiring plaintiffs to demonstrate asbestos-related physical impairment] reserve judicial resources and corporate money for those claimants that need it most.”).
parties, and witnesses; enforce venue and *forum non conveniens* laws to transfer cases more appropriately heard in other jurisdictions.

B. **Prioritize Claims of the Truly Sick**

- **Checklist Item #2:** Require plaintiff to show credible evidence of asbestos-related impairment in order to bring or proceed with a claim.
- **Checklist Item #3:** Establish the credibility of the diagnosis alleging injury by determining whether the claim was generated through a litigation screening or is supported by a report from a physician that has been implicated in fraudulent civil filings.

C. **Apply Traditional Tort Litigation Procedures**

- **Checklist Item #4:** Do not consolidate dissimilar claims.
- **Checklist Item #5:** Assure discovery rules are appropriate for each claim and defendant; if “form” discovery is used in one’s jurisdiction, make sure it is appropriate and not overly burdensome as applied in individual cases.
- **Checklist Item #6:** Do not short-circuit trials.

D. **Only Allow Claims Against Defendants Where There Is a Legal Basis for Liability**

- **Checklist Item #7:** Premises owners generally should owe no duty to plaintiffs alleging harm from off-site, secondhand exposure to asbestos.
- **Checklist Item #8:** Maintain traditional tort law distinctions for when premises owners can be liable for injuries to contractors’ employees.
- **Checklist Item #9:** Component part manufacturers should not be held liable for alleged asbestos-related hazards in external or replacement parts made, supplied, or installed by others and affixed post-manufacture.
E. Only allow a defendant to be held liable if its conduct or product was a legal cause of the alleged injury

- **Checklist Item #10**: Make gatekeeper decisions on expert testimony and assure that materials experts rely on actually support their claims.
- **Checklist Item #11**: Adhere to traditional elements of substantial factor causation at summary judgment and provide clear jury instructions as to whether a particular defendant’s asbestos was a “substantial factor” in causing the alleged harm.
- **Checklist Item #12**: Assure specific and adequate product identification by dismissing cases where product identification is not sufficient.
- **Checklist Item #13**: Issue disease-specific causation requirements for mesothelioma, lung cancer and other asbestos-related cancers.

F. Assure juries can fully compensate deserving plaintiffs while preserving assets for future claimants

- **Checklist Item #14**: Permit discovery of settlement trust claims, as well as any pre-trial settlements, and declare intentions to file any future claims.
- **Checklist Item #15**: Assure proper settlement credits and offsets at trial with monies paid by any entity to satisfy a legal claim directed at the injury alleged in accordance with state law.
- **Checklist Item #16**: Allow collateral sources to be admissible so that jurors can consider and account for all collateral sources that provided compensation to the plaintiff for the alleged harm.
- **Checklist Item #17**: Instruct jurors on the state’s joint and several liability rules.
- **Checklist Item #18**: Sever or strike punitive damages claims.
The actions included in these checklist items, along with state medical criteria laws and other legislative reforms, have proven to be effective in reducing the number of premature and abusive claims. Jennifer Biggs, who chairs the Mass Torts Subcommittee of the American Academy of Actuaries, has found that “[a] lot of companies that were seeing 40,000 cases in 2002 and 2003 have dropped to the 15,000 level.”"61 Frederick Dunbar, a senior vice president of NERA Economic Consulting, recently studied the Securities and Exchange Commission filings of eighteen large asbestos defendants and found that, “for all of them, 2004 asbestos claims had dropped from peak levels of the previous three years. Ten companies saw claims fall by more than half between 2003 and 2004.”62 A prominent Ohio asbestos litigation defense lawyer has said that Ohio’s medical criteria law “dramatically cut the number of new case filings by more than 90%.”63 The CEO of a large mutual insurer further highlighted the effects of recent asbestos reforms at the state level in testimony before Congress:

The beneficial impact of these efforts cannot be overstated. Historically Texas, Ohio and Mississippi have been the leading states to generate claims filed against [our] policyholders, collectively accounting for approximately 80% of the asbestos claims filed against [our] insureds. Since the statutory and judicial reforms in those three key states, the decrease in the volume of claims has been truly remarkable. In Mississippi, the decrease has been 90%, in Texas nearly 65% and, in Ohio, approximately 35%. Across all states, from 2004 to 2005 we have seen over a 50% decrease in the number of new claims filed, a trend that continued in 2006. These numbers are the best evidence that state-driven initiatives are working. . . .64

A. Curb Improper Forum Shopping

1. Checklist Item #1: Determine if the court’s jurisdiction is appropriate for the specific case given the jurisdiction’s connection to the alleged exposure(s), parties, and witnesses; enforce venue and forum non conveniens laws to transfer cases more appropriately heard in other jurisdictions.

Plaintiffs’ lawyers often strategically flock to forums where they believe they have a tactical advantage rather than file where there is a logical and factual connection to a claim or claimant. Indeed, throughout the past thirty years, asbestos claims have shown a remarkable ability to migrate from state-to-state and jurisdiction-to-jurisdiction depending on which courts plaintiffs’ lawyers believed would give them the greatest chance of achieving favorable recoveries. Given the scores of defendants typically

(testimony of Edmund F. Kelly, Chairman, President & CEO, Liberty Mutual Group).


What I call the “magic jurisdiction,...[is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected; they’re State Court judges; they’re popul[ists]. They’ve got large populations of voters who are in on the deal, they’re getting their [piece] in many cases. And so, it’s a political force in their jurisdiction, and it’s almost impossible to get a fair trial if you’re a defendant.

Id.

66 See CARROLL ET AL., supra note 15, at 61–62. RAND found that from 1970 through 1987 California bore 31% of asbestos claims that were filed, but only 5% from 1988 to 1992, 2% from 1993 to 1997, and 2% from 1998 to 2000. Texas trended in the opposite direction, accounting for only 3% of initial
named in asbestos cases, plaintiffs’ lawyers often have numerous jurisdictions from which to choose. In addition, some companies are named “simply to try and keep the cases” in certain jurisdictions.67

From the mid-1990s through 2003, Madison County, Illinois was a particularly popular destination for asbestos litigation.68 Asbestos claims had risen quickly from 65 in 1996 to a peak of 953 in 2003.69 During those years, Madison County received significant negative publicity for hearing cases that did not have the proper connections to the County.70 In response, the Illinois Supreme Court has removed some of the “pull” from the magnet jurisdictions. In Dawdy v. Union Pacific Ry. Co.,71 the court held that a foreign plaintiff’s forum choice deserves less deference if it is not the plaintiff’s home.72 In Gridley v. State Farm Mutual Auto Ins. Co.,73 the court remanded a Louisiana man’s case who was not injured in Illinois with directions to dismiss the complaint based on forum non conveniens.74 In addition, a new judge was appointed to oversee Madison County’s asbestos docket.75 He began enforcing the state’s venue and forum non conveniens laws.76 In one of his


69 See id.


71 797 N.E.2d 687 (Ill. 2003).

72 Id. at 694.

73 840 N.E.2d 269 (Ill. 2005).

74 Id. at 280–81.

75 See Paul Hampel, Dismissal of Asbestos Suits is Change for Madison County, ST. LOUIS POST-DISPATCH, Jan. 29, 2005, at 6.

76 See, e.g., Palmer v. Riley Stoker Corp., No. 04-L-167, 8–9 (Madison County Cir. Ct., Ill. Oct. 4, 2004) (order granting motion to transfer on the
first acts in this new role, the judge ordered the transfer of several out-of-state asbestos cases, noting that they “would place an astronomical burden upon the citizens of Madison County . . . . It is one thing to make such efforts to accommodate the citizens of Madison County and others whose cases bear some connection or reason to be here.”

In 2004, asbestos litigation in Madison County dropped 50% to 477 filings; the number fell further to 389 in 2005 and to 325 in 2006.

In the past few years, Delaware and California have attracted considerable attention as places to file asbestos claims. For example, the Madison County Record has observed that the number of new asbestos lawsuits dropped precipitously in Madison County in recent years, but the corresponding “deluge of filings is keeping clerks in a Delaware court working nights and weekends to keep up.” One Madison County lawyer acknowledged this

basis of forum non conveniens).


79 See Steve Korris, Asbestos Shift to Delaware is Sign of Distinction for Madison County, THE RECORD, July 7, 2005, available at http://madisonrecord.com/news/newsview.asp?c=162805; Wasserman et al., supra note 67, at 885 (“With plaintiff firms from Texas and elsewhere opening offices in California, there is no doubt that even more asbestos cases are on their way to the state.”); Hanlon & Smetak, supra, note 60, at 599 (“[P]laintiffs’ firms are steering cases to California, partly to the San Francisco-Oakland area, which is traditionally a tough venue for defendants, but also Los Angeles, which was an important asbestos venue in the 1980s but is only recently seeing an upsurge in asbestos cases.”); Victor E. Schwartz et al., Litigation Tourism Hurts Californians, 21:20 MEALEY’S LITIG. REP.: ASB. 20 (Nov. 15, 2006) (reporting that over 30% of pending asbestos claims sampled in California involve plaintiffs with out-of-state addresses); Emily Bryson York, More Asbestos Cases Heading to Courthouses Across Region, 28:9 L.A. BUS. J. 8 (Feb. 27, 2006) (“California is positioned to become a front in the ongoing asbestos litigation war.”); Steven Weller et al., Report on the California Three Track Civil Litigation Study 28 (Policy Studies Inc. July 31, 2002), available at www.clrc.ca.gov/pub/BKST/BKST-3TrackCivJur.pdf (“The San Francisco Superior Court seems to be a magnet court for the filing of asbestos cases.”).

80 Steve Korris, Delaware Court Seeing Upsurge in Asbestos Filings, THE
practice, stating, “We’re just filing [cases] in different places.”®
This practice of “litigation tourism”®® is one of the main reasons
the litigation has proved difficult to contain.®

To avoid being a litigation tourist destination, trial courts
should, as they do in Mississippi, permit defendants to motion for
a more definite statement from the plaintiffs that jurisdiction is
proper as to each claim.®® As a result of these motions, one
Mississippi court “dismissed the claims of 437 non-resident
plaintiffs who did not allege either exposure in the State of
Mississippi to a defendant’s asbestos-containing product or claims
against a Mississippi resident defendant.”®® The same court also
dismissed several claims for failure to comply with a court order
directing the plaintiffs to perfect transfer of the cases to their
respective proper venues in Mississippi.® Similar measures have
been undertaken in Ohio.®

® RECORD (Madison/St. Clair County, Ill.), July 1, 2005, available at
® Brian Brueggemann, Asbestos Lawsuits Continue to Decline,
BELLEVILLE NEWS-Democrat, June 21, 2005, at 3B (quoting Mike Angelides
of the SimmonsCooper firm).
®® See AMERICAN TORT REFORM FOUND., JUDICIAL HELLHOLES 2005, at
tourist’ industry, filing claims in jurisdictions with little or no connection to
their clients’ claims.”).
®® For example, in one case, an Indiana plaintiff with mesothelioma filed a
claim against U.S. Steel in Madison County, Illinois, for injuries allegedly
sustained from asbestos exposure at a U.S. Steel plant in Indiana. The plaintiff
had no significant connection to Illinois, much less to Madison County.
Nevertheless, his trial resulted in a $250 million verdict. See Brian
Brueggemann, Man Awarded $250 Million in Cancer Case, BELLEVILLE
NEWS-Democrat, Mar. 29, 2003, at 1A.
®® See Gordon v. Honeywell Int’l, Inc., 962 So. 2d 547 (Miss. 2007);
Culbert v. Johnson & Johnson, 883 So. 2d 550 (Miss. 2004) (transferring in-
state cases to the proper county and dismissing out-of-state plaintiffs).
®® Id. at 549 n.3.
® Id. at 550.
® See OHIO CIV. R. 3(B)(11).
B. Prioritize Claims of the Truly Sick

As discussed earlier, mass filings by unimpaired claimants have been a particular problem in asbestos litigation. Courts have found that the best guard against the continued filing of premature, or potentially fraudulent, claims by the unimpaired is to require all plaintiffs to develop the record early in the litigation regarding their alleged level of impairment and the credibility of their diagnoses upon which the claims are based.

1. Checklist Item #2: Require plaintiff to show credible evidence of asbestos-related impairment in order to bring or proceed with a claim.

Asbestos claimants generally have alleged various types of injuries, including mesothelioma, lung cancer and nonmalignant conditions that plaintiffs often refer to as asbestosis or pleural plaques. Mesothelioma is a type of cancer most often associated with asbestos exposure, though it has other causes and can occur idiopathically. For mesothelioma and lung cancer claims, a plaintiff should be required to present evidence verifying the condition with an exposure history and a credible doctor’s report certifying the condition as being asbestos-related.

Allegations of nonmalignant asbestos-related conditions, such as asbestosis, are more challenging for courts because they are subject to misinterpretation and abuse. Many people merely allege radiographic evidence of asbestos exposure, but only people who are physically impaired from exposure to asbestos should be permitted to bring an asbestos claim. A court can determine whether the plaintiff has a legitimate claim by requiring the plaintiff to provide the court with three core pieces of information from a treating physician: (1) a thorough occupational, exposure, and medical history; (2) an x-ray showing markings on the plaintiff’s

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lung that are consistent with asbestos exposure; and (3) a pulmonary function test showing breathing impairment outside of the normal range.\textsuperscript{89}

Trial courts have several options for handling claims that fail to meet all three of these base-line tests. First, the actions can be dismissed for failure to state a claim.\textsuperscript{90} Courts in Arizona, Delaware, Maine, Maryland, and Pennsylvania have held that physically unimpaired asbestos claimants do not have legally compensable claims.\textsuperscript{91} Federal courts interpreting Hawaii and Massachusetts laws have reached the same conclusion.\textsuperscript{92} As one of the courts explained, “[t]here is generally no cause of action in tort until a plaintiff has suffered an identifiable, compensable injury.”\textsuperscript{93} The Pennsylvania Supreme Court further specified that in asbestos cases, markings in the pleural linings of the lung without any accompanying impairment does not create a “compensable injury which gives rise to a cause of action.”\textsuperscript{94} Individuals with these conditions, the court concluded, “lead active, normal lives, with no pain or suffering, no loss of an organ function, and no disfigurement due to scarring.”\textsuperscript{95} Thus, they have no claim.

\textsuperscript{89} See generally Dr. John E. Parker, \textit{Understanding Asbestos-Related Medical Criteria}, 18-10 MEALEY’S LITIG. REP.: ASBESTOS 25 (June 18, 2003).

\textsuperscript{90} FED. R. CIV. P. 12(b).


\textsuperscript{93} Bernier, 516 A.2d at 542.

\textsuperscript{94} See Simmons, 674 A.2d at 237.

\textsuperscript{95} Id. at 236; see also \textit{In re Asbestos Prods. Liab. Litig. (No. VI),} MDL 875, 1996 WL 539589, at *2 n.8 (E.D. Pa. Sept. 16, 1996) (“Pleural disease is most often an asymptomatic scarring of the pleura—a tissue thin membrane surrounding the lung. Many states, including Pennsylvania, do not allow for a cause of action based upon this condition alone if it is asymptomatic. It can only be discovered through x-ray and, in and of itself, does not pose a health risk or
Second, trial courts may administratively dismiss claims brought by the non-sick. For example, in the federal asbestos multidistrict litigation, the late Judge Charles Weiner administratively dismissed all cases where the plaintiff could not provide the court with sufficient medical evidence of a “compensable injury sufficient to sustain a cause of action,” stating that he would reinstate them if and when the claimant shows evidence of asbestos exposure and an asbestos-related disease. The order stated simply, “it is ORDERED that the referenced cases are dismissed without prejudice. The Statute of Limitations is tolled. Parties are to notify the Court if they wish these cases reactivated.” Thousands of cases involving unimpaired claimants were dismissed under this and similar plans issued by this court.

Finally, a trial court can create an inactive docket (also called a pleural registry or deferred docket) to set aside and preserve the claims of the non-sick. Inactive asbestos dockets were first adopted in the late 1980s and early 1990s in jurisdictions that were experiencing large numbers of filings by the unimpaired—Massachusetts (September 1986), Chicago (March 1991), and Baltimore City (December 1992). Since 2002, the list of

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97 See id.
99 See Peter H. Schuck, The Worst Should Go First: Deferral Registries in Asbestos Litigation, 15 HARV. J.L. & PUB. POL’Y 541 (1992); see also In re Report of the Advisory Group, 1993 WL 30497, at *51 (D. Me. Feb. 1, 1993) (“[P]laintiffs need not engage in the expense of trial for what are still minimal damages, but are protected in their right to recover if their symptoms later worsen.”).
jurisdictions with inactive asbestos docket cases has grown to include Cleveland, Ohio (March 2006); Minnesota (coordinated litigation) (June 2005); St. Clair County, Illinois (February 2005); Portsmouth, Virginia (August 2004); Madison County, Illinois (January 2004); Syracuse, New York (January 2003); New York City (December 2002); and Seattle, Washington (December 2002). In 2005, RAND referred to the “reemergence” of inactive dockets as one of “the most significant developments” in asbestos litigation.

2. Checklist Item #3: Establish the credibility of the diagnosis alleging injury by determining whether the claim was generated through a litigation screening or is supported by a report from a physician that has been implicated in fraudulent civil filings.

A key turning point in the mass generation of asbestos claims was a landmark ruling in June 2005 by the manager of the federal silica multi-district litigation, U.S. District Judge Janis Graham Jack of the Southern District of Texas. Judge Jack recommended that all but one of the 10,000 federal court silica claims be dismissed on remand because the diagnoses were fraudulently prepared. Judge Jack said in her opinion: “[T]hese diagnoses were driven by neither health nor justice . . . . [T]hey were manufactured for money.”


102 Id. at 635; see also Fred Krutz & Jennifer R. Devery, In the Wake of Silica MDL 1553, 4:5 MEALEY’S LITIG. REP. SILICA 1, 2 (2006); Mike
The B readers and screening firms referenced in Judge Jack’s opinion have helped generate tens of thousands of asbestos claims. For example, it has been reported that seventy-two percent of the claimants before Judge Jack had filed asbestos-related claims, even though it is “statistically speaking, nearly impossible” to suffer from both asbestosis and silicosis. Dr. Ray Harron reportedly diagnosed disease in 51,048 Manville claims and supplied 88,258 reports in support of other claims. In one day, Dr. Harron reportedly diagnosed 515 people, or the equivalent of more than one a minute in an eight-hour shift. Dr. James Ballard provided 10,700 primary diagnoses and another 30,329 reports in


108 See id. Recently, Dr. Harron reached an agreement with the Texas Medical Board that he will never again practice medicine in Texas. According to the medical board’s website:

On April 13, 2007, the Board and Dr. Harron entered into an Agreed Order pursuant to which Dr Harron agreed not to practice medicine in the period before his medical license expires, not to renew his medical license after it expires and not to petition the Board for reinstatement or re-issuance of his license.

support of asbestos claims. According to Manville Trust records, Dr. Jay Segarra “participated in almost 40,000 positive diagnoses for asbestos-related illnesses over the last 13 years, or about eight per day, every day, including weekends and holidays. There were about 200 days on which Dr. Segarra rendered positive diagnoses for more than 20 people, and 14 days with more than 50.”

Judge Jack’s findings have impacted, and will continue to impact, asbestos litigation. For example, the Court of Common Pleas of Cuyahoga County (Cleveland), Ohio recently dismissed approximately 3,755 asbestos cases after the screening doctors, some of whom had been involved in the silicosis litigation, refused to testify, asserting their Fifth Amendment right against self-incrimination. The court also put aside another 35,000 asbestos cases where plaintiffs were diagnosed by the same doctors until those plaintiffs receive diagnoses from other doctors. Similarly, Claims Resolution Management Corporation, which manages the Manville Personal Injury Settlement Trust, has stated that it will no longer accept medical reports prepared by the doctors and screening companies that were the subject of Judge Jack’s opinion.

Several other trusts have followed Manville’s lead, including the Eagle-Picher, Celotex, Halliburton (DII Industries), and Keene Creditors Trusts. Most recently, the current manager of the

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109 See Editorial, Silicosis Clam-up, supra note 107.
113 Davies, Plaintiffs’ Lawsuits Against Companies Sharply Decline, supra note 6, at A9.
115 Letter from William B. Nurre, Executive Director, Eagle-Picher Personal
federal asbestos multi-district litigation docket, United States District Judge James Giles of the Eastern District of Pennsylvania, stated that, because “[c]urrent litigation efforts in this court and in the silica litigation have revealed that many mass screenings lack reliability and accountability and have been conducted in a manner which failed to adhere to certain necessary medical standards and regulations,” the court will “entertain motions and conduct such hearings as may be necessary to resolve questions of evidentiary sufficiency in non-malignant cases supported only by the results of mass screenings which allegedly fail to comport with acceptable screening standards.”

Given the claim generation history, the credibility of claims must be properly scrutinized. Also, trial courts should join the recent movement to reject claims generated by the screening firms and physicians that were the subject of Judge Jack’s opinion.

C. Apply Traditional Tort Litigation Procedures

There is now a better understanding that creating separate, fast-track procedures for asbestos cases fueled the claim-generation engine for unimpaired claimants by encouraging the settlement of claims without regard to their merits. In the last few years,
courts have restored order to asbestos cases and effectively reduced incentives for new filings by unimpaired claimants.

1. Checklist Item #4: Do not consolidate dissimilar claims.

The use of joinder to consolidate dissimilar claims has been discredited and should not be allowed. In 2004, the Mississippi Supreme Court began severing multi-plaintiff asbestos-related cases. In 2006, the Michigan Supreme Court adopted an administrative order to preclude the “bundling” of asbestos-related cases for trial, stating that “each case should be decided on its own merits, and not in conjunction with other cases. Thus, no asbestos-related disease personal injury action shall be joined with any other such case for settlement or for any other purpose, with the exception of discovery.” Similarly, the Ohio Supreme Court amended the Ohio Rules of Civil Procedure to preclude the joinder of pending asbestos-related actions for trial purposes. In addition, Georgia, Kansas, and Texas have enacted laws to prevent


118 See, e.g., Harold’s Auto Parts, Inc. v. Mangialardi, 889 So. 2d 493 (Miss. 2004); Albert v. Allied Grove Corp., 944 So. 2d 1 (Miss. 2006); Amchem Prods., Inc. v. Rogers, 912 So. 2d 853 (Miss. 2005); Illinois Cent. R.R. Co. v. Gregory, 912 So. 2d 829 (Miss. 2005); 3M Co. v. Johnson, 895 So. 2d 151 (Miss. 2005); Alexander v. ACanD, Inc., 947 So. 2d 891 (Miss. 2007); see also Mark A. Behrens & Cary Silverman, Now Open for Business: The Transformation of Mississippi’s Legal Climate, 24 MISS. C. L. REV. 393 (2005); David Maron & Walker W. (Bill) Jones, Taming an Elephant: A Closer Look at Mass Tort Screening and The Impact of Mississippi Tort Reforms, 26 MISS. C. L. REV. 253 (2007).


120 See OHIO R. CIV. P. 42(A)(2) (“In tort actions involving an asbestos claim, . . . the court may consolidate pending actions for case management purposes. For purposes of trial, the court may consolidate pending actions only with the consent of all parties. Absent the consent of all parties, the court may consolidate, for purposes of trial, only those pending actions relating to the same exposed person and members of the exposed person’s household.”).
the joinder of asbestos cases at trial unless all parties consent. These decisions are sound and should be followed. Apples and bananas may mix in a fruit salad, but not in asbestos litigation.

2. Checklist Item #5: Assure discovery is proper for each claim and defendant; if “form” discovery is used in one’s jurisdiction, make sure it is appropriate and not overly burdensome as applied in individual cases.

Some jurisdictions, such as San Francisco, use a standard form for discovery in asbestos cases that requires each defendant to respond to a sweeping set of interrogatories and production requests within 90 or 120 days of being served. In the past, these forms may have provided an effective and fair way to inject efficiency into asbestos litigation. The traditional asbestos defendants that were regularly named in asbestos litigation often had this information readily available, as they likely produced much of it in prior cases.

Broad-based discovery tools, however, can be inefficient, unfair, and out-of-date when applied to newer defendants. For companies that may only be peripherally connected, if at all, to the alleged injury, responding to “one size fits all” standing discovery orders can be unduly costly and burdensome. For example, in one California case, Watts Regulator Company—a valve manufacturer—was named in a lawsuit where the plaintiff alleged contact with one type of the company’s valves used on one day at one location. Despite the narrow scope of the plaintiff’s claim, the standing order required Watts to provide information on the identity and composition of all asbestos-containing products made or sold in a twelve year period, which reportedly amounted to


almost 2,000 unique products with more than a million different permutations.\footnote{See Petition for Review at 15, \textit{In re Complex Asbestos Litig.} (Watts Regulator Co.), No. 828864 (Cal. App. Dep’t Super. Ct. Apr. 2, 2007).}

As this example illustrates, orders to compel the production of substantial information that has no relevance to a case and will not result in the discovery of admissible evidence can be highly inappropriate. Assuming it is even possible to collect the information in the time period allowed, as a practical matter, companies would likely be coerced into settling claims regardless of their merits just to avoid spending the considerable time, money and resources it would take to comply with the standing order.

Trial courts should follow traditional litigation procedures and only require defendants to produce information that is reasonably related to a plaintiff’s specific allegations and is reasonably calculated to lead to the discovery of admissible evidence in the action.\footnote{See, \textit{e.g.}, \textsc{Fed. R. Civ. P.} 26(b)(1).} To the extent “form” discovery can still be a useful litigation tool, it should be updated regularly to reflect the many types of companies that are named in asbestos litigation and the many types of cases that are being brought today. Trial courts considering a form discovery order should seek input from the plaintiff and defense communities before issuing such an order. Courts also should allow objections by defendants to assure that a form’s discovery provisions are not overly burdensome as applied in individual cases.\footnote{Under San Francisco Superior Court Order No. 129, a defendant may not object that the information is not reasonably calculated to lead to the discovery of admissible evidence in the action and may not object that the discovery is unduly burdensome, except that a defendant may assert a “one-time” burden objection in the first ninety days of the first suit against it. \textsc{Gen. Order No. 129 Re: New Filings, supra note 122.}}


Another trial management technique that should be avoided is arbitrary time limits for defendants’ to present their cases. For example, a San Francisco court recently limited the 124 defendants
named in an asbestos action to 45 total hours, which amounted to thirty-six minutes per defendant to cross-examine plaintiffs and present their own cases. Such a limitation denies defendants basic procedural due process because their ability to mount a defense “will be hampered or even eliminated through actions of others over which these defendants have no control or lawful ability to control.”

D. Only Allow Claims Against Defendants Where There Is a Legal Basis for Liability

Now in its fourth decade, the litigation has been sustained by the plaintiffs’ bar search for new defendants coupled with new theories of liability. As the litigation evolves, the connection to asbestos-containing products is increasingly remote and the liability connection more stretched.

The issue of whether a legal duty exists between an asbestos plaintiff and a peripheral defendant who may have little or no connection to the alleged injury is increasingly becoming a central issue in the litigation. Unlike with most litigation, plaintiffs’ lawyers in asbestos cases are not selective in naming as defendants only those companies that could have caused the harm. They typically name scores of defendants regardless of their actual connection to the plaintiff’s alleged injury. Nevertheless, as in other tort cases, the plaintiff must still meet his or her burden of proving that the defendant owed a legal duty before liability can be imposed.128

1. Checklist Item #7: Premises owners generally should owe no duty to plaintiffs alleging harm from off-site, secondhand exposure to asbestos.

A newer duty issue is whether a premises owner may be held liable for injuries to workers’ family members who have been exposed to asbestos off-site, typically through contact with a directly exposed worker or that worker’s soiled work clothes. In earlier years, the litigation was focused mostly on the manufacturers of asbestos-containing products. Most of those companies have been forced to seek bankruptcy court protection. As a result, plaintiffs’ lawyers began to target “peripheral defendants,” including premises owners, for alleged harms to independent contractors exposed to asbestos. Plaintiffs’ lawyers are now targeting property owners for alleged harms to secondarily exposed “peripheral plaintiffs.”

Since the beginning of 2005, a growing number of courts have decided whether premises owners owe a duty to “take home” exposure claimants. The duty has been rejected by the highest courts in Georgia, New York, and Michigan, and Texas and

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130 See CSX Transp., Inc. v. Williams, 608 S.E.2d 208, 210 (Ga. 2005).
133 See Alcoa, Inc. v. Behringer, 2007 WL 2949524 (Tex. App. Oct. 11, 2007) (no duty owed because harm from non-occupational exposure to asbestos was not reasonably foreseeable at time of plaintiff’s exposure); see also Exxon Mobil Corp. v. Altimore, 2007 WL 1174447 (Tex. App. Apr. 19, 2007) (withdrawn Aug. 9, 2007) (premises owner owed no duty to an employee’s wife injured by pre-1972 exposure to asbestos brought home on her husband’s work clothing).
Iowa\textsuperscript{134} appellate courts; a Delaware trial court,\textsuperscript{135} and a Kentucky federal court.\textsuperscript{136} Earlier, a Maryland appellate court reached the same conclusion.\textsuperscript{137} The New Jersey Supreme Court is the only court of last resort to go the other way.\textsuperscript{138} A few appellate courts have found a duty to exist in some circumstances.\textsuperscript{139}

A broad new duty requirement for landowners would allow plaintiffs’ lawyers to begin to name countless premises owners directly in asbestos and other suits. As one commentator has explained,

If the law becomes clear that premises-owners or employers owe a duty to the family members of their employees, the stage will be set for a major expansion in premises liability. The workers’ compensation bar does not apply to the spouses or children of employees, and so allowing those family members to maintain an action against the employer would greatly increase the number of potential claimants. Moreover, people who claim to be injured from take-home exposure, especially children, have very appealing facts and tend to be much younger than other claimants. These factors all flow together in support

\textsuperscript{136} See Martin v. General Elec. Co., 2007 WL 2682064 (E.D. Ky. Sep. 5, 2007) (unpublished). As this article went to press, plaintiffs were appealing the Martin ruling in the Sixth Circuit Court of Appeals.
of high values for these claims.\textsuperscript{140}

The courts that have rejected a new duty rule for premises owners have recognized that tort law must draw a line between the competing policy considerations of providing a remedy to everyone who is injured and of extending tort liability almost without limit. As the Michigan Supreme Court explained, “imposing a duty on a landowner to anybody who comes into contact with somebody who has been on the landowner’s property” would create “a potentially limitless pool of plaintiffs.”\textsuperscript{141} Potential plaintiffs might include anyone who came into contact with an exposed worker or his or her clothes, such as co-workers, children living in the house, extended family members, renters, house guests, baby-sitters, carpool members, bus drivers, and workers at commercial enterprises visited by the worker when he was dirty, as well as local laundry workers or others that handled the worker’s clothes.

Trial courts would be wise to heed the concerns raised by the high courts of Georgia, New York, and Michigan, and dismiss premises owners from cases brought by persons exposed off-site.

2. Checklist Item #8: Maintain traditional tort law distinctions for when premises owners can be liable for injuries to contractors’ employees.

In asbestos litigation, the issue of landowner liability for harms caused to contractors’ employees arises in two types of situations. First, some personal injury lawyers have asserted liability against landowners when the contractor was specifically hired to perform


\textsuperscript{141} \textit{In re} Certified Question from Fourteenth Dist. Court of Appeals of Texas, 740 N.W.2d at 200; see also \textit{Adams}, 705 A.2d at 66 (“If liability for exposure to asbestos could be premised on [decedent’s] handling of her husband’s clothing, presumably Bethlehem [the premises owner] would owe a duty to others who came into close contact with [decedent’s husband], including other family members, automobile passengers, and co-workers. Bethlehem owed no duty to strangers based upon providing a safe workplace for employees.”).
the work that caused the injury—in this case, working with products that contained asbestos.\textsuperscript{142} The Nevada Supreme Court, however, ruled in \textit{Knutson v. Battle Mountain Gold Co.}\textsuperscript{143} that a premises owner does not owe such a duty of care to contractors’ employees\textsuperscript{144} because the independent contractor is in a better position than the premises owner to take special precautions to protect against any peculiar damages associated with working on the premises.\textsuperscript{145} The Delaware Supreme Court echoed that sentiment: “If the independent contractor, through its work, causes the condition that might otherwise give rise to landowner liability . . . employees of that independent contractor have no basis to claim that the landowner is liable for injuries resulting from that condition.”\textsuperscript{146}

Second, a contractor’s employee may sue a landowner for asbestos related exposures resulting from work of another independent contractor on the same premises. The Delaware Supreme Court, however, ruled that landowners cannot be liable “solely because they knew of the existence of a latent hazard on their premises.”\textsuperscript{147} Rather, two additional elements must be shown: “ignorance of the latent hazard on the part of the contractor and its employees and the failure to warn of the latent condition or to take other appropriate action.”\textsuperscript{148} The California Supreme Court has

\textsuperscript{142} See \textit{e.g.}, \textit{Knutson v. Battle Mountain, Gold Co.}, No. 46504 (Nev. July 20, 2007) (Order of Affirmance).

\textsuperscript{143} Id.

\textsuperscript{144} See also \textit{General Elec. Co. v. Cain}, 236 S.W.3d 579 (Ky. 2007);

\textsuperscript{145} See \textit{Knutson}, No. 46504, at 4 (internal citations omitted).


\textsuperscript{147} In \textit{re Asbestos Litig.}, 2006 WL 1214980, at *2.

\textsuperscript{148} Id. The Restatement (Second) of Torts § 343 states:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and
supported these principles, remanding a case for a new trial so that jury instructions could reflect that “the hirer/landowner who has not retained control over the work, and who was not itself actually on notice of a concealed hazardous condition that causes injury, should not be derivatively or vicariously liable for injuries contemporaneously inflicted by an independent contractor on another contractor’s employee.” 149 That court found it persuasive “that reasonable safety precautions against the hazard of asbestos were readily available, such as wearing an inexpensive respirator.” 150 Trial courts should follow these well-reasoned decisions.

3. Checklist Item #9: Component part manufacturers should not be held liable for alleged asbestos-related hazards in external or replacement parts made, supplied, or installed by others and affixed post-manufacture.

Plaintiffs’ lawyers have also begun naming manufacturers of non-asbestos components (typically pumps and valves) in product liability actions alleging that the component part maker had a duty to warn of hazards in asbestos-containing components or finished products made by others. 151 These claims should be dismissed; it is well established “[a]s a general rule, [that] component sellers should not be liable when the component itself is not defective.” 152 This rule was embodied in the Restatement, Third, Products Liability and has been found to apply even where the supplier should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

RESTATEMENT (SECOND) OF TORTS § 343 (1965).


150 Id. at 939.


knew its product may be integrated into a finished product that may cause harm.\footnote{153} The reporters of the Restatement chose their rules based on public policy rather than numbers of cases or bias toward any party.

To place a duty to warn on a defendant for harms caused by others’ products, or the use of others’ products, is contrary to two long-standing tort law principles: (1) that economic loss should ultimately be borne by the one who caused it, and (2) that the manufacturer of a particular product is in the best position to warn about risks associated with it. As the Restatement (Third) Products Liability explains, “[i]f the component is not itself defective, it would be unjust and inefficient to impose liability solely on the ground that the manufacturer of the integrated product utilizes the component in a manner that renders the integrated product defective.”\footnote{154}

Furthermore, expanding liability for failure to warn under these circumstances would be “untenable and unmanageable.”\footnote{155} Such a duty rule would lead to “legal and business chaos—every product supplier would be required to warn of the foreseeable dangers of numerous other manufacturers’ products. . . .”\footnote{156} “For example, a syringe manufacturer would be required to warn of the danger of any and all drugs it may be used to inject, and the manufacturer of bread would be required to warn of peanut allergies, as a peanut butter and jelly sandwich is a foreseeable use of bread.”\footnote{157} Packaging companies might be held liable for hazards regarding contents made by others. There are many other examples that


\footnote{154} Restatement (Third) of Torts: Products Liability §5 cmt. a (1997).


\footnote{157} Tardy & Frase, supra note 155, at 6.
could be provided.

Consumer safety also could be undermined by the potential for over-warning (the “Boy Who Cried Wolf” problem) and through conflicting information on different components and finished products. 158

E. Only Allow a Defendant To Be Held Liable If Its Conduct or Product Was a Legal Cause of the Alleged Injury

For issues relating to both general and specific causation, courts should require that plaintiffs provide precise and credible allegations against each defendant early in the litigation and exercise their judicial responsibility to require the application of well-grounded science in causation arguments. 159 General causation exists when a substance can cause an injury or condition in the general population; specific causation exists when the substance is the cause of a specific person’s injury. 160 Unlike some environmental contamination cases, there is no defined incident of exposure, and the latency period can take several decades. 161 This


159 See, e.g., Merrell Dow Pharm. Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997) (in toxic tort cases, a plaintiff has a burden of showing both general causation—that the substance the plaintiff was allegedly exposed to can generally cause the condition claimed—and specific causation—that the specific exposure was a substantial cause of the specific harm).

160 Id. at 714; see also Mobil Oil Corp. v. Bailey, 187 S.W.3d 265, 270 (Tex. App. 2006) (“Proving one type of causation does not necessarily prove the other, and both are needed in situations where direct, reliable medical testing for specific causation has not taken place.”).

circumstance is partly why “most plaintiffs sue every known manufacturer of asbestos products,”\textsuperscript{162} notwithstanding the plaintiff’s marginal contact, if any, with a particular defendant’s product. It is incumbent on trial courts, therefore, to dismiss defendants where causation cannot be established and instruct jurors on how to make appropriate causation decisions.\textsuperscript{163}

1. Checklist Item #10: Make gatekeeper decisions on expert testimony and assure that materials experts rely on actually support their opinions.

Trial courts should hold preliminary hearings to scrutinize the reliability of expert opinions and to determine whether there is a risk of disease associated with a particular asbestos exposure. There are different types, length and concentrations of asbestos fibers,\textsuperscript{164} and plaintiffs’ lawyers are increasing the number of

\textsuperscript{162} Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156, 1162 (4th Cir. 1986).

\textsuperscript{163} In some cases, especially where the plaintiffs are sympathetic, courts have relaxed specific causation requirements to allow a case to go to trial or to encourage settlement. The ability to recover absent proof of causation is considered by many legal observers to be a key cause of the rapid expansion in recent years of claims alleging asbestos-related injuries. See Steven Hantler, \textit{Toward Greater Judicial Leadership on Asbestos Litigation}, \textit{CIVIL JUSTICE FORUM}, MANHATTAN INST. FOR POLICY RESEARCH, Apr. 2003, at 6–8 (“[D]uring the course of discovery some of the defendants are dismissed on motions for summary judgment because there has been no evidence of any contact with any of such defendants’ asbestos-containing products. Other defendants may be required to go to trial but succeed at the verdict stage.”); \textit{but see} Pearson v. Garlock Sealing Tech., No. 2001-297 (Tex. Dist. Ct. order Jan. 25, 2005) (granting defendant’s summary judgment motion because plaintiff’s expert testimony attempting to link Garlock’s gaskets to plaintiff’s peritoneal mesothelioma failed to satisfy admissibility standards). HarrisMartin reported that Pearson’s settlements with other defendants totaled an estimated $20 million. \textit{See Texas Judge Awards Garlock Summary Judgment in Mesothelioma}, HARRISMARTIN’S COLUMNS: ASBESTOS, Feb. 2005, at 12.

\textsuperscript{164} See, \textit{e.g.}, Becker v. Baron Bros., Coliseum Auto Parts, Inc., 649 A.2d 613, 620 (N.J. 1994) (trial court erred in instructing jury that all asbestos-containing friction products without warnings are defective as a matter of law: “Our courts have acknowledged that asbestos-containing products are not uniformly dangerous and thus that courts should not treat them all alike.”);
diseases they claim are asbestos-related.\textsuperscript{165}

One particularly helpful tool is the epidemiological study. For example, as discussed later in this section, some experts claim that it may only take one fiber to cause certain asbestos-related ailments, including mesothelioma.\textsuperscript{166} In comparing this claim to epidemiological studies, an Ohio federal judge in \textit{Bartel v. John Crane, Inc.}\textsuperscript{167} ruled that testimony alleging “that every breath [plaintiff] took which contained asbestos could have been a substantial factor in causing his disease, is not supported by the medical literature.”\textsuperscript{168} The court said that it would accord “less weight” to that testimony.\textsuperscript{169}

Where consistent, significant, and clear epidemiology exists, as in \textit{Bartel}, courts have begun scrutinizing and, when appropriate, rejecting expert opinions that contradict those studies.\textsuperscript{170} Carefully

\begin{itemize}
\item Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1145 (5th Cir. 1985) (Tex. law) (“[A]ll asbestos-containing products cannot be lumped together in determining their dangerousness.”); Celotex Corp. v. Copeland, 471 So. 2d 533, 538 (Fla. 1985) (“Asbestos products . . . have widely divergent toxicities, with some asbestos products presenting a much greater risk of harm than others.”).


\item See infra notes 192–94 and accompanying text.


\item \textit{Id.} at 611.

\item \textit{Id.}

\item See, e.g., Norris v. Baxter Healthcare Corp., 397 F.3d 878, 885–86 (10th Cir. 2005) (“This is not a case where there is no epidemiology. It is a case where the body of epidemiology largely finds no association between silicone breast implants and immune system diseases. . . . We are unable to find a single case in which a differential diagnosis that is flatly contrary to all of the available epidemiological evidence is both admissible and sufficient to defeat a defendant’s motion for summary judgment.”); Allen v. Pa. Eng’g Corp., 102 F.3d 194, 197 (5th Cir. 1996) (numerous reputable epidemiology studies contradicted plaintiffs’ theory); Allison v. McGhan Med. Corp., 184 F.3d 1300, 1316 (11th Cir. 1999) (plaintiffs’ “proffered conclusions . . . were out of sync with the conclusions in the overwhelming majority of the epidemiological studies presented to the court.”); Chambers v. Exxon Corp., 81 F. Supp. 2d 661, 665 (M.D. La. 2000) (causation claim contradicted by “a number of
conducted pre-trial judicial “gatekeeper” hearings can bring these and other important causation issues to light and reduce the likelihood that liability can be based on speculative or discredited testimony.

2. Checklist Item #11: Adhere to traditional elements of substantial factor causation at summary judgment and provide clear jury instructions as to whether a particular defendant’s asbestos was a “substantial factor” in causing the alleged harm.

In cases where a plaintiff alleges multiple sources of exposures, which occurs regularly in asbestos litigation, courts must compare exposures to determine whether a particular source was a “substantial factor” in causing the alleged injury. When a defendant’s product could not have been a substantial factor in causing the claimed injury, the defendant must be dismissed—even when the defendant’s conduct could have been a “negligible” or “insubstantial” cause of the injury. For example, if there is clear evidence of long-term, substantial exposure to asbestos from one or more sources, incidental exposures cannot be deemed to be substantial causes of the alleged disease.

scientifically performed studies which demonstrate no association” between benzene and CML), aff’d, 247 F.3d 240 (5th Cir. 2001).

171 See RESTATEMENT (SECOND) OF TORTS §§ 431, 433 (1965). The term “substantial cause” is sometimes referred to as a “substantial contributing cause” or a “substantial factor in.”

172 Id. at § 431 cmt. d (“While it is necessary to the existence of liability for negligence that the defendant’s negligent conduct be a substantial factor in bringing about harm to another, this of itself is not necessarily conclusive. There are certain rules which operate to relieve a negligent actor from liability because of the manner in which his negligence produces it, even though his negligent conduct is a substantial factor in bringing it about. These rules are stated in §§ 435–453.”).

173 See id. at cmt. a (“The word ‘substantial’ is used to denote the fact that the defendant’s conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause . . . rather than in the so-called ‘philosophical sense’ which includes every one of the great number of events without which any happening would not have occurred.”).
“The most frequently used test for causation in asbestos cases is the ‘frequency-regularity-proximity test’ announced in Lohrmann.”174 In Lohrmann v. Pittsburgh Corning Corp.,175 the Fourth Circuit formulated this test in determining whether a specific asbestos product contributed to, or was a substantial cause of, the plaintiff’s injuries.176 The plaintiff, having gone to trial against seven asbestos product manufacturers, had argued that if he could “present any evidence that a company’s asbestos-containing product was at the workplace while the plaintiff was at the workplace, a jury question has been established as to whether that product contributed as a proximate cause to the plaintiff’s disease.”177 The Fourth Circuit rejected the argument, and adopted the rule employed by the district court judge, providing that whether a plaintiff could get to the jury (or defeat a motion for summary judgment) “would depend upon the frequency of the use of the product and the regularity or extent of the plaintiff’s employment in proximity thereto.”178 Many courts have applied the Lohrmann (or a Lohrmann-like) causation standard.179

174 Slaughter v. Southern Talc Co., 949 F.2d 167, 171 (5th Cir. 1991) (applying Lohrmann to an asbestos claim governed by Texas law).
175 782 F.2d 1156 (4th Cir. 1986).
176 See id. at 1163.
177 Id. at 1162.
178 Id.
Accordingly, a trial court should carefully evaluate the potential culpability of named defendants and dismiss those defendants where the plaintiff has not put forth sufficient facts to support a “frequency, regularity, proximity test” at summary judgment.\textsuperscript{180} For claims that go to trial, courts should instruct the jury that in order to find against a specific defendant, a plaintiff alleging multiple exposure sources must present evidence (1) of exposure to a “specific product” attributable to the defendant, (2) “on a regular basis over some extended period of time,” (3) “in proximity to where the plaintiff actually worked,” (4) such that it is probable that the exposure to the defendant’s product caused plaintiff’s injuries.\textsuperscript{181}

Importantly, courts should avoid suggestions that substantial cause should be characterized in terms of risk. Some personal injury lawyers and their experts have suggested that it should be sufficient that a defendant’s exposure is a substantial factor in the risk of asbestos disease.\textsuperscript{182} This mistaken notion arose from a California Supreme Court opinion adopting the substantial cause test because the court, perhaps unintentionally, equated risk with cause.\textsuperscript{183} California courts that have followed this path have

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\textsuperscript{180} See Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488 (6th Cir. 2005) (applying the frequency, regularity, and proximity test and finding that the plaintiff did not establish that most of the named defendants had any exposure to the products).

\textsuperscript{181} Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156, 1162–63 (4th Cir. 1986).

\textsuperscript{182} See Wasserman et al., supra note 67, at 897.

\textsuperscript{183} See Rutherford v. Owens-Illinois, Inc., 941 P.2d 1203, 1223 (Cal. 1997) (“[T]he plaintiff may meet the burden of proving that exposure to defendant’s product was a substantial factor causing the illness by showing that
reduced California’s causation standard to a minimal threshold; essentially allowing a claim to be based on any exposure that “is not negligible, theoretical, or infinitesimal.” Being a substantial risk is not the same as being a substantial factor in the cause of asbestos disease and, therefore, is contrary to the doctrines set forth in the Restatement (Second) and in Lohrmann, as well as sound science. Trial courts in California and elsewhere should avoid weakening this fundamental concept in tort law that a defendant, in order to be deemed liable, must have had some part—and in these cases a substantial one—in actually causing the plaintiff’s harm.

3. Checklist Item #12: Assure specific and adequate product identification by dismissing cases where product identification is not sufficient.

Because of the practice of naming scores, sometimes hundreds, of defendants, product identification can be particularly weak, such as the vague recollection by a co-worker that a particular defendant’s product was at a workplace. Trial courts, consequently, should and do regularly dismiss defendants at summary judgment for lack of proper product identification. Discovery requests and subsequent summary judgment motions from individual defendants should be permitted early in the process in reasonable medical probability it was a substantial factor contributing to the plaintiff’s or decedent’s risk of developing cancer.” (emphasis added).

184 See Wasserman et al., supra note 67, at 897.


so that defendants, especially peripheral defendants, are not pressured to engage in “nuisance” settlements to avoid the costs of defending the litigation.

Trial courts should adhere to the traditional tort law principle that a plaintiff must be able to identify a particular manufacturer as a cause of the alleged injuries.\footnote{See Eckenrod v. GAF Corp., 544 A.2d 50, 52 (Pa. Super. Ct. 1988) (“The mere fact that [defendant’s] asbestos products came into the facility does not show that the decedent ever breathed these specific asbestos products or that he worked where these asbestos products were delivered.”).} It is insufficient to establish the mere presence of asbestos in the workplace. At minimum, a plaintiff must show a specific defendant’s asbestos product was used near where the plaintiff worked. As a Philadelphia trial court wrote: “[A plaintiff] must prove that he worked in the vicinity of the product’s use... Product identity can be established where the record shows that plaintiff inhaled asbestos fibers shed by that manufacturer’s specific product.”\footnote{Campbell, 2000 WL 33711047, at *2 (internal citations omitted).}

Some states consider product identification as part of the Lohrmann substantial factor analysis.\footnote{See, e.g., Monsanto Co. v. Hall, 912 So. 2d 134 (Miss. 2005).} For example, the Mississippi Supreme Court held, “the proper test to be used is the frequency, regularity, and proximity standard to show product identification of the defendants’ actual products, exposure of the plaintiffs to those products, and proximate causation as to the injuries suffered by the plaintiffs.”\footnote{Id. at 137.}


a. Mesothelioma

Mesothelioma cases can be the most challenging for trial courts and juries because the plaintiffs can be particularly sympathetic. Notwithstanding the desire to assist those with this deadly form of
cancer, it is important that plaintiffs’ lawyers only seek recovery from those whose products may have caused the disease. One theory that plaintiffs’ lawyers and their experts have used to expand the pool of potential defendants, as alluded to above, is the so-called “any fiber” theory.\textsuperscript{192} The single fiber theory suggests that any exposure to asbestos, regardless of quantity, duration or frequency, contributes to the development of asbestos disease.\textsuperscript{193} This theory has been increasingly scrutinized by the courts because, according to epidemiological studies and leading scientific experts, the theory violates the fundamental toxicology tenet that dose makes the poison.\textsuperscript{194}

For example, in \textit{Borg-Warner Corp. v. Flores},\textsuperscript{195} the Texas Supreme Court rejected the “single fiber” theory, holding that in order to prove causation, a plaintiff must show “[d]efendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease.”\textsuperscript{196} The trial judge responsible for administering the Texas asbestos docket agreed, stating that the single fiber theory “confuses the difference between a potential cause and a substantial cause, and encourages speculation on how little exposure, and how infrequently the exposure must take place, before causation can be said to have been proven.”\textsuperscript{197}

Likewise, the Pennsylvania Supreme Court recently rejected...
the *any exposure* theory in *Gregg v. V.J. Auto Parts, Inc.*\(^{198}\) *Gregg* involved allegations that personal car repair work on brakes and gaskets caused plaintiff’s mesothelioma, resulting in a lawsuit against the auto parts store that sold Mr. Gregg the parts he used. The primary holding in the case dealt with the application of the “frequency, proximity, and regularity” test, but in the course of the discussion the Court majority expressed a clear rejection of the *any exposure* approach:

We recognize that it is common for plaintiffs to submit expert affidavits attesting that any exposure to asbestos, no matter how minimal, is a substantial contributing factor in asbestos disease. However, we share Judge Klein’s perspective, as expressed in the *Summers v. Certainteed Corp.*, 886 A.2d 240 (Pa. Super. 2005) decision, that such generalized opinions do not suffice to create a jury question in a case where exposure to the defendant’s product is *de minimis*, particularly in the absence of evidence excluding other possible sources of exposure (or in the face of evidence of substantial exposure from other sources). As Judge Klein explained, one of the difficulties courts face in the mass tort cases arises on account of a willingness on the part of some experts to offer opinions that are not fairly grounded in a reasonable belief concerning the underlying facts and/or opinions that are not couched within accepted scientific methodology.\(^{199}\)

While recognizing the occasional difficulty of proving which of plaintiff’s exposures contributed to the disease, Pennsylvania’s highest court nevertheless rejected the easy way out of simply stating that all exposures are responsible:

[W]e do not believe that it is a viable solution to indulge in a fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures, implicates a fact issue concerning substantial-factor causation in every “direct-evidence” case. The result, in our view, is to subject defendants to full joint-and-several liability for injuries and


\(^{199}\) *Id.* at **8 (internal citations omitted).
fatalities in the absence of any reasonably developed scientific reasoning that would support the conclusion that the product sold by the defendant was a substantial factor in causing the harm.\textsuperscript{200}

In the last three years, a growing number of other courts in multiple jurisdictions have excluded or criticized \textit{any exposure} causation testimony, either as unscientific under a \textit{Daubert}/\textit{Frye} analysis or as insufficient to support causation. This pattern of decisions includes:

- a Texas appellate court in a mesothelioma case rejecting testimony that any dry wall exposures above 0.1 fibers/cc year would be a substantial contributing factor;\textsuperscript{203}
- an Ohio federal district court and the Sixth Circuit Court of Appeals in a gasket and packings case;\textsuperscript{204}
- two Pennsylvania state trial judges rejecting the \textit{any exposure} testimony in mechanic cases and another criticizing the theory’s application in a pleural disease case;\textsuperscript{205}
- a federal bankruptcy court in litigation involving

\textsuperscript{200} Id. at **9.


\textsuperscript{202} See \textit{Frye} v. \textit{United States}, 293 F. 1013 (D.C. Cir. 1923).


asbestos in vermiculite insulation;\textsuperscript{206} 

- a Mississippi appellate court that rejected a medical monitoring class for persons allegedly exposed in a school building;\textsuperscript{207} and

- a Washington trial court decision rejecting an \textit{any exposure} opinion in a heavy equipment mechanic case.\textsuperscript{208}

These decisions are sound, as a matter of law and science, and should be adopted elsewhere.

One complicating factor in mesothelioma cases is that, while mesothelioma is generally associated with asbestos exposure, it has been estimated that between ten and twenty percent of all mesothelioma patients contract their disease from non-asbestos sources.\textsuperscript{209} At this point the cause of these illnesses is unknown.\textsuperscript{210} Nevertheless, it clearly would be inappropriate for courts to allow plaintiff’s lawyers to pursue litigation under the theory that asbestos exposure must have caused a plaintiff’s mesothelioma. Courts must require causation standards to be met.

\paragraph{b. Lung Cancer}

The key issue for courts with lung cancer cases is to distinguish between lung cancers caused by asbestos exposure and those from other causes. The plaintiff must “offer competent evidence that asbestos exposure, more likely than not, caused [plaintiff’s] lung cancer, and also to negate with reasonable certainty [plaintiff’s] heavy smoking history as the other plausible cause of his lung cancer.”\textsuperscript{211}

In cases involving heavy smokers, plaintiffs’ lawyers have tried to get around this task by suggesting that there is a synergistic


\textsuperscript{207} \textit{See Brooks v. Stone Arch.}, P.A., 934 So. 2d 350 (Miss. App. 2006).

\textsuperscript{208} \textit{Anderson v. Asbestos Corp.}, Ltd., No. 05-2-04551-5SEA (Wash. Super. Oct. 31, 2006) (Transcript of bench ruling at 144–45).

\textsuperscript{209} \textit{See Sporn \& Roggli, supra note 88, at 108.}

\textsuperscript{210} \textit{See id.}

effect between smoking and asbestos exposure in causing lung cancer.\footnote{212}{See id.} Under such a theory, asbestos can cause lung cancer even where the plaintiff does not have asbestosis.\footnote{213}{See id.} As a Texas appellate court held in \textit{Mobil Oil Corp. v. Bailey},\footnote{214}{See id.} trial courts should not admit expert testimony asserting these theories because they have not been shown to be relevant and reliable.\footnote{215}{See id. at 271–72.} With such novel scientific theories of causation, “[c]areful exploration and explication of what is reliable scientific methodology in a given context is necessary.”\footnote{216}{Id. at 274 (citing Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 719 (Tex. 1997)).} Smoking and other potential causes for lung cancer, therefore, must be accounted for in cases alleging lung cancer from asbestos-related exposures.

c. Other Forms of Cancer

Personal injury lawyers also have filed asbestos-related claims for more general types of cancer, such as cancers of the colon, kidney, rectum, larynx, stomach, pharynx and esophagus.\footnote{217}{See Jonathan M. Samet, \textit{Asbestos and Causation of Non-Respiratory Cancers: Evaluation by the Institute of Medicine}, 15 J.L. & POL’Y 1117 (2007).} Courts adhering to \textit{Daubert}, \textit{Frye} or other such sound scientific screening standards should reject these claims because the science does not support a causal link between asbestos and these other cancers.\footnote{218}{See Letter from Dr. James D. Crapo to U.S. Sen. Jon Kyl (July 23, 2003), in S. Rep. No. 108-118, at 148 (“Compensation by the FAIR Act for forms of cancer other than lung cancer and mesothelioma is not justified by current medical science.”).} With regard to colon cancer, for example, some cases have been filed where asbestos bodies and fibers have been found in the plaintiff’s colon.\footnote{219}{See Alani Golanski, \textit{General Causation at a Crossroads in Toxic Tort Cases}, 108 PENN ST. L. REV. 479, 491–96 (2003).} Presence of asbestos fibers, however, does not
create a causal relationship between those fibers and any cancer.\textsuperscript{220} The Institute of Medicine of the National Academies, which has published the broadest look into theories of causal relationships between selected cancers, including colon cancer, and asbestos, found that there is “not sufficient [evidence] to infer a causal relationship between asbestos exposure and colorectal cancer.”\textsuperscript{221} Accordingly, courts applying sound scientific principles have rejected these claims.\textsuperscript{222}

As discussed above, epidemiological studies can be an important tool for courts in assessing such new theories of causation. Again, in the context of colon cancer, a number of epidemiologists and medical organizations have expressly determined that asbestos exposure does not cause colon cancer.\textsuperscript{223} For example, one study in the Los Angeles area concluded “occupational exposure to asbestos is not a risk factor for colon cancer.”\textsuperscript{224} Similarly, a 2004 study found that “[c]urrent epidemiology does not support the link between asbestos exposure and adenocarcinoma of the colon.”\textsuperscript{225} Yet, some personal injury

\textsuperscript{220} Id.
\textsuperscript{221} Inst. of Med. Comm. on Asbestos: Selected Health Effects, Asbestos: Selected Cancers (National Academies Press 2006) (“The overall lack of consistency or of the suggestion of an association among the case-controlled studies (even those of the highest quality) and the absence of convincing dose-response relationships in either type of study design, however weigh against causality.”).
\textsuperscript{222} See, e.g., In re Joint E. & S. Dist. Asbestos Litig., 827 F. Supp. 1014, 1037–50 (S.D.N.Y. 1993) (granting judgment as a matter of law on the ground that epidemiological studies failed to demonstrate a sufficiently strong and consistent association between asbestos and colon cancer); Washington v. Armstrong World Indus., Inc., 839 F.2d 1121 (5th Cir. 1988) (holding that expert testimony that plaintiff’s colon cancer “could have been due to asbestos exposure lacked probative value because it was pure speculation based on negative inferences”); but see Grassis v. Johns-Manville Corp. 591 A.2d 671, 675–77 (N.J. Ct. App. 1991) (reversing grant of summary judgment on these grounds).
\textsuperscript{224} Id.
\textsuperscript{225} Sporn & Roggli, supra note 88, at 108.
lawyers continue to file these cases. When such novel theories of causation are proffered, courts should perform their gatekeeper function to reject them unless and until credible science can establish such a link.

F. Assure That Juries Can Fully Compensate Deserving Plaintiffs While Preserving Assets For Future Claimants

1. Checklist Item #14: Permit discovery of settlement trust claims, as well as any pre-trial settlements, and declare intentions to file any future claims.

Ohio trial court Judge Harry Hanna showed the importance of allowing defendants to seek discovery of claim forms that a plaintiff’s lawyers had previously submitted to settlement trusts. In Kananian v. Lorillard Tobacco Co., he “exposed one of the darker corners of tort abuse” in asbestos litigation: inconsistencies between allegations made in open court and those submitted to settlement trusts or other funds set up by bankrupt companies to pay asbestos-related claims.

As the Cleveland Plain Dealer reported, “[Judge] Hanna’s order effectively opened a Pandora’s box of deceit . . . Documents from the six other compensation claims revealed that [plaintiff’s lawyers] presented conflicting versions of how Kananian acquired his cancer.” In addition, emails and other documents from the

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228 Id.
230 James F. McCarty, Judge Becomes National Legal Star; Bars Firm Form Court Over Deceit, CLEVELAND PLAIN DEALER, Jan. 25, 2007, at B1
plaintiff’s attorneys showed that “the client has accepted monies from entities to which he was not exposed,” and one settlement trust form was “completely fabricated.”231 In all, Mr. Kananian reportedly collected $700,000 from trusts and settlements.232 The Wall Street Journal has editorialized that Judge Hanna’s opinion should be “required reading for other judges” to assist in providing “more scrutiny of ‘double dipping’ and the rampant fraud inherent in asbestos trusts.”233

Other courts have recognized the discoverability of claim forms submitted by plaintiffs to asbestos-related bankruptcy trusts.234 In Volkswagen of America, Inc. v. Superior Court, for example, a California appellate court issued a writ of mandamus, stating that it would be an unjustifiable denial of discovery for the trial court to not allow defendants to discover documents submitted to bankruptcy trusts by the plaintiff’s attorney in support of the plaintiff’s claims to those trusts for compensation for the alleged asbestos-related injuries.235 Likewise, Texas trial courts are granting

(“In one claim, the lawyers said Kananian had been exposed to asbestos while working as a welder around insulated pipes. In another claim they said he welded for only two weeks while on a ship in the Philippines. In a third claim, the lawyers said the victim had been exposed to asbestos at the San Francisco Naval Shipyard at a time when Kananian testified he was a rifleman who merely had passed through the port on board a troopship.”).


motions to compel responses to interrogatories directed to asbestos claimants regarding claims and settlements made or expected to be made with any bankruptcy trust.236 In New Jersey, a discovery master for the court overseeing that state’s consolidated asbestos docket recommended that production of claim forms be directed, explaining that, whether or not ultimately admissible in evidence, such documents reveal discoverable factual information regarding plaintiffs’ alleged exposure to asbestos-containing products.237 Most recently, a New York trial court acted to head off gamesmanship in filing practices by requiring plaintiff’s counsel to file all claim forms that they intend to file within ninety days before the start of trial, and produce such forms to defendants.238 The court cautioned that if plaintiff’s counsel ignored the order and filed claim forms with bankruptcy trusts at a later date, the court would “vacate any verdict if it is against the Defendant.”239

By allowing such discovery, and preventing gamesmanship, courts can better prevent an unscrupulous claimant from trying to tell one story to a bankruptcy trust and a different story to the jury in a civil action. Transparency with respect to claim forms also creates proper pressure on plaintiffs’ lawyers to file more consistent and accurate bankruptcy trust claims.

(unpublished).


238 See Cannella v. Abex, Nos. 1037729/07, 105609/03, 105136/07, 107449/07, 104144/07, 106808/07, 117395/06, 116617/06 (N.Y. Sup. Ct., N.Y. County Jan. 24, 2007) (hearing transcript).

239 Id. at 46.
2. Checklist Item #15: Assure proper settlement credits and offsets at trial with monies paid by any entity to satisfy a legal claim directed at the injury alleged in accordance with state law.

An important way to assure that litigation resources are preserved for future claimants, while allowing current claimants to be fully compensated, is to properly offset judgments with settlement credits and trust receipts. Given the mass numbers of defendants typically named in the litigation, the final sum of all settlements is often substantial. In addition, as discussed in the previous section, most plaintiffs also collect funds from bankruptcy trusts in satisfaction of a claim outside of the litigation process. With several large trusts coming online with assets totaling $30 billion in 2007 and 2008, “[f]or the first time ever, trust recoveries may fully compensate asbestos victims.”

Trial courts should expect that plaintiffs’ lawyers will try to affect the off-set calculation. One tactic plaintiff’s lawyers have used is to include in the settlements they reach with most defendants that only a small portion, if any, of those settlements will be used to off-set any judgment against the remaining defendants; they will then argue that these side agreements should “control the allocation of set-offs.” As can be expected, courts have rejected these efforts because they “subvert the findings of the trier of fact” in assessing liability. Courts also have recognized that plaintiffs and their lawyers have an undisputed “interest in allocating as little as possible” of settlements to final judgments.

In addition, some plaintiffs’ lawyers have argued, as in New
York asbestos cases, that because of the automatic stay of litigation against bankruptcy trusts, a plaintiff cannot obtain effective jurisdiction over the trust and, consequently, monies received from those trusts should not be included in the off-set calculations. Judge Freedman, who oversees New York City’s asbestos docket, has wisely rejected this argument, holding that the culpability of tortfeasors who are bankrupt and, therefore, not a party to the case, will be included when calculating a defendants’ liability under New York law. The impact of this issue in asbestos litigation, she recognized, “is especially pronounced, because of the large number of potentially culpable parties that have filed for bankruptcy.”

In the face of these and similar efforts, trial courts must assure that the controlling allocation formula is applied in ways that are reasonable and fair.

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246 Id. at 479.
247 Id. at 473.
248 See Restatement (Second) of Torts § 920A (1979) (“A payment made by a tortfeasor or by a person acting for him to a person whom he has injured is credited against his tort liability, as are payments made by another who is, or believes he is, subject to the same tort liability.”); see also Burns v. Stouffer, 100 N.E. 2d 507 (Ill. Ct. App. 1951) (holding that it is reversible error not to credit an amount received from a joint tortfeasor); see generally Jean Macchiaroli Eggen, Understanding State Contribution Laws and Their Effect on the Settlement of Mass Tort Actions, 73 Tex. L. Rev. 1701, 1702 (1995) (discussing various approaches to state contribution laws); Brittany L. Wills, To Settle or Not to Settle?: The Calculation of Judgments Among Nonsettling Defendants in Texas, 31 St. Mary’s L.J. 529, 536 (2000) (focusing on Texas contribution laws).
3. **Checklist Item #16**: Allow certain collateral sources to be admissible so that jurors can consider and account for all collateral sources that provided compensation to the plaintiff for the alleged harm.

   To further preserve resources for future claimants, trial courts should dedicate “any amount paid by anybody, whether they be joint tort-feasors or otherwise,” that have compensated a plaintiff for the asbestos-related harm at issue.\(^{249}\) This calculation should include collateral sources when a plaintiff’s initiative did not generate the source of the funds.\(^{250}\) Generally, the collateral source rules provide that damages awarded by a jury are not reduced by the amount of compensation or benefits that the plaintiff received from sources other than the defendant, even when the plaintiff did not use his or her own assets to help create those sources of funding.\(^{251}\) A North Carolina appellate court in *Schenk v. HNA Holdings, Inc.*\(^{252}\) reviewed the impact of the collateral source rule on modern asbestos litigation and affirmed a trial court’s decision to offset plaintiffs’ verdict awards by amounts collected through workers’ compensation benefits.\(^{253}\) Given the mature state of

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\(^{250}\) Where a plaintiff’s initiative generated the source of the funds, such as by purchasing life insurance, it may not be appropriate for the court to allow such evidence before a jury.

\(^{251}\) The collateral source rule “ordains that, in computing damages against a tortfeasor, no reduction be allowed on account of benefits received by the plaintiff from other sources, even though they have partially or wholly mitigated his loss.” John Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478, 1478 (1966).


\(^{253}\) *Id.* at 510.
asbestos litigation today, the Schenk Court provides an appropriate method for preserving litigation resources.

Taking this step can be particularly important where joint and several liability still applies, as jurors may want to spare defendants from providing windfall benefits for harm they did not cause. Such a system also allows juries to assist in rationing the remaining litigation resources while still preventing those plaintiffs from bearing the costs for their own bills.

4. Checklist Item #17: Instruct jurors on the state’s joint and several liability rules.

In asbestos litigation, dozens, even hundreds, of companies may be named as potentially responsible parties, but most settle and “usually only one or, at most, a couple of defendants remain” at trial. These defendants likely are only peripherally related to the alleged injury and named mostly for their “deep pockets.” To help jurors accurately assess liability, courts should include in jury instructions an explanation of the state’s joint and several liability laws.

When juries are not informed of the effect of joint and several liability, they can be led to believe that a peripheral asbestos

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254 Informing the jury in this manner recognizes the jurors’ fundamental role as “the judge of the facts.” Joel K. Jacobsen, The Collateral Source Rule and the Role of the Jury, 70 OR. L. REV. 523, 523 (1991); see also Whiteley v. OKKC Corp., 719 F.2d 1051, 1058 (10th Cir. 1983) (“The determination of damages is traditionally a jury function. . . . The jury must have much discretion to fix the damages deemed proper to fairly compensate the plaintiff.”).

255 Wasserman et al., supra note 67, at 917.

256 Joint and several liability holds a defendant responsible for an entire harm, even though a jury has determined that it was only partially responsible. “The clear trend over the past several decades has been a move away from joint and several liability.” RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17 cmt. a (2000). As of this writing, about forty states have either abolished or modified their joint liability rules. See Hantler et al., supra note 32, at 1147–51. Another approach to the one discussed in this section would be for courts to abolish joint liability in asbestos cases altogether. See Richard L. Cupp, Jr., Asbestos Litigation and Bankruptcy: A Case Study for Ad Hoc Public Policy Limitations on Joint and Several Liability, 31 PEPP. L. REV. 203 (2004).
defendant “will only be liable for a small contribution to the total damage award and the main defendant will be liable for the remainder.” Such “blindfold rules,” no matter how well-intended, may result in setting a “trap for the uninformed jury.” The jury will not know that the “deep pocket defendant may be liable for the entire award, with little hope of contribution from the party that is mainly at fault.” Concern about this issue in general litigation has caused several state supreme courts to implement “sunshine rules,” requiring trial courts to inform juries of joint and several liability rules. These courts have found that it is “better to equip jurors with knowledge of the effect of their findings than to let them speculate in ignorance and thus subvert the whole judicial process.” This concern about the ability of the judicial system to competently adjudicate such claims is particularly pressing in asbestos litigation, where the dynamics of the peripheral defendant tend to dominate most cases.

For this reason, San Francisco Superior Court Judge Stephen Allen Dombrink, provided such a jury instruction in response to a defense motion. He instructed the jury that, under California

260 Id.
261 See, e.g., Reese v. Werts Corp., 397 N.W.2d 1 (Iowa 1985) (holding that the trial court should have instructed the jury on the effects of its verdict on the plaintiff’s recovery); Decelles v. State, 795 P.2d 419, 419–21 (Mont. 1990) (“We think Montana juries can and should be trusted with the information about the consequences of their verdict.”); Coryell v. Town of Pinedale, 745 P.2d 883, 884, 886 (Wyo. 1987) (holding that statute provided that the court must “inform the jury of the consequences of its verdict”).
262 Id.
263 See Horr v. Allied Packing, No. RG-03-104401, slip op. at *2 (Cal. Super. Ct. App. Dep’t Feb. 13, 2006). The proposed order stated: “If you find [Defendant] liable for any percentage of fault, [Defendant] will be responsible to pay for its proportionate share of any non-
law, any finding of a proportionate share of liability for economic damages would result in the defendant being responsible for the full amount of economic damages. Judge Dombrink had faith that juries are responsible enough to handle this knowledge. A similar instruction has recently been issued in Los Angeles County Superior Court.

5. Checklist Item #18: Sever or strike punitive damages claims.

Finally, courts should sever or strike punitive damages claims in asbestos cases because it is unsound public policy to allow such awards in modern asbestos cases. The purpose of punitive damages generally is to punish specific wrongdoers, deter them from committing wrongful acts again, and deter others in similar situations from committing wrongful behavior. The message of

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264 Id. (approving the following jury instruction: “If you find Dentsply liable for any percentage of fault, Dentsply will be responsible to pay for its proportionate share of non-economic damages you may award. With respect to economic damages, Dentsply will [be] responsible for the full amount of those damages less a proportionate share of any settlements that may have been made by other defendants.”).

265 See id. (“The proposed instruction will aid the jury in determining the proper amount of damages and making the proper allocation of the ratio of settlement percentages as between the economic and noneconomic damages.”).

266 See Reporter’s Daily Transcript of Proceedings, at 41, Mikul v. Bondex Int’l, No. BC332247 (Los Angeles County Super. Ct. Nov. 22, 2006) (“If you find a Defendant liable for any percentage of fault, that defendant will be responsible to pay for its proportionate share of any noneconomic damages you may award. With respect to economic damages, that defendant will be responsible for the full amount of those damages, less a proportionate share of any settlements that may have been made by other Defendants.”).

267 See, e.g., Mark A. Behrens & Barry M. Parsons, Responsible Public Policy Demands an End to the Hemorrhaging Effect of Punitive Damages in Asbestos Cases, 6 TEX. REV. L. & POL. 137 (2001).

deterrence, both specific and general, has been heard loud and clear in asbestos cases. At this phase in litigation, punitive damages have an unintended and unfortunate effect—they “threaten fair compensation to [pending and future] claimants” who await their recovery, and “threaten . . . the economic viability of [peripheral] defendants.” The problem is exacerbated when punitive damages are repeatedly assessed against a company in different trials for the same or similar underlying conduct.

The United States Court of Appeals for the Third Circuit approved a decision by Judge Weiner, who oversaw the federal multi-district litigation for asbestos cases, to sever all punitive damages claims from federal asbestos cases before remanding compensatory damages cases for trial. The Third Circuit, quoting liberally from a 1991 Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation, said that its decision was based on “compelling” public policy:

Although there may be grounds to support an award, multiple judgments for punitive damages in the mass tort context against a finite number of defendants with limited assets threaten fair compensation to pending claimants and future claimants who await their recovery, and threaten the economic viability of the defendants. To the extent that some states do not [sic] permit punitive damages, such awards can be viewed as a malapportionment of a limited fund. Meritorious claims may go uncompensated while earlier claimants enjoy a windfall unrelated to their actual damages.

At the conclusion of its opinion, the Third Circuit strongly urged state courts to sever or stay punitive damages claims in asbestos

(2003).

269 JUD. CONF. REP., supra note 11, at 3, 5.

270 See William W. Schwarzer, Punishment Ad Absurdum, 11 CAL. LAW 116 (1991) (“Barring successive punitive damage awards against a defendant for the same conduct would remove the major obstacle to settlement of mass tort litigation and open the way for the prompt resolution” of legitimate claims.”).

271 In re Collins, 233 F.3d 809, 812 (3d Cir. 2000).

272 Id.
cases to preserve assets for sick claimants. Several state courts have done so, including trial courts in Baltimore City, Northampton County (Bethlehem and Easton), Pennsylvania; Philadelphia, and New York City. Florida has enacted a law banning punitive damages “in any civil action alleging an asbestos or silica claim.”

Trial courts should follow these examples and sever punitive damages in order to preserve funds to compensate the truly sick. This step should be taken in the early stages of litigation because of the leveraging effect punitive damages have at the settlement table.

CONCLUSION

The foregoing checklist items were born in jurisdictions where the asbestos litigation crisis is most prolific and best understood. The common theme is that they facilitate the resolution of claims on their merits. Specifically, they focus scarce litigation resources on the claims of those truly impaired from asbestos exposure, allow defendants to exculpate themselves when they or their

273 See id. (“It is discouraging that . . . some state courts allow punitive damages in asbestos cases. The continued hemorrhaging of available funds deprives current and future victims of rightful compensation.”).

274 See Keene Corp. v. Levin, 623 A.2d 662, 663 (Md. 1993) (noting that trial court deferred payments of punitive damages “until all Baltimore City plaintiffs’ compensatory damages are paid”).

275 See Third Circuit Rehears Dunn Arguments en banc, 8:1 MEALEY’S LITIG. REP.: ASBESTOS 20 (Feb. 5, 1993) (“[The] Philadelphia Court of Common Pleas has a basic ‘standing order’ that all punitives are to be stayed . . . ”).

276 See $64.65 Million Awarded in Four Asbestos Cases, 4:18 MEALEY’S LITIG. REP.: TOXIC TORTS 16 (Dec. 15, 1995) (reporting on a New York case in which the trial court severed and deferred punitive damages indefinitely).

277 FLA. STAT. ANN. § 774.207(1) (West 2005).

278 See Dunn v. Hovic, 1 F.3d 1371, 1398 (3d Cir. 1993) (Weis, J., dissenting) (“[T]he potential for punitive awards is a weighty factor in settlement negotiations, . . . [and] assets that could be available for satisfaction of future compensatory claims are dissipated”), modified in part, 13 F.3d 58 (3d Cir. 1993), cert. denied, 510 U.S. 1031 (1993).
products could not have caused the harm alleged, cut down on the gaming of the legal system, and preserve assets for future claimants. To employ these checklist items most effectively, courts should require plaintiffs early in their lawsuits to provide facts relating to the nature of their damages and to each defendant. By separating out the colorable claims as soon as practicable, the nation’s judges can maintain the current momentum towards restoring order and sound public policy to asbestos cases.
THE TUG OF WAR: COMBATANT STATUS REVIEW TRIBUNALS AND THE STRUGGLE TO BALANCE NATIONAL SECURITY AND CONSTITUTIONAL VALUES DURING THE WAR ON TERROR

Doran G. Arik*

There are, it is predicated, certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community. Such principles were made by no human hands; indeed, if they did not antedate deity itself, they will so express its nature as to bind and control it. They are external to all Will as such and interpenetrate all Reason as such. They are eternal and immutable. In relation to such principles, human laws are, when entitled to obedience save as to matters indifferent, merely a record or transcript, and their enactment an act not of will or power but one of discovery and declaration.1

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INTRODUCTION

The three branches of the American government have been wrangling over the rights of non-citizen detainees held at the U.S. naval base at Guantanamo Bay, Cuba ever since the government began sending suspected terrorists there in 2002. Times of war often give rise to internal struggles within government as the nation’s leadership attempts to maintain a delicate balance between the equally important yet competing interests of defending national security and individual liberty. The terrorist attacks of September 11, 2001 unquestionably placed new and different pressures on the American government; an attack on American soil heightened the government’s responsibility to preserve and protect the nation. National defense and individual liberty are not mutually exclusive interests, however, and unfortunately the American government has thus far been unable to strike the appropriate balance between the two initiatives. The result is perhaps best described as a six-year tug-of-war between Congress and the Executive on the one hand and the Supreme Court on the other.

Almost immediately after the United States brought the first suspected terrorists to Guantanamo in January of 2002, detainees

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3 On several occasions, the Supreme Court ruled that the right to seek a writ of habeas corpus in federal court challenging the legality of one’s detention extends to Guantanamo detainees, while Congress, under political pressure from both its own members and the Administration, effectively legislated to overturn those decisions. After the Supreme Court held in Rasul v. Bush, 542 U.S. 466 (2004), that non-citizen detainees held at Guantanamo have the right to petition federal courts for writs of habeas corpus pursuant to 28 U.S.C. § 2241, Congress passed the Detainee Treatment Act (“DTA”) which stripped federal courts of their jurisdiction over detainees’ habeas petitions. See infra note 47 and accompanying text. Then, after the Supreme Court held in Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006), that the DTA did not apply to habeas petitions already pending when the DTA was enacted, Congress passed the Military Commissions Act (“MCA”) which explicitly and effectively stripped federal courts of any and all jurisdiction over detainees’ habeas petitions. See infra text accompanying notes 53–54.
4 Vogel, supra note 2.
began petitioning federal courts for writs of habeas corpus to challenge the legality of their detentions on both constitutional and statutory grounds.\textsuperscript{5} However, each time the Supreme Court held that 28 U.S.C. § 2241, commonly referred to as the habeas statute, extended to alien detainees held at Guantanamo,\textsuperscript{6} Congress responded with legislation to strip federal courts of their jurisdiction over detainees’ habeas petitions.\textsuperscript{7} Without access to federal courts through habeas petitions, each detainee must instead rely on the limited review process that accompanies his individual Combatant Status Review Tribunal (“CSRT”)—a process hastily created by the Department of Defense (“DOD”) in 2004 to review detainees’ enemy combatant status designations. Under the Detainee Treatment Act (“DTA”) and Military Commissions Act (“MCA”), a detainee at Guantanamo may only seek review in the D.C. Circuit Court as to whether the CSRT in his case properly

\textsuperscript{5} See generally Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002) (holding that the Court did not have jurisdiction over habeas petitions filed by aliens held outside the sovereign territory of the United States), aff’d by Al-Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), rev’d, Rasul, 542 U.S. 466 (2004) (holding, inter alia, that Guantanamo detainees have the right to file habeas petitions in federal court to challenge the legality of their detentions pursuant to 28 U.S.C. § 2241).

\textsuperscript{6} See Rasul, 542 U.S. at 483 (holding that detainees at Guantanamo have the right to petition federal courts for writs of habeas corpus under the habeas statute for a review of the legality of their detentions); see also Hamdan, 126 S. Ct. at 2769 (concluding that restrictions imposed on detainees’ right to file petitions for writs of habeas corpus in federal court by Congress in the DTA did not apply to cases already pending when the DTA was passed).

followed DOD standards and procedures. This limited review prevents any examination of the underlying legitimacy of CSRT procedures, despite the fact that the process denies detainees bedrock procedural guarantees at the core of the American legal system.

In stripping federal courts of their jurisdiction over detainees’ habeas petitions, the Administration strenuously maintains, and Congress has thus far seemingly agreed, that because Guantanamo detainees are non-citizens captured and detained abroad, U.S. constitutional rights do not extend to them. Such an argument presupposes that constitutional rights exist in a vacuum, and fails to take into account both the core principles underlying constitutional guarantees and the historical purpose for their inclusion in the Constitution.

The Framers recognized certain rights as deriving from natural law, and intended the Constitution to serve as the protector, not the

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8 “The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit . . . shall be limited to the consideration of—whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals . . . .” Detainee Treatment Act § 1005(e)(2)(C). The MCA left this portion of the DTA unchanged when it was subsequently enacted in 2006. See Military Commissions Act.

9 Judge Joyce Green of the D.C. District Court, before whom many detainees have appeared after filing petitions, lamented in her disposition of one group of consolidated cases that, “CSRTs are unconstitutional for failing to comport with the requirements of due process.” In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 481 (D.D.C. 2005), vacated, Boumediene v. Bush, 476 F.3d 981, (D.C. Cir. 2007), cert. and reh’g granted, 127 S. Ct. 3078 (2007).

10 See Boumediene, 476 F.3d at 990–91; see generally Johnson v. Eisentrager, 339 U.S. 763 (1950). This Note does not examine whether specific constitutional rights as such should extend to detainees held at Guantanamo. Rather, the discussion here is limited to an examination of the degree to which natural law and founding principles require that a minimum procedural standard be met in order to preserve fundamental constitutional values. The analysis undertaken here does not imply an assumption of the constitutionality, or unconstitutionality, of the jurisdiction-stripping provisions of the DTA and MCA.
creator, of those rights. Indeed, the liberty rights as recognized by the Framers did not originate in the Constitution, but rather were deemed natural rights that predated its ratification. More than simply conferring certain rights on American citizens, the constitutional guarantees of due process and habeas corpus serve to “preserve unimpaired the . . . safeguards of civil liberty.” Because protecting against “interferences with the individual’s right to liberty is . . . one of the fundamental principles of a democratic society,” such a goal cannot be limited to citizens. Unchecked attempts to curtail individual liberty—regardless of citizenry—will irreparably undermine our democratic foundations. Preserving safeguards of civil liberties thus must be a universal imperative.

This Note argues that the CSRT process cobbled together by the DOD undermines the fundamental tenet of individual liberty, which sits at the core of the American legal system. Part I of this Note provides the history of detention at Guantanamo and examines detainees’ challenges to their detentions coupled with the varying responses by Congress and the courts. Part II examines the natural law principles that underlie specific guarantees provided in the Constitution and the degree to which such principles lend legitimacy to the American legal system. Part III presents a more detailed examination of the CSRT system and analyzes how the inherent problems therein undermine the role of natural law

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12 See Jeff Rosen, Note, Was the Flag Burning Amendment Unconstitutional?, 100 YALE L.J. 1073, 1074–80 (1991) (arguing that the Framers of the American Constitution shared a strong belief in natural rights, including but not limited to the right to liberty, and understood natural rights to “come from God rather than the government”).
principles in the American constitutional system. Finally, Part IV provides a survey of recent and pending developments, arguing that the most effective method for remedying the problems with the current process for examining detainees’ detention, and by extension for striking an appropriate balance between preserving core American principles and protecting our national security interests, lies in congressional action that respects Supreme Court mandates.

I. THE HISTORY OF DETENTION AT GUANTANAMO—A TIMELINE

A. Arrival and Detention

Within one week of September 11, 2001, Congress passed a joint resolution authorizing the President to use “all necessary and appropriate force . . . to prevent any future acts of international terrorism against the United States.” Shortly after U.S. troops


THE TUG OF WAR initiated the first strike in Afghanistan, President Bush issued a military order giving the Secretary of Defense detention and trial authority over individuals captured by the United States and outlining minimum provisional and procedural guarantees for detainees.

In January of 2002, Secretary of Defense Donald Rumsfeld announced that the military was “making preparations” to send detainees to the U.S. naval base in Guantanamo Bay, Cuba. One week later, the first of several hundred detainees arrived there. Though the President’s Military Order authorized Secretary Rumsfeld to regulate detainees’ trials, Secretary Rumsfeld made clear at that time that there were “no plans to hold any kind of tribunal [in Guantanamo].”

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17 On October 7, 2001 the United States military began strikes, pursuant to President Bush’s order, “against al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.” Presidential Address to the Nation, supra note 16.

18 For example, the order mandated that detainees be treated humanely, be afforded adequate food and water, and be allowed to practice their religion freely. In addition, the order provided that detainees were to be given a “full and fair trial” subject to the “rules for the conduct of the proceedings of military commissions.” Press Release, George W. Bush, President of the U.S., The White House, President Issues Military Order: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism (Nov. 13, 2001), available at http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html [hereinafter President’s Military Order].


20 See Vogel, supra note 2.

21 The President’s Military Order authorized the Secretary of Defense to appoint military commissions and issue any other orders and regulations deemed necessary to carry out the provisions of the Order. See President’s Military Order, supra note 18.

22 DOD Briefing, supra note 19.
B. Initial Challenges

Almost immediately after terrorism suspects arrived at Guantanamo, detainees began to seek judicial review of their detentions by filing habeas petitions in federal court.\textsuperscript{23} Detainees argued that they did not fight against the United States, that they were never “supporter[s] of the Taliban or any terrorist organization,” and that their detentions were therefore unlawful.\textsuperscript{24} In response, the government argued that U.S. courts lacked jurisdiction to consider habeas petitions brought by non-citizens captured and detained abroad.\textsuperscript{25} The D.C. District Court agreed, and granted the government’s motion to dismiss the detainees’ petitions.\textsuperscript{26}

On appeal, the D.C. Circuit Court upheld the District Court’s decision to grant the government’s motion to dismiss.\textsuperscript{27} However, in 2004 the Supreme Court reversed the decisions of the lower courts, holding in \textit{Rasul v. Bush} that U.S. courts do have

\textsuperscript{23} For example, petitioner in \textit{Rasul v. Bush} first filed their habeas petition in D.C. District Court on February 19, 2002. \textit{Rasul v. Bush}, 215 F. Supp. 2d 55, 57 (D.D.C. 2002). The action before the District Court was a consolidation of two cases, \textit{Rasul v. Bush} and \textit{Al-Odah v. United States}. Later appeals in that action to the D.C. Circuit Court and the United States Supreme Court are referenced by varying captions, including both \textit{Rasul v. Bush} and \textit{Al-Odah v. United States}.

\textsuperscript{24} \textit{Rasul}, 215 F. Supp. 2d at 61.

\textsuperscript{25} \textit{Id.} at 56.

\textsuperscript{26} \textit{Id.} at 57. The District Court looked to earlier precedent, and held that \textit{Johnson v. Eisentrager}, 339 U.S. 763 (1950), was controlling. In \textit{Johnson}, the Supreme Court dismissed habeas petitions filed by German nationals captured and tried in China during World War II and subsequently detained at a military prison in Germany. \textit{See id.} In dismissing their habeas petitions for lack of jurisdiction, the Supreme Court held that the writ of habeas corpus did not extend to aliens held outside the sovereign territory of the United States. \textit{Id.} at 778. The District Court in \textit{Rasul} held that, like in \textit{Johnson}, the writ of habeas corpus did not extend to detainees held at Guantanamo because Guantanamo Bay, Cuba is “outside the sovereign territory of the United States,” and thus the Court lacked jurisdiction. \textit{Rasul}, 215 F. Supp. 2d at 72–73.

jurisdiction under the habeas statute to consider challenges to the legality of the detention of foreign nationals captured abroad and detained at Guantanamo. That same day, in another similar case, a plurality of the Supreme Court held that Congress’ Authorization for the Use of Military Force (“AUMF”) provided the necessary authorization to detain, but that detainees must be afforded the opportunity to appeal an enemy combatant status determination.

In response to the Supreme Court’s ruling in *Rasul* affirming detainees’ right to challenge the legality of their detention by filing habeas petitions, Deputy Secretary of Defense Paul Wolfowitz issued a memorandum establishing CSRTs and outlining the procedures required therein. Specifically, CSRT proceedings were to operate under the presumption that each detainee was an enemy combatant. CSRTs were billed as an opportunity for a detainee to

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28 Rasul v. Bush, 542 U.S. 466, 484 (2004). In practice, the Supreme Court’s disposition in *Rasul* meant that detainees’ petitions for habeas corpus in the United States District Court for the District of Columbia could no longer be dismissed for lack of jurisdiction.

29 Hamdi v. Rumsfeld, 542 U.S. 507, 536–37 (2004). *Hamdi* involved a habeas petition brought by a United States citizen who was captured in Afghanistan, classified as an enemy combatant and detained at a navy brig in South Carolina. See id. In *Hamdi* the Court was confronted with whether a United States citizen could be detained as an enemy combatant without being formally charged. *Id.* at 509. A plurality of Justices held that while a citizen could be detained, due process requires that he be given a “meaningful opportunity” to contest the factual basis of his detention. See id. Though the case dealt with the rights of a detained U.S. citizen, the applicability of this case lies in the plurality’s conclusion that the AUMF passed by Congress in 2001 did in fact authorize the United States government to hold detainees without charging them. *Id.*


31 The Wolfowitz Memorandum defines the term “enemy combatant” as “an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.” See id.
challenge that determination. Pursuant to the Wolfowitz Memorandum, panels of commissioned military officers were directed to review each detainee’s enemy combatant status designation based upon a record prepared by a designated “Recorder,” which consisted of “reasonably available information generated in connection with the initial determination to hold the detainee as an enemy combatant . . . as well as any reasonably available records, determinations, or reports generated in connection therewith.” The memorandum provided that detainees were permitted to attend proceedings accompanied by an interpreter and a “Personal Representative,” and to call “reasonably available” witnesses.

CSRT panels are not bound by traditional rules of evidence, but rather may consider “any information it deems relevant and helpful . . . [and] may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances.” In determining whether detainees were properly designated as enemy combatants, CSRT panels were directed to base their decisions on the “preponderance of the evidence,” with the caveat that the panel

32 The Wolfowitz Memorandum outlined various procedures that would govern CSRT review of a detainee’s enemy combatant status determination, and provided, amongst other things, that detainees would be given an “opportunity to contest designation as an enemy combatant . . . [and to] consult with and be assisted by a personal representative.” Id.

33 Id.

34 See Id. The “Personal Representative” was authorized to assist the detainee in his CSRT. Implementing guidelines issued by the Secretary of the Navy clarified that the Personal Representative was not to serve as an advocate for the detainee but rather his role was merely to explain the nature of the proceedings. Memorandum from Gordon England, Sec’y of the Navy, U.S. Dep’t of Def. on Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Naval Base, Cuba (July 29, 2004), available at http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf [hereinafter England Memorandum].

35 The CSRT panel has the authority, pursuant to the Wolfowitz Memorandum, to determine the “reasonable availability” of witnesses, and provides that written statements may be substituted if a witness is deemed not reasonably available. See Wolfowitz Memorandum, supra note 30.

36 Id.
would accord the government’s evidence presented against a detainee a presumption of validity.\footnote{37} Although the Wolfowitz Memorandum explicitly preserved detainees’ right to petition U.S. federal courts for writs of habeas corpus,\footnote{38} the government would later contest that right in subsequent litigation.\footnote{39}

In the months following the Rasul decision, detainees filed numerous habeas petitions in federal court,\footnote{40} many but not all of which were consolidated in D.C. District Court to facilitate proceedings.\footnote{41} While these consolidations were meant to create a smoother, more uniform process, in reality there were huge inconsistencies in the way district court judges interpreted detainees’ rights in the different groups of cases.\footnote{42} For example, in

\footnote{37} Id.


\footnote{40} Many of these petitions have since become well known, including those filed on behalf of Jose Padilla and Salim Hamdan. Individual petitions were often filed by “next friends” on behalf of many detainees. Though “next friend” status at times posed problems of standing, Gherebi v. Bush, 338 F. Supp. 2d 91 (D.D.C. 2004), such a standing discussion is outside the scope of this Note.

\footnote{41} After the Supreme Court held in Rasul that proper jurisdiction for detainees’ habeas petitions lay in the District Court in Washington, D.C., the government filed a motion to coordinate detainees’ numerous pending petitions. In August of 2004, the Calendar and Case Management Committee for the D.C. District Court designated Judge Joyce Green to “coordinate and manage all proceedings in these matters [of Guantanamo detainees] and to the extent necessary rule on common procedural and substantive issues.” Gherebi, 338 F. Supp. 2d at 94. The Committee’s order was affirmed by an Executive Session of the D.C. District Court on September 14, 2004. Id. Judge Leon of the D.C. District Court, however, chose not to transfer the pending cases on his docket. As such, he retained the cases collectively known as Boumediene v. Bush, currently pending before the Supreme Court. In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 452 n.14 (D.D.C. 2005).

one group of cases Judge Richard Leon of the D.C. District Court granted the government’s motion to dismiss the petitions on the ground that there “was no viable legal theory under which a federal court could issue a writ of habeas corpus” even though detainees technically had the right to petition the court for such writs. Judge Leon reasoned that irrespective of detainees’ rights to petition a court for a writ of habeas corpus, they had no legally enforceable constitutional rights on which a federal court could actually issue a writ. In contrast, only one week later in another group of consolidated cases, Judge Joyce Green of the D.C. District Court denied similar motions to dismiss filed by the government, finding that “Guantanamo detainees are entitled to due process under the Fifth Amendment to the United States Constitution.”

C. Congressional Response

Congress swiftly responded to the wave of petitions filed by detainees. Following the Supreme Court’s decision to uphold the right of Guantanamo detainees to petition federal courts for writs of habeas corpus, Congress amended the habeas statute. The

detainees had no substantive constitutional rights on which the court could issue a writ), with In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005) (denying the government’s motion to dismiss detainees’ habeas petitions because the D.C. District Court was the appropriate forum for their resolution).

43 Khalid, 355 F. Supp. 2d at 314.
44 In re Guantanamo Detainee Cases, 355 F. Supp. 2d at 443.
45 Id. at 465. After Judge Green denied the government’s motion to dismiss, the government filed a motion for a protective order to prevent disclosure of certain information to detainees and their counsel, and further limited contact between detainees and their counsel. The D.C. District Court ultimately issued a protective order that laid out the scope of attorney-client contact and the extent to which the government was entitled to restrict access to classified documents. The Green Protective Order, named for Judge Green who authored the opinion, was largely followed until its scope was challenged two years later in Bismullah v. Gates. See Bismullah v. Gates (Bismullah I), 501 F.3d 178 (D.C. Cir. 2007).

46 Section 1005(e)(1) of the DTA expressly amends the habeas statute to strip federal courts of their jurisdiction over habeas petitions filed by detainees at Guantanamo. Detainee Treatment Act § 1005, Pub. L. 109-148, 119 Stat. 2680
DTA, which was signed into law by President Bush on December 30, 2005, prevented any United States court from exercising jurisdiction over petitions for writs of habeas corpus filed by detainees held at Guantanamo.\textsuperscript{47} As an alternative, the DTA

\textsuperscript{47} Detainee Treatment Act § 1005. Congress enacted the DTA as part of an emergency supplemental appropriations package to the fiscal year 2006 Department of Defense appropriations bill. Relevant portions of the DTA are found in Section 1005:

(e) Judicial Review of Detention of Enemy Combatants-

(1) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by adding at the end the following:

“(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—

“(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

“(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—

“(A) is currently in military custody; or

“(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.”.

(2) REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPIETY OF DETENTION.—

(A) IN GENERAL.—Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.

(B) LIMITATION ON CLAIMS.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien—

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and
allowed for judicial review of CSRT determinations exclusively in the D.C. Circuit Court. The legislative history of the DTA makes clear that Congress’ goal was to deny detainees at Guantanamo any rights to petition federal courts for writs of habeas corpus, thereby negating the Supreme Court’s ruling in Rasul.

The Supreme Court, however, balked at Congress’ move to eliminate its jurisdiction. Six months after the DTA was signed into law, the Court held in Hamdan v. Rumsfeld that the DTA “did not strip federal courts’ jurisdiction over cases pending on the date of the DTA’s enactment.” The Court gave import to the fact that no provision of the DTA explicitly applied to pending cases, noting that Congress “chose not to so provide—after being

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) SCOPE OF REVIEW.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government’s evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

Detainee Treatment Act § 1005.

48 Detainee Treatment Act § 1005.

49 Senator Lindsey Graham’s statement during the Senate’s consideration of the National Defense Authorization Conference Report, of which the DTA was a part, is just one example of similar statements indicating Congress’ intent to expressly respond to the Rasul decision. 151 CONG. R. S14256 (daily ed. Dec. 21, 2005) (statement of Sen. Graham) (“Since the Rasul decision was based on the habeas statute in the U.S. Code, I am very comfortable amending that statute as a proper congressional response to the Court’s decision.”).


51 Id. at 2769 n.15 (emphasis added).
presented with the option—for [a provision to deal with pending cases] . . . [and that] omission is an integral part of the statutory scheme.”52 In effect, the Court’s decision invalidated any habeas corpus petition that was pending when the DTA was enacted.

The struggle between Congress and the Court continued. Congress responded to the Court’s ruling in Hamdan that the DTA did not apply to pending cases by passing the Military Commissions Act of 2006.53 The legislation again amended the habeas statute, this time explicitly stripping federal courts of jurisdiction over any and all habeas petitions filed by Guantanamo detainees, and again limiting the scope of review to CSRT procedures.54 Congress spoke directly to the Court’s decision in

52 Id. at 2769.
54 Military Commissions Act §7(a). The stated purpose of the comprehensive law was “to authorize trial by military commission for violations of the law of war, and for other purposes.” §7(a). When President Bush signed the MCA into law, he called it “one of the most important pieces of legislation in the war on terror.” Press Release, George W. Bush, President of the United States, The White House, President Bush Signs Military Commissions Act of 2006 (Oct. 17, 2006), available at http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html.

President Bush also described the law as providing “a way to deliver justice to the terrorists we have captured . . . [with] a fair trial, in which the accused are presumed innocent, have access to an attorney, and can hear all the evidence against them. These military commissions are lawful, they are fair, and they are necessary.” Id. President Bush’s description is accurate only insofar as it describes the military commissions authorized by the law, but his statement should not be read to encompass the provisions of the MCA that strip federal courts of their jurisdiction to hear Guantanamo detainees’ habeas petitions or those that codify CSRTs and the D.C. Circuit’s appellate review authority.

The relevant portion of the MCA is found in Section 7, entitled Habeas Corpus Matters:

(a) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by striking both the subsection (e) added by section 1005(e)(1) of Public Law 109–148 (119 Stat. 2742) and the subsection (e) added by added by section 1405(e)(1) of Public Law 109–163 (119 Stat. 3477) and inserting the following new subsection
Hamdan with Section 7(b), which explicitly dealt with pending cases and stated that the amendment to the habeas statute “shall apply to all cases, without exception, pending on or after the date of the enactment of this Act.” The plain language of the statute foreclosed any further arguments that pending cases fell outside the scope of the legislation. Subsequently, the D.C. Circuit Court was left with the limited power to review only whether a CSRT complied with its own procedures.

(e):

“(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

“(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”.

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

Military Commissions Act § 7.

55 Military Commissions Act § 7 (emphasis added).

56 The Congressional Record reveals numerous statements making clear that, “[w]ithout exception, both the proponents and opponents of section 7 [of the MCA] understood the provision to eliminate habeas jurisdiction over pending cases.” Boumediene v. Bush, 476 F.3d 981, 987 n.2 (D.C. Cir. 2007) (internal citations omitted), cert and reh’g granted, 127 S. Ct. 3078 (June 29, 2007).

57 The Court was thus limited under the DTA and MCA to a narrow review of the procedures afforded to detainees during the D.C. Circuit’s examination on appeal of an individual CSRT proceeding, rather than a broader analysis of the processes detainees should be afforded during the underlying
While Congress attempted to act with sufficient intent to quell future challenges, the struggle continued. In 2006, a group of detainees\textsuperscript{58} invoked the limited statutory review permitted by the CSRT process itself.


According to the State Department, the “[Chinese] Government used the international war on terror as a pretext for cracking down harshly on suspected Uighur separatists expressing peaceful political dissent.” \textit{Id.} Petitioners fled persecution to an Uighur expatriate village in the mountains of Afghanistan near the Pakistan border. Petition for Immediate Release and Other Relief Under Detainee Treatment Act of 2005, and, in the Alternative, for Writ of Habeas Corpus at 13–14, \textit{Parhat v. Gates}, No. 06-1397 (D.C. Cir. Dec. 4, 2006) [hereinafter Petition for Release]. After the village was bombed in October, 2001, the Uighurs crossed into Pakistan and were taken in by local villagers who later turned them over to the U.S. military, along with the other Uighurs in the village, in exchange for a $5,000 bounty per Uighur. \textit{Id.} at 15.

Despite public exculpatory statements made on behalf of the \textit{Parhat} petitioners, including a United States Ambassador and a colonel in the United States military, CSRT panels found that each was properly designated an enemy combatant. Respondents’ Joint Opposition to the Application for a Stay of the Judgment of the Court of Appeals for the District of Columbia Circuit Until 14 Days After Disposition of this Case and Consent to the Motion for Expedited Consideration of the Petition for a Writ of Certiorari and for Expedited Merits Briefing and Oral Argument in the Event that the Court Grants the Petition at 8–9, \textit{Gates v. Bismullah}, No. 07A-677 (U.S. Feb. 20, 2008) [hereinafter Respondents’ Joint Opposition Brief]. The eighth petitioner, Haji Bismullah, is an Afghan national who fled Afghanistan to Pakistan in 1996 when the Taliban came to power. \textit{Id.} at 5. Bismullah returned to Afghanistan along with his brothers after Hamid Karzai came to power to “help U.S. and coalition forces defeat the Taliban,” and was later appointed as a transportation minister under Karzai’s government. \textit{Id.} at 5–6. American forces mistakenly arrested him in 2003, and “despite assurances of his innocence from the Afghan government, the military transferred Bismullah to Bagram Air Base and then Guantanamo” where a CSRT found he was properly designated as an enemy combatant. \textit{Conference Call: Another Detainee Case Heads to High Court, Courtwatch—Justices Asked to Take Case of Prisoners Seeking Evidence Government Used to Declare Them ‘Enemy Combatants’,} \textit{Legal Times}, March 10, 2008, at 1 [hereinafter Conference Call].
DTA and MCA to challenge their CSRTs and enemy combatant status designations in the D.C. Circuit Court.\textsuperscript{59} After months of briefing, largely regarding the scope and type of evidence the court may consider in conducting its review, a unanimous panel of the D.C. Circuit dealt a blow to the government by ruling that it must provide to the reviewing court all the information “reasonably available” to the government relevant to a detainee, as opposed to the smaller subset of evidence presented at his CSRT as the government had urged.\textsuperscript{60} Although the government subsequently sought a rehearing \textit{en banc}, arguing that the court’s ruling imposed too substantial a burden and would endanger national security, the D.C. Circuit Court declined to rehear the case in February 2008.\textsuperscript{61}

In the meantime, another group of detainees mounted a challenge to the court-stripping provision of the DTA and MCA itself. In December 2007, the Supreme Court heard oral arguments in the companion cases \textit{Boumediene v. Bush} and \textit{Al-Odah v. United States},\textsuperscript{62} wherein petitioner detainees argued that they are entitled to habeas rights under the United States Constitution, and that the CSRT process along with judicial review in the D.C. Circuit is not an adequate and effective alternative.\textsuperscript{63} The government, in contrast, maintained that the right to petition a federal court for a writ of habeas corpus does not extend to non-citizen detainees at Guantanamo and that the procedures afforded by the DTA and MCA are more than adequate.\textsuperscript{64}

\textit{Boumediene’s} pendency in the Supreme Court afforded the

\textsuperscript{59} Petitioner in \textit{Bismullah v. Gates} filed an appeal from his Combatant Status Review Tribunal on June 9, 2006. Petitioners in \textit{Parhat v. Gates} filed their own appeals on December 4, 2006. After considerable motion practice, the D.C. Circuit ordered that the two groups of cases be set for oral argument on the same day before the same panel. \textit{See Bismullah I}, 501 F.3d 178 (D.C. Cir. 2007).

\textsuperscript{60} \textit{See id.}

\textsuperscript{61} \textit{Bismullah v. Gates} (\textit{Bismullah III}), 514 F.3d 1291 (D.C. Cir. 2008).

\textsuperscript{62} \textit{Boumediene v. Bush}, No. 06-1195; \textit{Al-Odah v. United States}, No. 06-1196 (U.S. argued Dec. 5, 2007).

\textsuperscript{63} \textit{Conference Call, supra} note 58.

\textsuperscript{64} Transcript of Oral Arguments, \textit{Boumediene}, No. 06-1195; \textit{Al-Odah}, No. 06-1196 (U.S. Dec. 5, 2007).
government another angle in *Bismullah* after its petition for a rehearing *en banc* was denied. In February 2008, the government petitioned the Supreme Court for a writ of certiorari, arguing that until the Court decides the merits of the *Boumediene* case the government should not have to undertake the burdensome task of either compiling voluminous records as required by the D.C. Circuit’s July 2007 ruling or, instead, act on the court’s alternative suggestion of reconvening new CSRTs. As such, the government requested that the Supreme Court stay the D.C. Circuit’s judgment and hold the petition for certiorari in *Bismullah* until it renders a decision in *Boumediene*, or, alternatively, that the Court grant the petition for certiorari and set *Bismullah* on an expedited schedule so that the two cases may be decided together this term. For their part, detainees argued in a reply brief that the government’s petition to the Supreme Court is merely a veiled attempt to delay detainees’ cases brought under the DTA, and that a stay would “harm the interests of justice and serve no legitimate purpose.” Although the Court was expected to consider the appeal at its private conference on March 14, 2008, no action has yet been taken.

II. **FUNDAMENTAL PRINCIPLES, NATURAL LAW AND THE AMERICAN CONSTITUTION**

Constitutional ratification debates and Supreme Court jurisprudence provide the background by which to understand the need to provide Guantanamo detainees with procedures that adequately respect constitutional principles. It is clear from the debates prior to ratification of the Constitution and the addition of the Bill of Rights that the Framers recognized that certain rights,

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65 See *Bismullah I*, 501 F.3d 178 (D.C. Cir. 2007).
67 Respondents’ Joint Opposition Brief, supra note 58, at 18.
namely liberty rights, were natural rights. The Supreme Court has confirmed the importance of natural rights by making clear that even in the context of a national emergency, government encroachment upon natural and fundamental rights is only legitimate if it is sufficiently justified.

The Court’s historical view of the right to liberty was clearly embraced by Justice Harlan, who in 1883 recognized it as a “natural right of man” and encouraged a government policy that would acknowledge the Constitution as one “of government, founded by the people . . . for the establishment of justice, for the general welfare, and for a perpetuation of the blessings of liberty.” The government’s use of CSRTs in the context of the War on Terror fails to acknowledge that even Guantanamo detainees have a natural right to liberty. Though the government’s national security rationale for its CSRT policy may be legitimate, the government nevertheless insufficiently justifies the extent of its encroachment. The government’s failure to adhere to its great responsibility of protecting liberty has thus undermined our own constitutional system.

A. The Framers and Natural Rights

The Constitution, along with the Bill of Rights, is an expression of principles as well as an enumeration of specific guarantees. These principles reflect the Framers’ objective to secure individual

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69 See The Ninth Amendment, supra note 11, at 55–60. While the Framers explicitly enumerated certain rights in the Constitution and Bill of Rights, they understood that those documents “did not create or generate many of the rights they secured. Rather, they merely re-stated, or declared, the rights that the people already possessed.” Thomas B. McAffee, Restoring the Lost World of Classical Legal Thought: The Presumption in Favor of Liberty Over Law and the Court Over the Constitution, 75 CIN. L. REV. 1499, 1503 (2007) (internal citations omitted).


liberty, and can perhaps best be understood according to an “individual natural rights model” of constitutional interpretation. Accordingly, certain rights predate the Constitution rather than the Constitution establishing rights to be derived from the document itself. Although Federalists and their opponents may have disagreed about whether to include a Bill of Rights, they nonetheless agreed that inherent individual rights, namely individual liberty, were natural rights that did not derive from the Constitution. Thus the individual liberty right as understood by

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73 Id.
75 Similarly, the explicit enumeration of certain rights should not be construed to diminish those that are not expressly enumerated. Corwin, supra note 1, at 70–71 (“Principles of transcendental justice . . . [as understood in] terms of personal and private rights . . . is the same as that of the principles from which they spring and which they reflect. They owe nothing to their recognition in the Constitution—such recognition was necessary if the Constitution was to be regarded as complete.”).
76 Though much debate surrounding the ratification of the Constitution hinged on the issue of whether or not to include the Bill of Rights in the final document—opponents of which argued that including it was both unnecessary and dangerous—it is widely accepted that both supporters and opponents shared a belief in natural rights. See James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), reprinted in JAMES MADISON, WRITINGS 437, 444 (Jack N. Rakove ed., 1999) (“[A] great number of the . . . champions for republican liberty, have thought such a provision, not only unnecessary, but . . . some have gone so far as to think it even dangerous.”); see also The Ninth Amendment, supra note 11, at 7–8, 27 (“Because the Constitution was one of limited and enumerated powers, these enumerated limits constituted a bill of rights [, and] [b]y attempting to enumerate any rights to be protected, it would imply that all that were not listed were surrendered.”) (internal citations omitted). James Madison attempted to allay those fears when he explained the necessity of the Bill of Rights before the House of Representatives, stating that it would, “expressly declare the great rights of mankind secured under this constitution.” Madison, supra note 76, at 444.
77 It is clear that the Framers understood natural rights—and specifically liberty rights—as rights possessed by all persons, not just citizens. For example, Theodore Sedgwick, a delegate to the Massachusetts ratifying convention, objected to including in the Bill of Rights those that are “self-evident, unalienable [and which] the people possess.” 1 ANNALS OF CONG. 759
the Framers may be invoked by all persons because of its status as a natural right rather than merely because it is explicitly protected under the Constitution.\textsuperscript{78}

\textbf{B. The Supreme Court, Natural Rights and National Emergencies\textsuperscript{79}}

The Supreme Court has long recognized the right to seek a writ of habeas corpus as a safeguard of personal liberty against arbitrary government encroachment.\textsuperscript{80} Federal law provides the Executive the ability to respond to national emergencies using inherent or implied constitutional power or authority delegated from Congress;\textsuperscript{81} however, the Supreme Court has instructed that even in times of

\begin{footnotesize}
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\item \textsuperscript{78} The inclusion of the Ninth Amendment in the Constitution is evidence of the Framers’ recognition of individual, natural and preexisting rights that, even if not enumerated in the Constitution itself, were nonetheless retained. The Ninth Amendment, supra note 11, at 13–14, 29.
\item \textsuperscript{79} The term “national emergency” in the context of Executive power does not have a hard and fast definition, but has been interpreted by the Congress and the Supreme Court as the existence of unexpected and dangerous conditions that do not lend themselves to resolution according to precedent. HAROLD C. RELYEA, NATIONAL EMERGENCY POWERS 4 (Cong. Research Serv., Aug. 30, 2007), available at http://www.fas.org/sgp/crs/natsec/98-505.pdf.
\item \textsuperscript{80} See, e.g., Harris v. Nelson, 394 U.S. 286, 290–91 (1969) (“The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.”).
\item \textsuperscript{81} See Relyea, supra note 79, at 1. The Executive has used these powers to respond to emergency conditions as far back as 1792. \textit{Id.} at 5. Until the 20th century, however, the power was largely unchallenged by Congress or the Supreme Court. \textit{Id.} at 6–7.
\end{itemize}
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national emergency, the government must shoulder the burden of justification when it seeks to curtail individual liberty or other constitutional rights.\textsuperscript{82}

\textit{i. Home Building and Loan Association v. Blaisdell and the Great Depression}\textsuperscript{83}

The Supreme Court required the government to carry the burden of justification in the 1934 case \textit{Home Building and Loan Association v. Blaisdell}.\textsuperscript{84} In response to widespread unemployment and mortgage foreclosures, as well as low wages and poor credit, the Minnesota state legislature passed a statute that allowed individuals facing foreclosure to petition a state court to postpone the sale of their homes and to extend the statutory redemption period.\textsuperscript{85} Pursuant to this statute, individuals who had defaulted on their mortgage and whose property had been foreclosed petitioned a Minnesota state court for an extension of

\textsuperscript{82} See Schneider v. State, 308 U.S. 147, 151 (1939) ("[W]here legislative abridgment of [fundamental] rights is asserted . . . the delicate and difficult task falls upon the courts to . . . appraise the substantiality of the reasons advanced [by the government] in support of the regulation of the free enjoyment of the rights.").

\textsuperscript{83} \textit{Home Building and Loan Association v. Blaisdell} came before the Court during the severe economic depression of the early 1930s. 290 U.S. 398 (1934). Against this backdrop, the Court characterized a national emergency as one that requires “limited and temporary interpositions [on constitutional rights] if made necessary by a great public calamity . . . [or] vital public interests would . . . suffer.” \textit{Id.} at 439–40.

\textsuperscript{84} See \textit{id.} at 442 ("The Court also decided that while the declaration by the legislature as to the existence of the emergency was entitled to great respect, it was not conclusive . . . It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends.").

\textsuperscript{85} \textit{Id.} at 422 n.3, 424–25. “Redemption” refers to the legal right of a party who borrows money to purchase a property to regain ownership of that property after it has been sold at a foreclosure sale due to nonpayment. State statutes often give parties with mortgages a certain period of time to pay the amount for which the property was sold at the foreclosure sale—the “redemption period”—and typically parties are entitled to remain on the premises during that period of time. See 1 \textit{HON. WILLIAM HOUSTON BROWN, THE LAW OF DEBTORS AND CREDITORS} § 8:21 (2007).
the redemption period. The court granted the extension, and the owner of the mortgage appealed on grounds that it violated the Constitution’s Contract Clause. The Minnesota Supreme Court upheld the state statute as a valid exercise of the government’s power to respond to an emergency, though it acknowledged that the statute impaired the obligations of the underlying mortgage contract.

On appeal, the Supreme Court looked to the historical understanding and interpretations of the Contract Clause for guidance. The Court recognized that in times of national emergency, the government may utilize its power to respond to exigent conditions, but that doing so “must be consistent with the fair intent of the constitutional limitation of that power.” By way of explanation, the Court analogized that, “the war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency . . . [however] even the war power does not remove constitutional limitations safeguarding

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86 Blaisdell, 290 U.S. at 418–19. Petitioners argued that because of the economic depression, they were unable to redeem their property, and without relief from the court in the form of an extension, they would lose it. Id. at 419.

87 Id. at 420.

88 Id. at 420–21.

89 The Court stated that because the constitutional grant and limitation of power in the Contract Clause was general, affording “a broad outline,” it was necessary to “fill in the details.” Id. at 426. The Court noted that although the debates in the Constitutional Convention did not provide guidance for interpreting the Contract Clause, the “reasons which led to the adoption of that clause . . . are not left in doubt . . . .” Id. at 427. The Court explained that debt and legislative interferences with private contracts were so widespread during the Revolutionary period as to undermine “the confidence essential to prosperous trade . . . and the utter destruction of credit was threatened.” Id. The inclusion of the Contract Clause was necessary both to preserve individual rights to contract and to limit the government’s power to encroach on that right. Id. at 427–28. The Court went on to examine prior courts’ interpretation and application of the Contract Clause in determining its scope, concluding that the Contract Clause “should not be so construed as to prevent limited and temporary interpositions” on individuals’ rights to enter into and enforce private contracts if the government is faced with a national emergency. Id. at 439 (emphasis added).

90 Id.
essential liberties.\footnote{Id. at 426 (emphasis added).} The Court ultimately upheld the statute, reasoning that government’s limited encroachment on the rights guaranteed by the Constitution’s Contract Clause was permissible in light of the exigent circumstances presented by the severe economic recession.\footnote{Id. at 444–47.}

While the Court made clear that “[e]mergency does not create power” and that the government may only act consistent with constitutional limitations,\footnote{Id. at 424.} practical realities might require a compromise between individual rights—in this case, the right of the mortgage-holders to expect that their private contracts be enforced—and protecting the national interest.\footnote{Id. at 440.} Such a compromise is legitimate so long as it is appropriately targeted to a particular emergency and conducted pursuant to reasonable conditions.\footnote{The Court explained that the state statute was reasonable because the conditions on the extension of the redemption period did not undermine the integrity of the mortgage contract itself. Home Building & Loan Ass’n v. Blaisdell, 290 U.S. 398, 433 (1934). For example, the Court noted that interest continued to run on the contract, the validity of the foreclosure sale was maintained if the property-owner failed to redeem the property during the extension, and any other statutory conditions on redemption were left intact. Id. at 445–46. Moreover, the Court emphasized the fact that the state statute only postponed the redemption period to a specified date, and as a result the statute could not outlive the emergency for which it was created. Id. at 447.} Here, the Court found that the statute met those conditions, and thus that the government did not impermissibly encroach on the mortgage holders’ rights guaranteed in the Constitution’s Contract Clause.

Like the state of emergency that existed in Blaisdell, the War on Terror presents conditions that call for a degree of deference to the government in its efforts to protect the national interest. Unlike in Blaisdell, however, the government’s CSRT policy is not a legitimate compromise between individual rights and protecting the national interest. While it appears clear that the government’s policy is sufficiently targeted to a particular exigency—the War on Terror—it is not conducted pursuant to reasonable conditions.
While the statute in *Blaisdell* extended deadlines and left the underlying mortgage contract intact, the government’s CSRT policies do not merely limit detainees’ rights; rather, the policies arguably eliminate detainees’ rights altogether. Moreover, in *Blaisdell*, the government’s power to interfere with individuals’ contracts and grant extensions was subject to an articulated deadline whereas the government’s CSRT policy is not limited in duration. Because the government may detain individuals for the duration of the War on Terror—which is essentially of indefinite duration—and because every foreign national held at Guantanamo is subject to the CSRT process, there is no real limitation on the government’s power. Thus, while the War on Terror provides the government an important justification for its actions, any compromise between individual rights and national security must be subject to reasonable conditions in order to be legitimate. Mandating minimal procedural guarantees for detainees during the CSRT process would provide those conditions, and would thus form the basis for an acceptable compromise between

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96 During the extension of the redemption period, the integrity of the mortgage contract remained intact, interest on it continued to run, the validity of the foreclosure sale as well as the right of the purchaser to obtain a deficiency judgment were maintained, and any other conditions on the redemption period pursuant to existing statutory law remained as they were prior to the extension. *Id.* at 433.

97 CSRTs in practice do not provide detainees any real opportunity to challenge an enemy combatant designation. See infra Part III.C.

98 The Court emphasized in *Blaisdell* that the statute in question was explicitly temporary. 290 U.S. at 439–40. In contrast, neither the Wolfowitz Memorandum outlining CSRTs nor the England Memorandum implementing them articulate any limit on their duration. See Wolfowitz Memorandum, *supra* note 30; see also England Memorandum, *supra* note 34.

99 In 2004, the Supreme Court said in *Hamdi v. Rumsfeld* that the Authorization for the Use of Military Force authorizes the President to detain enemy combatants for the “duration of the conflict.” 542 U.S. 507, 522 (2004).

100 President Bush has acknowledged that the duration of the “War on Terror” is unknown, stating, “[w]e cannot know the duration of this war.” Press Release, George W. Bush, President of the U.S., The White House, President Submits Wartime Budget (March 25, 2003), available at http://www.whitehouse.gov/news/releases/2003/03/20030325-2.html.

individual rights and national security while legitimizing the government’s actions and conforming with fundamental constitutional principles.

**ii. United States v. Robel and the Communist Threat**

Several decades after the Court’s landmark decision in *Blaisdell*, the Court again had the opportunity to examine the degree to which the government may curtail constitutional rights in the context of a national emergency. This time, the Cold War and the threat of Communism provided the impetus for government action. In 1967, in *United States v. Robel*, the Supreme Court examined the constitutionality of the Subversive Activities Control Act, which prohibited any member of a “Communist-action organization” from maintaining employment at a “defense facility.”

The defendant was a member of the Communist party, and was subsequently prohibited from working at his job in a shipyard. The

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102 In 1950, President Truman proclaimed a state of national emergency in response to the hostilities in Korea. Proclamation No. 2914, 15 Fed. Reg. 9029 (Dec. 16, 1950). See also Relyea, supra note 79, at 8. The state of emergency was not terminated at the end of the Korean conflict, however, due “to the continuance of the Cold War atmosphere which . . . made the imminent threat of hostilities an accepted fact of everyday life, with ‘emergency’ the normal state of affairs.” EMERGENCY POWERS STATUTES: PROVISIONS OF FEDERAL LAW NOW IN EFFECT DELEGATING TO THE EXECUTIVE EXTRAORDINARY AUTHORITY IN TIME OF NATIONAL EMERGENCY at 5, S. REP. NO. 93-549 (1973) (Conf. Rep.) [hereinafter EMERGENCY POWERS STATUTES]. In 1973, a Special Senate Committee charged with examining the use of emergency power during national emergencies recommended that Congress terminate the state of national emergency then in effect. See generally id.

103 389 U.S. 258, 259 (1967).

104 Id. at 260. The Subversive Activities Control Act of 1950 required the registration of Communist organizations with the Attorney General, and created the Subversive Activities Control Board which was charged with investigating people suspected of “un-American activities.” Laura K. Donohue, Article: TERRORIST SPEECH AND THE FUTURE OF FREE EXPRESSION, 27 CARDOZO L. REV. 233, 246 (2005). In addition to general registration requirements, the Act provided that any member of a Communist organization under a final order to register was prohibited from working anywhere designated as a “defense facility” by the Secretary of Defense. Robel, 389 U.S. at 260. The defendant, Mr. Robel,
government justified the statute under “Congress’ war power . . . [as the] Court ha[d] given broad deference to the exercise of that constitutional power by the national legislature.\textsuperscript{105}

Justice Warren, writing for the majority, acknowledged the government’s legitimate national security concerns\textsuperscript{106} but stated that the government had encroached too deeply on the constitutional right of association protected by the First Amendment.\textsuperscript{107} In striking down the statute as unconstitutional, the Court stated that, “the phrase ‘war power’ cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit.”\textsuperscript{108} The Court focused on the lack of a clear, rational connection between the defendant and the harm the government sought to prevent, as the statute established guilt on the basis of association with the Communist Party without requiring a showing that the individual actually posed a danger to the national interest.\textsuperscript{109} Congress’ concern over national defense was certainly not without merit—the 1950s and early 1960s were the height of McCarthyism, and Cold War escalation as well as the Cuban Missile Crisis in 1962 caused widespread security concerns throughout the country. Notwithstanding the fear and paranoia that marked the Cold War era,\textsuperscript{110} however, the Court stated that the statute itself imposed too

was a member of the Communist party employed at a shipyard in Seattle, Washington. \textit{Id.} In 1962, the Secretary of Defense designated the shipyard in which the defendant worked as a defense facility, and his continued employment there subjected him to prosecution under the Act. \textit{Id.}

\textsuperscript{105} \textit{Id.} at 263.
\textsuperscript{106} \textit{Id.} at 266–67.
\textsuperscript{107} \textit{Id.} at 264. Like the right to liberty, the right of assembly preserved by the First Amendment was also an individual natural right possessed by the people and which existed prior to the ratification of the Constitution. \textit{The Ninth Amendment, supra} note 11, at 13–14.
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} \textit{United States v. Robel,} 389 U.S. 258, 265 (1967).
\textsuperscript{110} President Truman’s 1950 proclamation exemplified the widespread anxiety felt throughout the United States at the time:

Whereas recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict;
substantial a burden on the defendant’s legitimate constitutional rights.111

Here, like in Robel, the government cannot justify its CSRT policy simply by pointing to the War on Terror. Certainly the government’s interest in protecting national security is as legitimate now as it was during the Cold War.112 Nevertheless, like the policy at issue in Robel, CSRTs often establish guilt by association without requiring the government to establish that a detainee actually poses the danger of which he is accused113—the Supreme Court explicitly held such a policy unjustifiable in Robel.114 Moreover, just as in Robel, here there are feasible alternatives to

111 Robel, 389 U.S. at 267–68 (“Our decision today . . . recognizes that, when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a less drastic impact on the continued vitality of First Amendment freedoms . . . In this case, the means chosen by Congress are contrary to the letter and spirit of the First Amendment.”) (internal quotations and italics omitted). The existence of alternative methods to protect national security interests, such as prescribing criminal penalties, further restricting access to state secrets or positions in national defense industries, or a more thorough security screening program, presented Congress with just such “less drastic” means. Id. at 267.

112 The 1950s and early 1960s experienced the escalation of the Cold War and the threat of mutually assured destruction, and the United States government perceived a real and imminent threat to its security. Today, the threat of terrorism is perceived as just as real and imminent, if not more so, because that threat materialized into an attack on U.S. soil on September 11, 2001.

113 See infra Part III.C. CSRTs permit the use of hearsay evidence as well as evidence obtained by torture or coercion. In addition, CSRTs have upheld enemy combatant status designations based upon unsubstantiated anonymous allegations. See Denbeaux & Denbeaux, supra note 38.

114 Robel, 389 U.S. at 265.
the government’s present CSRT system, many of which have been suggested by members of Congress and even the Administration.\footnote{See infra Part IV.}

So while the Executive may indeed respond to national emergencies using inherent or implied constitutional power or authority delegated from Congress, as it did after September 11, 2001, the Supreme Court has made clear that even national emergencies do not provide the government a free pass.

III. **Combatant Status Review Tribunals**

Despite their stated purpose, CSRT standards and procedures fail to provide a detainee with the opportunity to challenge his enemy combatant status designation. Detainees’ slightly expanded procedural rights in the form of access to counsel and an expanded scope of the record during the D.C. Circuit’s limited review of CSRTs—currently “the sole mechanism by which detention may be challenged”\footnote{Brief Amicus Curiae of United States Senator Arlen Specter in Support of Petitioners at 12, Boumediene v. Bush, No. 06-1195; Al-Odah v. United States, No. 06-1196 (U.S. Aug. 24, 2007) [hereinafter Brief of Senator Specter].}—do not remedy the underlying infirmity of the CSRT process itself. According to the England Memorandum, discussed below, the CSRT process was meant “to determine, in a fact-based proceeding, whether the individuals detained . . . [at] Guantanamo Bay, Cuba, are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation.”\footnote{England Memorandum, supra note 34.} However, the “opportunity” provided “was far less than the written procedures appear to require.”\footnote{Denbeaux & Denbeaux, supra note 38, at 4.} Because CSRTs neither comport with the fundamental elements of due process nor sufficiently respect traditional constitutional principles, CSRTs fail to protect against arbitrary government encroachment on the right to liberty.\footnote{Brief of Senator Specter, supra note 116, at 13.}
A. The Hasty Introduction of CSRTs

Only one week after the Supreme Court decided in Rasul that Guantanamo detainees had the right to challenge the legality of their detentions in federal court, the DOD issued a memorandum creating CSRTs and directed the Secretary of the Navy to promulgate guidelines for implementation. The Secretary of the Navy, Gordon England, issued a memorandum on July 29, 2004 outlining the formation and procedures of CSRTs, specifying: 1) the basic structure and process of a CSRT; 2) the specific duties and qualifications of CSRT participants; and 3) the detainees’ role in the CSRT process. Though the England Memorandum elaborated upon the basic framework provided by the DOD in the Wolfowitz Memorandum, it failed to provide the procedural guarantees that would ensure the legitimacy of the CSRT process and preserve traditional American constitutional principles.

The government has repeatedly justified its CSRT policy as a wartime exigency despite the policy’s discordance with the

121 See Wolfowitz Memorandum, supra note 30.
122 England Memorandum, supra note 34. The Wolfowitz Memorandum that initially established CSRTs designated the Secretary of the Navy as the Convening Authority, and directed him to issue implementing guidelines. Wolfowitz Memorandum, supra note 30.
123 See England Memorandum, supra note 34.
124 Id.
125 In defending the CSRT system on the Senate floor, Senator Lindsay Graham stated that, “to substitute a judge for the military in a time of war to determine something as basic as who our enemy is is not only not necessary under our Constitution, it impedes the war effort, [and] it is irresponsible.” 152 CONG. R. S10354 (daily ed. Sept. 28, 2006) (Statement of Sen. Graham). Similarly, the government has defended the propriety of CSRT procedures on the basis that wartime exigencies mandate a system that provides for “the detention of the enemy in wartime; the operation of a secure naval facility overseas; civilian access to enemy detainees, and the handling of classified national security information,” none of which can be satisfied in a traditional judicial setting. Corrected Brief for Respondent Addressing Pending Preliminary Motions at 26, Bismullah I, 501 F.3d 178 (D.C. Cir. Apr. 10, 2007) (Nos. 06-1197, 06-1397).
traditional guarantees of due process. As the Supreme Court has noted, national security is not a catchall justification for any government action:

[T]he concept of “national defense” cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term “national defense” is the notion of defending those values and ideals which sets this Nation apart . . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.

Certainly the government’s objective in defending the nation is a legitimate end and should be accorded due weight, but not without considering whether the means adopted are both appropriate and within the “letter and spirit of the constitution.”

Thus, the primary inquiry is whether the CSRT procedures respect our own constitutional imperatives. As will be discussed below,

126 Though the government has argued that CSRT procedures are sufficient to satisfy constitutional requirements, it has ardently maintained that Guantanamo detainees’ non-citizen status precludes them from invoking constitutional protections. See Opening Brief for the United States, et al., Al Odah v. United States, 476 F.3d 981 (D.C. Cir. Apr. 27, 2005) (Nos. 05-5064, 05-5095 through 05-5116). Joseph Marguilies, a Minneapolis civil liberties attorney who represented detainees in challenging the government’s detention policy in Rasul v. Bush, described the CSRT process as a system that “forces an alien prisoner unfamiliar with our justice system and held incommunicado to disprove allegations he cannot see, and whose reliability he cannot test, before a military panel whose superiors have repeatedly pre-judged the result, all without counsel.” JOSEPH MARGUILIES, GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER 170 (2006). The government has defended CSRTs as a legitimate means by which a prisoner might contest his enemy combatant status, but some have accused the government of creating CSRTs solely to give the appearance that detainees are not being held at Guantanamo “beyond the law.” Id. at 169–70.


128 Chief Justice Marshall famously declared in McCulloch v. Maryland: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” 4 Wheat. 316, 421 (1819).
CSRTs fail to meet even this standard.\textsuperscript{129}

\textbf{B. The CSRT Participants and Procedures}

The government depicts CSRTs as non-adversarial proceedings wherein neutral panels determine whether detainees already classified as enemy combatants actually meet the criteria for such a designation, and in which detainees are afforded more than sufficient procedural guarantees.\textsuperscript{130} CSRT procedures as outlined in

\textsuperscript{129} It is important to make explicit the focus of this inquiry. It is not a question of whether the procedures afforded detainees actually satisfy explicitly delineated constitutional \textit{requirements}. Rather, the question is whether the procedures afforded the detainees are in line with traditional constitutional \textit{principles}. This is unquestionably a much lower standard.

\textsuperscript{130} The government has argued that CSRTs are “virtually identical” to the tribunals conducted pursuant to Army Regulation 190-8, which implements Article 5 of the Geneva Convention. Transcript of Oral Argument at 32–33, Boumediene v. Bush, No. 06-1195; Al-Odah v. United States, No. 06-1196 (U.S. Dec. 5, 2007); see also Brief for the Boumediene Respondents at 50, Boumediene v. Bush, No. 06-1195; Al-Odah v. United States, No. 06-1196 (U.S. Oct. 9, 2007). In defending CSRTs before the Supreme Court, the government noted that, like Army Regulation 190-8, CSRTs are:

\begin{itemize}
    \item Composed of three commissioned officers plus a non-voting officer who serves as a recorder; [CSRT] members are sworn to faithfully and impartially execute their duties; The detainee has the right to attend the open portions of the proceedings; An interpreter is provided if necessary; The detainee has the right to call relevant witnesses if reasonably available, question witnesses called by the [CSRT], and testify or otherwise address the [CSRT]; The detainee may not be forced to testify; The [CSRTs] make decisions by majority vote; The decision is made based on a preponderance of the evidence; The [CSRTs] create a written report of their decision; and The [CSRT] record is reviewed by the Staff Judge Advocate for legal sufficiency.
\end{itemize}

\textit{Id.} at 50–51. In addition, the government argued that in fact CSRTs provide more procedural guarantees than Army Regulation 190-8 in that CSRTs provide detainees with a Personal Representative, detainees are provided with an unclassified summary of the government’s evidence and are permitted to present their own documentary evidence, and the Recorder is obligated pursuant to CSRT procedures to provide the panel with any relevant potentially exculpatory information. \textit{Id.} at 51–52.

While the government is correct to point out the similarities between
the England Memorandum guarantee that detainees are supplied interpreters if necessary and that each detainee be appointed a Personal Representative to explain the nature of the CSRT and assist him in the proceedings. Detainees are to be presented with an unclassified summary of the charges against them, are permitted to testify before the CSRT panel but are not required to do so, and are permitted to cross-examine government witnesses or call their own, so long as they are “reasonably available.”

The reality of CSRT proceedings present a much darker picture. Armed guards bring the detainee, shackled at the hands and feet, to a small room where he is seated against the wall and chained to the floor. The detainee sits across from his Personal Representative, an interpreter, a paralegal, and the Recorder, whose function is most analogous to that of an “investigator and prosecutor, [who] has nearly complete control over the information that reaches a CSRT hearing panel.” The three members of the panel, all commissioned military officers who make the ultimate determination as to whether the detainee was properly designated as an enemy combatant, sit off to one side of the room.

CSRTs and the procedures authorized in Army Regulation 190-8 as well as those CSRT procedures which, in the government’s view, exceed the guarantees afforded in the army regulation, those similarities do not speak to the infirmities in the CSRT process. For example, permitting a detainee to call reasonably available witnesses is meaningless if the CSRT panel almost always concludes that detainees’ witness requests are not reasonably available. See Denbeaux & Denbeaux, supra note 38, at 31–33. A guarantee that a detainee may question witnesses presented against him is meaningful only if government witnesses actually appear at his CSRT. It is really no guarantee at all if, as has been reported, the government “did not produce any witnesses in any hearing.” See id. at 2. That CSRTs are required to create a written report of their decisions provides only a nominal procedural guarantee if that decision is based upon evidence obtained by coercion or anonymous or otherwise unsupported conclusory statements. Id. at 33–36.

131 England Memorandum, supra note 34.
132 See id.
133 Denbeaux & Denbeaux, supra note 38, at 20.
134 Id.
135 Respondents’ Joint Opposition Brief, supra note 58, at 4.
136 Wolfowitz Memorandum, supra note 30.
When gathering evidence to present to the panel, the Recorder is directed to examine all “reasonably available” information in the government’s possession relevant to a detainee’s enemy combatant status designation, and at his discretion includes “such evidence . . . as may be sufficient to support the detainee’s classification as an enemy combatant.” He is then charged with compiling an unclassified summary that he presents to the CSRT panel for review. In essence, the Recorder has access to information in the

137 The England Memorandum refers to the entire body of information in the government’s possession about a particular detainee as “Government Information,” and defines such information as:

[S]uch reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, including information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any records, determinations, or reports generated in connection with such proceedings.

England Memorandum, supra note 34, at Enclosure 1. The Recorder is charged with reviewing this large body of information, and at his discretion chooses what to present to the CSRT panel. Id.

138 The England Memorandum refers to this smaller subset of information as “Government Evidence.” England Memorandum, supra note 34, at Enclosure 1–2.

139 Id. at Enclosure 1. The Recorder is also responsible for preparing a “record” of the proceedings, which consists of the documentary evidence presented to the panel, witness transcripts, any evidence presented by the detainee, and “the findings of fact upon which the [panel’s] decision was based.” Id. Certainly the Recorder need not include information that is duplicative or irrelevant. Of concern is the fact that the Recorder is not required to present to a CSRT panel all information in the government’s possession that is relevant to a detainee—what the England Memorandum terms “Government Information”—but rather only information that he deems sufficient to support a detainee’s enemy combatant status designation, or “Government Evidence.” See id. Moreover, the Recorder has unchecked discretion in his presentation of exculpatory evidence, if there is any. Thus, there is a real possibility that the government could possess relevant information, some of which might be exculpatory, that the Recorder is not required to present to the panel.

The scope of the record is also implicated if a detainee petitions the D.C. Circuit for a review of his CSRT, pursuant to his right to do so under the DTA. Until recently the D.C. Circuit Court was only permitted to review the record
government’s possession about a particular detainee that is not necessarily presented to the panel. Perhaps more importantly, CSRT regulations direct the Recorder to present to the panel any potentially exculpatory evidence, but the Recorder’s decisions are neither reviewed nor checked by any process to confirm that the panel was given all relevant information.\footnote{140}

As for the Personal Representative, while he is authorized to “assist” the detainee, the England Memorandum makes clear that this officer acts neither as a lawyer nor as an advocate.\footnote{141} In fact, a Personal Representative does little more than explain the process to the detainee in meetings that are often brief and rarely take place more than once.\footnote{142} The other so-called “guarantees” outlined in the presented to the CSRT panel, but the scope of the record on review in the D.C. Circuit is now being challenged. See \textit{Bismullah I}, 501 F.3d 178 (D.C. Cir. 2007), \textit{reh’g en banc denied, Bismullah III}, 514 F.3d 1291 (D.C. Cir. 2008), \textit{petition for cert. filed}, Gates v. Bismullah, No. 07A-677 (U.S. 2008). Though the D.C. Circuit Court recently agreed with detainees that it should be privy to the entire body of information in the government’s possession relevant to a detainee when reviewing a CSRT, see \textit{Bismullah I}, 501 F.3d 178, in February 2008 the government petitioned the Supreme Court for a stay of the D.C. Circuit Court’s order, or in the alternative for the Supreme Court to examine the scope of review on the merits. Petition for a Writ of Certiorari at 33, Gates v. Bismullah, No. 07-1054 (U.S. Feb. 14, 2008).

\footnote{140} Petitioners’ Joint Brief in Support of Pending Motions to Set Procedures and for Entry of Protective Order at 7, \textit{Bismullah I}, 501 F.3d 178 (D.C. Cir. March 26, 2007) (Nos. 06-1197, 06-1397).

\footnote{141} \textit{Id.} The England Memorandum directs the Personal Representative to state the following at each initial meeting with a detainee:

\begin{quote}
I am neither your lawyer nor your advocate, but have been given the responsibility of assisting your preparation for the hearing. None of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing. I am available to assist you in preparing an oral or written presentation to the [panel] should you desire to do so.
\end{quote}

\textit{Id.}

\footnote{142} Denbeaux & Denbeaux, \textit{supra} note 38, at 14. Mark Denbeaux, a professor at Seton Hall University School of Law and counsel to two detainees held at Guantanamo, undertook an analysis of CSRT proceedings at Guantanamo. His study compared “the hearing process that the detainees were promised with the process actually provided.” \textit{Id.} at 4. The results of the study are based on records from 393 of the 558 detainees for whom CSRTs were
England Memorandum similarly fall far short of the minimal procedural safeguards that would be necessary to ensure both the legitimacy of the CSRT system and adherence to our overarching constitutional system.

C. CSRTs Do Not Provide Adequate Procedural Safeguards

Although the fundamental right to liberty exists regardless of one’s citizenship, such a right is meaningless without adequate protective measures, which lie in procedural due process guarantees and judicial review. Indeed, the Framers saw the judiciary as the protector of fundamental rights. Thomas Jefferson expressed his understanding that the Bill of Rights would be “the legal check [on the threat to rights] which it puts into the hands of the judiciary.”143 James Madison expressed his understanding of the courts as “the guardians of those rights.”144 The CSRT process does not begin to provide even minimal procedural guarantees to ensure that the government does not use its congressionally recognized power to detain enemy combatants at Guantanamo arbitrarily. Thus the legitimacy of the detentions as well as our commitment to the natural law principles underlying the Constitution are severely undermined.

Although the government has strenuously argued that the conducted. Of those 393 detainees, only 102 full CSRT records are available. Id. In addition to the 102 full CSRT records, Professor Denbeaux reviewed 356 “transcripts”—summarized detainee statements—that were released by the DOD as part of a Freedom of Information Act lawsuit initiated by the Associated Press. Id. at 7. After comparing the transcripts with the full CSRT records, the study concluded that of the 558 detainees for whom CSRTs were conducted, 202 detainees chose not to participate in the process; of the 102 full hearing records available, forty-three of them represent CSRTs where the detainee was not physically present. Id. at 8.

143 McAffee, supra note 69, at 1522 (quoting Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 620 (1971)).

144 Id. at 1523 (quoting Madison’s statement of June 8, 1789, in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 83–84 (Helen E. Veit, Kenneth R. Bowing, & Charlene Bangs Bickford eds., 1991)).
procedures afforded detainees need not satisfy constitutional requirements because detainees held at Guantanamo do not have constitutional rights,\textsuperscript{145} this argument ignores the values and principles underlying the Constitution—values which are “essential components of the rule of law.”\textsuperscript{146} Even if the Constitution does not apply to detainees per se, those principles underlying the Constitution are still applicable and thus mandate that we provide, at a minimum, procedural guarantees that conform with the American notion of due process. In order to “ensure that the rule of law prevails at Guantanamo,”\textsuperscript{147} detainees must be afforded a system of adequate substantive and procedural safeguards to ensure that long-held constitutional principles are not compromised.\textsuperscript{148}

\textsuperscript{145} See Johnson v. Eisentrager, 339 U.S. 763 (1950). Both the government and the D.C. Circuit Court have relied on the Supreme Court’s reasoning in Johnson v. Eisentrager to deny detainees at Guantanamo constitutional rights. Johnson examined the rights of a group of German nationals captured by American forces in China during World War II who were tried and convicted by a military commission sitting in China, and subsequently sent to Germany to serve out their sentences. \textit{Id.} at 765–66. In holding that nonresident enemy aliens captured and detained abroad have no right to petition a United States court for a writ of habeas corpus, the Supreme Court explained that nonresident aliens have historically only been permitted access to United States courts if they could demonstrate some arguable presence within the United States. \textit{Id.} at 776–78. In contrast, the German detainees in this case “at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.” \textit{Id.} at 777. In denying Guantanamo detainees the right to seek writs of habeas corpus, both the government and the courts have borrowed the rationale from Johnson, explaining that because Guantanamo detainees are non-resident aliens captured abroad and detained in Cuba, Johnson precludes any constitutional right to habeas corpus. \textit{See} Opening Brief for the United States at 15, Al-Odah v. United States, 476 F.3d 981 (D.C. Cir. Apr. 27, 2007) (Nos. 05-5064, 05-5095 through 05-5116); \textit{see also} Rasul v. Bush, 215 F. Supp. 2d 55, 68 (D.D.C. 2002). This reasoning has been widely criticized, and even the Supreme Court called such a comparison into question in Rasul. \textit{See} Rasul v. Bush, 542 U.S. 466, 476–78 (2004).

\textsuperscript{146} Brief of Specialists in Israeli Military Law, \textit{supra} note 14, at 4.

\textsuperscript{147} Brief of Senator Specter, \textit{supra} note 116, at 4.

\textsuperscript{148} That is not to say that non-citizen prisoners captured and detained
The traditional understanding of due process—fundamental to an adversarial system—\(^{149}\) is inextricably linked with “the right to present a defense (including the right to testify and to call witnesses); . . . representation by counsel . . . and the right to confront and cross-examine.”\(^ {150}\) But because CSRTs are explicitly non-adversarial,\(^ {151}\) they cannot provide detainees with that opportunity. Technically, the England Memorandum sets out provisions to allow detainees the opportunity to “participate” in the CSRT process by giving them:

[T]he assistance of a Personal Representative; an interpreter if necessary; an opportunity to review unclassified information; the opportunity to appear personally to present reasonably available information relevant to [his classification] as an enemy combatant; the opportunity to question witnesses . . .; and, to the extent

abroad must necessarily be able to invoke all potential procedural safeguards existing within the broadest application of constitutional due process. Such an argument has been widely criticized for its incompatibility with the Executive’s constitutional war powers and because of the far-reaching ramifications of extra-territorial application of constitutional rights. See Tung Yin, *Procedural Due Process to Determine “Enemy Combatant” Status in the War on Terrorism*, 73 Tenn. L. Rev. 351, 366, 373–75 (2006). *See also* Johnson, 339 U.S. at 784 (“If the Fifth Amendment confers its rights on all the world . . . [s]uch a construction would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and ‘werewolves’ could require the American Judiciary to assure them [constitutional protections] . . . . No decision of this court suggests such a view.”). This Note asserts that one of the “primary purposes” of the Due Process Clause—to protect the natural right to liberty against arbitrary encroachment by the government—is instructive in determining what procedures should be afforded to Guantanamo detainees. An examination of the ramifications of extra-territorial application of all constitutional rights is beyond the scope of this Note.

\(^{149}\) The term “adversarial system” is a legal term of art that refers to “a procedural system, such as the Anglo-American legal system, involving active and unhindered parties contesting with each other to put forth a case before an independent decision-maker.” *Black’s Law Dictionary* 58 (8th ed. 2004).

\(^{150}\) Yin, *supra* note 148, at 401 (internal citations omitted).

\(^{151}\) England Memorandum, *supra* note 34. “Non-adversarial” as used here is a legal term of art that contrasts the traditional American adversary system. *See supra* note 149.
they are reasonably available, the opportunity to call witnesses on his behalf.\textsuperscript{152}

Despite the supposed procedures afforded detainees in the England Memorandum’s implementing guidelines, detainees’ requests to see government evidence, witnesses, or even testimony from other detainees at Guantanamo have almost always been denied.\textsuperscript{153} These guarantees, therefore, are illusory at best. Written accounts and studies of CSRTs demonstrate the extent to which their procedures undermine traditional constitutional protections of liberty and demonstrate a prisoner’s total inability to mount any kind of meaningful defense.\textsuperscript{154}

\textit{i. The Government’s Evidence}

CSRT guidelines do not require the government to conform to traditional rules of evidence, but rather permit the panel to consider hearsay and evidence possibly obtained through torture or coercion.\textsuperscript{155} Such a departure from traditional evidentiary

\begin{itemize}
  \item[\textsuperscript{152}] England Memorandum, supra note 34.
  \item[\textsuperscript{153}] Denbeaux & Denbeaux, supra note 38, at 30. CSRT panels are only required to honor detainees’ requests for witnesses and evidence if they are “reasonably available,” though CSRT procedures fail to define this term. Thus, to deny a detainee’s request, the government need only maintain that the evidence or witness requested by the detainee was not reasonably available. \textit{Id.} It should be noted that although requests for testimony from other detainees were sometimes granted, the extent to which such testimony might help exonerate a detainee is questionable, given that such testimony is delivered by a presumed enemy combatant in favor of another presumed enemy combatant. \textit{Id.} at 5.
  \item[\textsuperscript{154}] See generally \textit{id.} (concluding that CSRTs are an attempt by the government to “replace habeas corpus with this no hearing process”); see also MARGUILIES, supra note 126. Indeed, several detainees have been subject to second hearings after initially being found not to be enemy combatants, and “at least one detainee, after his first and second [CSRTs] unanimously determined him to not be an enemy combatant, had yet a third [CSRT] . . . which finally found him to be properly classified as an enemy combatant.” Denbeaux & Denbeaux, supra note 38, at 37. Such re-hearings are conducted \textit{in abstantia}, and a detainee is not informed that his first CSRT determined he was not an enemy combatant. \textit{Id.} at 37–39.
  \item[\textsuperscript{155}] Denbeaux & Denbeaux, supra note 38, at 35–36; see also MARGUILIES, supra note 126, at 164. The government has maintained that although CSRT
standards, in conjunction with inconsistent adherence to other evidentiary rules governing the CSRTs, makes reliability uncertain. For example, CSRT panels have been known to rely

156 In 2006, The National Journal reviewed the government’s files on 132 Guantanamo detainees, as well as largely redacted transcripts of the CSRTs for 314 detainees, and concluded that “much of the evidence—even the classified evidence—gathered by the Defense Department against [the detainees] is flimsy, second-, third-, fourth- or 12th-hand. It’s based largely on admissions by the detainees themselves or on coerced, or worse, interrogations of their fellow inmates, some of whom have been proved to be liars.” Corine Hegland, Empty Evidence, NAT’L J., Feb. 4, 2006. Indeed, the review found that one particular Guantanamo detainee made accusations against more than 60 other detainees—“more than 10 percent of Guantanamo’s entire prison population”—placing many of them at a jihadist training camp. Id. After Syrian detainee Mohammed al-Tumani’s protestations that he was not at the training camp were bolstered, perhaps uncharacteristically, by his Personal Representative who took the time to examine the classified evidence, it was discovered that the aforementioned accuser “had placed Tumani [at the training camp] three months before the teenager had even entered Afghanistan.” Id. His curiosity piqued, the Personal Representative looked into the other detainees the accuser had fingered, and discovered that “[n]one of the men had been in Afghanistan at the time the accuser said he saw them at the camp.” Id. Despite the seemingly blatant unreliability of this evidence, Tumani’s CSRT nonetheless declared him an
on evidence that a prisoner owns a particular kind of cheap, common Casio watch as proof that the detainee has or knows how to make explosives. Similarly, one CSRT panel relied on a detainee’s sarcastic remarks as true admissions of his involvement with terrorism.

Of all the information the Recorder may collect about a detainee and which may ultimately be presented to a CSRT panel, CSRT guidelines permit a detainee access only to unclassified evidence. Though this may certainly seem legitimate given the government’s national security concerns, because most evidence and other relevant information presented against a detainee at a CSRT is classified, practical application means detainees often have no opportunity to see or rebut any of the evidence presented against them. In fact, in 52% of CSRT proceedings, the government did

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157 The government has used ownership of a Casio watch, one model of which has a circuit board that al Qaeda has used for making bombs, as evidence against at least ten detainees held at Guantanamo. Hegland, supra note 156, at 165; see also MARGUILIES, supra note 126.

158 During one detainee’s CSRT, he was reported to have said, “I saw bin Laden five times: Three times on Al Jazeera and twice on Yemeni news.” MARGUILIES, supra note 126, at 165. This statement was characterized in the detainee’s file as an admission to knowing Osama bin Laden. Similarly, after another detainee sarcastically yelled “Fine, you got me; I’m a terrorist,” the CSRT panel recorded this statement as an admission despite the fact that the interrogators recognized it as sarcasm. Id. These statements should have been accurately conveyed in the detainees’ files, allowing the CSRT panels to make a more informed assessment. Because this “evidence” was misrepresented, the panel’s ultimate determination must be called into question.

159 See England Memorandum, supra note 34, at 7. Unclassified evidence includes documents from family and friends and publicly available documents released by the government or published by the press. See Denbeaux & Denbeaux, supra note 38, at 24–29. Technically, unclassified evidence also includes internal government documents labeled “For Official Use Only.”Id. The extent to which these documents are relied upon is unclear, and independent studies have charged that the government treats these official documents as classified despite their unclassified status. Id.

160 See Denbeaux & Denbeaux, supra note 38, at 25 (“In essence detainees were not shown any evidence against them, classified or unclassified. Not only was [certain unclassified but “For Official Use Only”] evidence withheld from
not present any unclassified evidence in its cases against detainees but rather relied “solely on the presumptively valid classified information to meet its burden of proof.” Moreover, an astounding 89% of detainees were not provided any facts or evidence, unclassified or otherwise. These statistics illustrate that detainees have virtually no access to the vast majority of documents and information in the government’s possession.

Finally, CSRT determinations often rest upon classified evidence, which is presumed to be reliable and to which detainees have no access. CSRTs operate under a rebuttable presumption in favor of the government’s evidence. Rebuttable presumptions are certainly not novel; indeed, courts often use them when direct proof is impractical or difficult to obtain. However, because

the detainee in violation of the CSRT procedures, but other declassified evidence was also withheld.”).

161 Id. at 22 (“A review of the 361 [available CSRT] transcripts reveals that the Government may have shown the detainee some evidence before he began his statement in 4% of the cases. When the hearing began, 89% of the detainees had no facts to rebut whether from witnesses or from documentary evidence. The same documents reveal that the [CSRT panel] showed the detainee unclassified information in only 7% of the hearings. It is unclear why the [CSRT panel] showed unclassified evidence in some cases but not others.”).

162 Id. at 22, 31.

163 For example, the records for detainee ISN #1463 include the detainee’s statement that, “[T]here is no attorney here today and I don’t know anything about the law . . . I cannot say anything that [might] be used against me. I am even afraid to say what my name is.” MARGUILES, supra note 126, at 163. During the CSRT proceeding for Mustafa Ait Idir, a Bosnian-Algerian, the CSRT panel questioned him about charges that he associated with an Al Qaeda operative and planned to attack the U.S. embassy in Sarajevo. When Idir asked for the name of the al Qaeda operative with whom he had allegedly associated, the CSRT panel refused, saying it did not know the name of the operative. Idir responded, “How can I respond to this? . . . If you tell me the name then I can respond and defend myself against this accusation.” The CSRT panel either refused or was unable to give him any information, rendering it impossible for Idir to rebut or contest the accusation. See Denbeaux & Denbeaux, supra note 38, at 16–17.

164 Denbeaux & Denbeaux, supra note 38, at 19; see also, England Memorandum, supra note 34.

CSRT panels may consider evidence that is never shared with detainees, it is virtually impossible for a detainee to disprove any evidence supporting the determination that he is an enemy combatant.\footnote{Because the evidence before a CSRT is almost always classified and the detainee is not permitted access to it, he is “unable to challenge, explain, or simply rebut it. The rebuttable presumption of validity becomes, in practice, an irrebuttable one.” Denbeaux & Denbeaux, supra note 38, at 19. For example, during the CSRT for detainee ISN # 1463, who was only provided an unclassified summary of evidence, the detainee said in response to the allegations against him, “That is not true. I did not help anybody and whoever is saying that I did, let them present their evidence . . . . It’s not fair for me if you mask some of the secret information . . . . How can I defend myself?” Id. at 21.}

\textit{ii. The Detainees’ Evidence}

While CSRT guidelines technically permit a detainee to request his own exculpatory evidence, those same guidelines also allow the government to deny a detainee’s request for evidence if it is irrelevant or if it is not “reasonably available.”\footnote{England Memorandum, supra note 34, at 4.} Such standards are easily manipulated by the government—CSRTs often fail to provide any reason at all for denying evidence requests\footnote{Detainees ISN #333, ISN #680, and ISN #928 all identified specific documents or evidence during their CSRTs that they said would exonerate them, including passports and visas. Denbeaux & Denbeaux, supra note 38, at 32–33. In each of their cases, the government failed to procure the identified evidence after designating the information as not “reasonably available.” Id. Consequently, each detainee’s enemy combatant status designation was affirmed. Id.} even when the outside evidence could in fact contribute greatly to the CSRT process. For example, prior to the CSRT for Mustafa Ait Idir, a Bosnian-Algerian apprehended in Bosnia and accused of associating with an al Qaeda operative and planning an attack on the U.S. embassy in Sarajevo, the detainee requested official court documents from Bosnia which he asserted would have proved that he had already been cleared of terrorism charges; the government
refused to grant Idir’s request. Although the Bosnian government had already investigated Idir and cleared him of terrorism charges, and though Idir’s CSRT panel consulted other legal documents from Bosnia, the panel determined that the specific records sought by Idir were not “reasonably available.”

iii. Witnesses

CSRT guidelines technically give detainees the right to cross-examine the government’s witnesses and to call their own witnesses. These rights are only meaningful, however, if the government’s witnesses are actually present at a CSRT and if detainees’ requests for witnesses are honored. For 393 out of the 558 detainees for whom CSRTs were reportedly conducted at Guantanamo—and the only CSRTs for which records have actually been released—the government did not produce a single witness.

Furthermore, a detainee’s right to call his own witnesses is severely limited in practice. Because detainees are completely isolated from the outside world, unable to communicate with family, and have only limited communication with counsel, it is unclear how a prisoner detained at Guantanamo could practically

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169 Denbeaux & Denbeaux, supra note 38, at 33. See also Marguilies, supra note 126, at 164.
170 Marguilies, supra note 126, at 164.
171 Denbeaux & Denbeaux, supra note 38, at 33. Other records that CSRTs have determined to be not “reasonably available” include such things as medical records from a hospital in Jordan and testimony from explicitly identified family members even though their names, phone numbers and addresses had been provided by the detainee. Id. at 32. The government is not required to explain why certain evidence is not reasonably available; a conclusory statement that the evidence is not reasonably available is a sufficient justification. See generally Denbeaux & Denbeaux, supra note 38.
172 England Memorandum, supra note 34.
173 Denbeaux & Denbeaux, supra note 38, at 21. In these cases, CSRTs relied on classified information.
174 Detainees are not represented by counsel for purposes of their CSRTs, though detainees may be represented by counsel, often on a pro bono basis, for purposes of D.C. Circuit review of their CSRTs.
locate any witnesses to testify on his behalf.\footnote{Marguilies, supra note 126, at 167.} In reality, a detainee’s potential pool of witnesses is limited to other alleged terrorists similarly detained at Guantanamo. This subset of witnesses, as well as any proposed witness for the detainee, is further limited by the CSRT panel’s discretion to decide whether the witness is “reasonably available.” Unsurprisingly, the panels do not often honor witness requests.\footnote{Id.} Therefore, while detainees’ requests for testimony from other detainees at Guantanamo were granted approximately 50% of the time, requests for testimony of witnesses located outside Guantanamo were uniformly denied.\footnote{Denbeaux & Denbeaux, supra note 38, at 28–29. Requests for witnesses located outside Guantanamo were denied if not reasonably available or “irrelevant.” Practical and security considerations regarding the transport of civilians to Guantanamo to testify at a CSRT could also deem a requested witness “not reasonably available.” In one case, a CSRT panel denied a detainee’s request for witnesses because the panel determined that it “would have been burdened with repetitive, cumulative testimony” by witnesses who would have testified similarly that the detainee was not an enemy combatant. Denbeaux & Denbeaux, supra note 38, at 28. However, CSRT guidelines do not include a provision for denying witness requests on this basis.}

IV. MOVING FORWARD: RECENT DEVELOPMENTS IN THE ADMINISTRATION, CONGRESS AND THE COURTS

The continuing disagreement among the Supreme Court, Congress and the Administration over detainees’ rights has resulted in a six-year struggle between the three branches and has seriously undermined the credibility of the American constitutional system.\footnote{Members of Congress and the Administration have directly contributed to the perpetuation of the struggle over detainees’ rights—had they simply afforded detainees basic procedural guarantees during the CSRT process to allow for a meaningful review and the potential for release, it is at least arguable that detainees’ need to challenge the legality of their detentions in federal court would have been sharply diminished. Further, it is perhaps even likely that federal courts at the various stages of the review process might have looked upon detainees’ petitions with less scrutiny had they been afforded minimal procedural guarantees in the beginning.} The good news, albeit minor, is that recent
developments in the three branches signal the government’s recognition of the need to modify the procedures provided to the Guantanamo detainees.\textsuperscript{179} Certainly any revised procedures must allow for legitimate defense of national security interests, but the most effective procedures will do so without compromising core constitutional principles. Affording detainees a process that comports with fundamental constitutional values, while recognizing the need to tailor the system to take account of particular exigencies presented by the War on Terror, will strengthen the United States’ security interest by maintaining the credibility of the American constitutional system and preserving the core principles upon which the United States was founded.

\textbf{A. The Administration}

Though the Administration has consistently defended CSRTs as an effective process for reviewing detainees’ enemy combatant status,\textsuperscript{180} roughly one quarter of detainees cleared by the system

\textsuperscript{179} For example, in July 2007 the D.C. Circuit Court ruled to expand the record on review in an action brought under the DTA—a ruling that the government is now attempting to challenge in the Supreme Court. See \textit{Bismullah I}, 501 F.3d 178 (D.C. Cir. 2007). Although the government has challenged the D.C. Circuit’s order to produce an expanded—and more complete—record during the review of a detainee’s CSRT, various officials from within the Administration, including some members of the military involved in the CSRT process, have acknowledged the need to reexamine the procedures afforded detainees. Commander Jeffrey Gordon of the Navy, a Pentagon spokesman, said in October 2007 that while no decisions had yet been made to “redo” any CSRTs, “discussions on a wide variety of detainee procedures continue within interagency circles.” William Glaberson, \textit{U.S. Mulls New Status Hearings for Guantanamo Inmates}, \textsc{N.Y. Times}, Oct. 15, 2007, at A16. All the while, members of Congress have attempted to undo the damaging legislation passed in previous Congresses—numerous bills have been introduced that would repeal the court-stripping provisions passed in 2005 and 2006 and restore habeas rights to Guantanamo detainees. \textit{See infra} note 243 and accompanying text.

\textsuperscript{180} The government has contended that detainees, “enjoy more procedural protections than any other captured enemy combatants in the history of warfare.” Brief for the Boumediene Respondents, \textit{supra} note 130, at 9.
remain in custody at Guantanamo. The military has suggested that the failure to release some cleared detainees lies in the refusal of the detainees’ home countries to accept them back or guarantee that they will not be tortured or mistreated upon their return. However, military officials have also acknowledged that the Pentagon retains the ultimate authority to continue holding a detainee regardless of a CSRT determination that a detainee should be released from custody. In practice, this means that the Pentagon may order new CSRTs for detainees who are initially recommended for release, thereby allowing the government to continue holding detainees at Guantanamo. The Pentagon’s authority to continue detainment despite a CSRT determination in favor of release questions the legitimacy of the entire CSRT process.

i. Military Officials Condemn the CSRT Process

Sworn statements by two military officials involved in CSRTs further reinforce the conclusion that the process is fatally flawed. Both officers have filed declarations in federal court to

181 “At least eight prisoners at Guantanamo are there even though they are no longer designated as enemy combatants.” Hegland, supra note 156. See also Farah Stockman, Some Cleared Guantanamo Inmates Stay in Custody—Lawyers call U.S. System of Hearings a Sham, BOSTON GLOBE, Nov. 19, 2007, at 1A.
182 Id. In regard to the transfer of detainees to their home countries, a Pentagon spokesman said, “many countries are just not moving very quickly.” William Glaberson, Hurdles Frustrate Effort to Shrink Guantanamo, N.Y. TIMES, Aug. 9, 2007, at A1.
183 Stockman, supra note 181. In addition to determinations made at Guantanamo, case-by-case reviews are also conducted in Washington. In determining whether to authorize release of a detainee, officials consider factors such as new evidence, any danger potentially posed by a detainee, and the willingness of a detainee’s home country to ensure that he will not pose a threat to the United States in the future. Id.
184 Id.
185 Id.
186 Mark Jacobson, an assistant for detainee policy under Secretary of Defense Donald Rumsfeld from November 2002 through August 2003, said in
support detainees’ contentions that the CSRT process is unfair and inadequate. One statement, filed in the Supreme Court by Army Reserve Lt. Col. Stephen A. Abraham, was so revealing and critical of CSRTs that some believe it contributed to the Court’s decision to grant certiorari in Boumediene v. Bush.

Similarly, statements by an unnamed Army Reserve Major collected during an investigation by the Oregon Federal Public Defender’s Office in the case of a Sudanese national detained at

an interview with The National Journal, “I think the standards for sending someone to Guantanamo in 2002 and early 2003 were not as high as they should have been.” Hegland, supra note 156; see also Lyle Denniston, A New Critique of Pentagon Detainee Panels, SCOTUSblog.com, Oct. 5, 2007, http://www.scotusblog.com/wp/uncategorized/a-new-critique-of-pentagon-detainee-panels/ [hereinafter A New Critique].


See A New Critique, supra note 186. In a second statement filed in the D.C. Circuit Court in another detainee case, Hamad v. Gates, No. 07-1098 (D.C. Cir. 2007), Lt. Col. Abraham charged that, “there was no systematic method for requesting the government information relating to specific detainees” and that, “the individuals collecting, reviewing, and processing the information to be used by the [CSRTs] appeared to have little experience with intelligence products.” Abraham Declaration, supra note 188.

The officer’s name was redacted from the publicly available declaration and withheld from reports. According to his sworn declaration, he sat on forty-nine CSRT panels in Guantanamo. Declaration of William J. Teesdale, Esq., Hamad v. Bush, No. 05-1009 (D.D.C. Sept. 4, 2007) [hereinafter Teesdale Declaration].
Guantanamo also provided sharp criticism of the process.\textsuperscript{191} In his declaration, the anonymous military official stated that he witnessed several major problems involving evidence and procedure.\textsuperscript{192} First, no exculpatory evidence was ever formally presented in any CSRT he attended, although he did acknowledge that panels sometimes inadvertently discovered exculpatory evidence as a result of investigating inconsistencies in the record.\textsuperscript{193} Second, the role and responsibilities of the Recorder seemed to differ in each hearing.\textsuperscript{194} Third, he witnessed officers involved in the proceedings express legitimate concern that CSRT panel members “did not understand the distinction between conclusory statements and actual evidence.”\textsuperscript{195} Moreover, he stated that in six of the forty-nine CSRT hearings in which he participated, the panel came to a unanimous decision that the detainee was not an enemy combatant, but he observed that in each case, the Pentagon directed that a new CSRT panel be convened.\textsuperscript{196}

\textit{ii. Political Influences on the CSRT Process}

The government’s CSRT policy has not been untouched by politics. Documents released by the Pentagon in response to a Freedom of Information Act request\textsuperscript{197} reveal that CSRTs have resulted in “inconsistent decisions to release men declared by the Bush administration to be among America’s most-hardened enemies . . . rais[ing] questions about whether [the decisions] were arbitrary.”\textsuperscript{198} The October 2007 resignation of the lead prosecutor for terrorism trials at Guantanamo, Air Force Col. Morris Davis,
also illustrates the force of politics. Col. Davis resigned after he charged that, “politically motivated officials at the Pentagon pushed for [the] conviction of high-profile detainees [in formal military commissions] before the 2008 election.”\(^{199}\) In discussing his abrupt resignation, Col. Davis cited his concerns about the use of classified evidence in CSRTs and the propensity of supposedly neutral legal advisors to interfere with prosecutorial functions.\(^{200}\)

### iii. The Administration’s Suggested Alternatives

Aware of the criticisms of and challenges to the CSRT system, the Administration recently indicated that it is considering alternatives.\(^ {201}\) One of the options being contemplated would allow the government to convene new CSRTs for detainees currently remaining at Guantanamo.\(^ {202}\) Another alternative proposed by the White House would involve granting detainees “substantially greater rights [than they currently have] as part of an effort to close the detention center” and relocate detainees to prisons in the United States.\(^ {203}\) This may involve providing detainees counsel and giving final status determination authority to federal judges rather than military officers.\(^ {204}\) Though certainly an improvement on the current process, these proposed alternatives are not an acknowledgement by the current Administration that the current CSRT procedures are flawed. Rather, the Administration maintains that they are only an attempt to assess the practicality of closing the detention center at Guantanamo.\(^ {205}\)

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\(^{200}\) *Id.*


\(^{203}\) Glaberson, *supra* note 201.

\(^{204}\) *Id.*

\(^{205}\) *Id.*
B. The Courts

i. Bismullah v. Gates and the Fight Over the Scope of the Record on Review

Petitioners in *Bismullah* were detained at Guantanamo, designated by separate CSRTs as enemy combatants, and subsequently filed petitions for review of their enemy combatant status designations in the D.C. Circuit.206 During review before the D.C. Circuit, the parties disagreed over the breadth of the protective order originally issued in 2005 that dictated the scope of the record on review as well as how to handle sensitive information and interaction between detainees and their counsel.207 The government argued that the record before the D.C. Circuit when conducting its review of a CSRT should be limited to that compiled by the Recorder, and that the government should only be required to turn over to petitioners’ counsel the information presented to

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206 *Bismullah I*, 501 F.3d 178 (D.C. Cir. 2007). *Bismullah v. Gates* was consolidated from two separate cases—*Bismullah v. Gates* and *Parhat v. Gates*. Petitioner Bismullah was captured in Afghanistan in 2003 and determined by a CSRT to be an enemy combatant on November 30, 2004. The seven petitioners in *Parhat* were captured in Pakistan in December 2001 and each was determined by a separate CSRT to be an enemy combatant. Because both cases were filed under the DTA and ostensibly dealt with the same issue, the D.C. Circuit ordered them to be argued on the same day and consolidated both cases.

207 The Green Protective Order governed a detainee’s access to counsel and information from 2004 until it was challenged in *Bismullah I*. See supra notes 41, 45. The old protective order provided some protections for letters written between counsel and a detainee that were related to counsel’s representation of the detainee, as well as protections for privileged documents and publicly-filed legal documents relating to that representation; a presumption that detainees’ counsel have a “need to know” information in their own cases and in related cases; and revised procedures for in-person counsel visits at Guantanamo. See *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004). Though the Green Protective Order provided some guarantees for detainees, it was severely limited in scope and significantly impaired the D.C. Circuit Court’s ability to conduct any kind of meaningful review. See *Bismullah I*, 501 F.3d 178.
the CSRT. By contrast, petitioners argued that the reviewing court should have access to all evidence and information “reasonably available to the government,” including information that may have not been presented to the CSRT panel.

The D.C. Circuit Court agreed with detainees that the record on review should consist of the entire body of information collected by the government and not merely that which was compiled by the Recorder and presented to the CSRT panel. The court explained that such a limitation on courts’ access to evidence would severely inhibit meaningful judicial review, and the court subsequently ordered the government to turn over the relevant documents.

The government did not readily acquiesce to the court’s order. Rather than turn over the entire body of information relevant to each detainee, the government requested a panel rehearing, arguing that it could not meet the burden of production imposed by the court’s decision. While the D.C. Circuit Court ultimately denied the government’s petition for a panel rehearing, it expressly presented the government with the option of convening new CSRTs rather than attempting to compile all of the relevant information in the government’s possession at the time of each detainee’s original CSRT. While this alternative would still require the government to compile information regarding a detainee, DOD regulations only require the compilation of information that is reasonably available at the time the CSRT is convened. The government argued that this standard still imposed too heavy a burden and petitioned the court for a rehearing en banc. The court, in an even 5-5 split, denied the government’s motion on February 1, 2008.

Not yet willing to concede, the government asked the D.C.

\[208\] Bismullah I, 501 F.3d at 185.
\[209\] Id. at 184.
\[210\] Id. at 185–86.
\[211\] Id.
\[213\] Bismullah II, 503 F.3d at 141.
\[214\] Id.
Circuit Court to stay its July 2007 order, applicable not only to the petitioners in *Bismullah I* but to all the 180 detainee petitions now pending before it, thus giving the government time to challenge that decision in the Supreme Court. The Circuit Court duly granted the stay—though it applied only to the petitioners in *Bismullah I*—and on February 14, 2007 the government petitioned the Supreme Court to hold the case until after its disposition of another detainee case already pending there, or in the alternative, to grant review and set it on an expedited schedule so that it may be decided this term. In its petition to the Supreme Court, the government argued that the Circuit Court’s July 2007 order expanding the scope of the record on review is “unprecedented in any administrative or judicial context” and would require the government “to divert a significant portion of its intelligence, law enforcement, and military resources to either creating new ‘records’ for DTA litigation or to conducting entirely new CSRT hearings for those detainees.” Detainees’ reply brief urged the court to deny the government’s appeal, but agreed that, should the Court decide to hear the case, it should do so on an expedited schedule. Though the Supreme Court was expected to consider the appeal at its private conference on March 14, 2008, no action has yet been taken.

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219 Respondents’ Joint Opposition Brief, *supra* note 58, at 43.

While the parties in *Bismullah* continue to disagree over the scope of the D.C. Circuit’s review of CSRT procedures under the DTA and MCA, petitioners in the companion cases *Boumediene v. Bush* and *Al-Odah v. United States* are awaiting the Supreme Court’s ruling in their own action, wherein they challenged the constitutionality of the court-stripping provision itself.221 After the D.C. Circuit Court ordered that petitioner detainees’ habeas petitions be dismissed in February 2007,222 they filed petitions for writs of certiorari in the Supreme Court.223 The Supreme Court initially denied petitioners’ request,224 but in a rare and unexpected move, the Court reversed itself on the last day of the term several months later and granted detainees’ petition for certiorari and rehearing.225

After years of navigating the federal appellate court system,226

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222 *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007). The D.C. Circuit agreed that detainees had no independent right to seek writs of habeas corpus in federal court under the MCA; rather, the court held detainees have only the right to a review of their CSRT determinations pursuant to the DTA. See generally id. Judge Rogers dissented from the majority opinion and maintained that the court-stripping provision of the MCA is an unconstitutional suspension of the writ of habeas corpus and that, “[Congress’] attempt to revoke federal jurisdiction that the Supreme Court held to exist exceeds the powers of Congress.” *Id.* at 1007 (Rogers, J., dissenting).


224 *Boumediene v. Bush*, 127 S. Ct. 1478 (Apr. 2, 2007) (denying cert.); see also Joan Biskupic, *Court to Decide Detainees’ Rights, Justices Try to Balance Protection of Nation, Protection of Individual*, USA TODAY, Nov. 27, 2007, at 7A. Justices Stevens and Kennedy acknowledged the importance of the issue presented and signaled their intent to consider developments in other pending detainee cases, namely *Bismullah*, as to the efficacy of the CSRT review process. *Id.*


226 Petitioners in *Boumediene* have been litigating their asserted rights to
detainees finally had the opportunity to present their argument to the Supreme Court on December 5, 2007. Petitioner detainees stressed the inadequacies of the CSRT process, arguing that the constitutional writ of habeas corpus extends to non-citizen detainees held at Guantanamo and thus that the court-stripping provision of the MCA is an unconstitutional suspension of the writ.\(^\text{227}\) Petitioners went on to contend that while suspending habeas rights is a valid exercise of Congress’ authority if it provides an “adequate and effective alternative,”\(^\text{228}\) the CSRT process does not meet this standard.\(^\text{229}\)

In response, the government first argued that the constitutional writ of habeas corpus does not extend to non-citizens captured and detained abroad, and, alternatively, that Guantanamo detainees “enjoy more procedural protections than any other captured enemy combatants in the history of warfare.”\(^\text{230}\) The government maintained that detainees were provided an “adequate and effective alternative” for habeas in the form of the CSRT and D.C. Circuit Court review processes,\(^\text{231}\) and the Court should therefore exercise restraint and refrain from overruling long-respected precedent.\(^\text{232}\)

In light of the D.C. Circuit’s disposition in *Bismullah*, the petitioners in *Boumediene* and *Al-Odah* filed supplemental briefing with the Supreme Court after the oral argument on December 5, 2007. In an attempt to buttress their constitutional challenge, petitioners cited *Bismullah* in support of their contention that the procedures set up by Congress to challenge CSRTs under the DTA


\(^{228}\) *See* Swain v. Pressley, 430 U.S. 372, 381 (1977) (holding that where a collateral remedy is adequate and effective to test the legality of one’s detention, such a substitution is not an unconstitutional suspension of the writ of habeas corpus).

\(^{229}\) Brief for the Boumediene Petitioners, *supra* note 227, at 18–32.

\(^{230}\) *See* Brief for Boumediene Respondents, *supra* note 130.

\(^{231}\) *Id.*

\(^{232}\) *Id.*
are clearly ineffective. Because the Supreme Court had signaled that its decision in *Boumediene* and *Al-Odah* “might be affected at least in part by what the Circuit Court [does] in *Bismullah*,” detainees seized the opportunity to reinforce the arguments they made before the Court in early December.

In the first of two supplemental briefs, detainees argued that the D.C. Circuit’s decision to deny the government’s motion for a rehearing *en banc* “does nothing to alleviate the fundamental structural inadequacies of the DTA review process as a substitute for habeas, and will only result in more delay.” In its second brief, filed just days later, detainees further argued that

> [t]he fractured nature of the D.C. Circuit’s recent action does not bode well for the future of DTA proceedings. There is ample reason to believe that the D.C. Circuit will continue to engage in divided, incremental decisionmaking on threshold procedural issues on which Congress has provided no guidance, thus making DTA review far less speedy than the centuries-old remedy of habeas.

Indeed, both briefs attempted to further emphasize the fact that the D.C. Circuit Court’s disposition in *Bismullah* would not resolve the overarching question of detainees’ rights.

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C. Congress

Even if the Supreme Court takes the opportunity in Boumediene and Al-Odah to hold the court-stripping provision of the MCA unconstitutional, there is still the possibility that Congress may attempt to circumvent the ruling as it did in the wake of both Rasul and Hamdan.\textsuperscript{237} While some members of Congress have recognized that, “the elimination of basic legal rights undermines, not strengthens, [the] ability to achieve justice,”\textsuperscript{238} a vocal segment of Congress ardently maintains that habeas corpus does not, and indeed should not, extend to alien enemies captured and detained abroad in wartime.\textsuperscript{239}

Nonetheless, there is still the possibility for change: Senators Patrick Leahy and Arlen Specter, Chairman and Ranking Member of the Senate Judiciary Committee respectively, have repeatedly criticized Congress’ failure to repeal the court-stripping provision of the MCA, calling it “a historic error in judgment”\textsuperscript{240} and an attempt to “set back basic rights by some 900 years.”\textsuperscript{241} Moreover, several measures have been introduced in the House and the Senate that would have repealed the section of the MCA that stripped federal courts of their jurisdiction over detainees’ habeas petitions and restored detainees’ right to habeas corpus.\textsuperscript{242} Unfortunately,

\textsuperscript{237} See supra note 3.


\textsuperscript{239} See 152 CONG. REC. S10354 (daily ed. Sept. 28, 2006).

\textsuperscript{240} Id.

\textsuperscript{241} 152 CONG. REC. S10265 (daily ed. Sept. 27, 2006) (statement of Sen. Specter). Senator Specter has been criticized for his vote in favor of the MCA because of his ardent statements that the court-stripping provision was unconstitutional and for his subsequent efforts to repeal that provision. The Avoiding Congressional Accountability Act, National Review Online, Sept. 17, 2007, http://nationalreview.com (search “National Review Online” for “The Avoiding Congressional Accountability Act”; then follow hyperlink under “Search Results”).

\textsuperscript{242} See generally Habeas Corpus Restoration Act of 2007, S. 185, 110th
however, no measures have yet garnered enough support to pass through a House committee or overcome a Senate filibuster.\textsuperscript{243}

\textbf{CONCLUSION}

Detainees at Guantanamo have only one form of procedural due process, and it is minimal at best: the D.C. Circuit Court can only review whether the CSRT in the detainee’s case complied with its own procedures.\textsuperscript{244} In order to preserve the legitimacy of American constitutional values and ensure the legitimacy of the CSRT system, detainees must be afforded basic procedural guarantees and a fair adversarial process during their initial CSRTs.\textsuperscript{245} The Framers of the Constitution recognized liberty as a preexisting natural right, and sought to protect it in the Constitution and the Bill of Rights.\textsuperscript{246} Recognition of Guantanamo detainees’ right to liberty might seem counterintuitive in the context of protecting the nation

\textsuperscript{243} For example, on September 19, 2007, a Senate amendment to the defense appropriations bill that would have reversed the provisions of the MCA that eliminated the jurisdiction of any court to hear or consider applications for a writ of habeas corpus filed by aliens detained at Guantanamo failed to garner the sixty votes needed to invoke cloture. The cloture vote failed by a mere four votes, however, with fifty Democrats and six Republicans voting to end debate and proceed to a final vote on the amendment. 153 CONG. REC. S11688 (daily ed. Sept. 19, 2007) (Roll Call Vote No. 340, Motion to Invoke Cloture on the Specter Amdt. No. 2022 to H.R. 1585).

\textsuperscript{244} See Bismullah I, 501 F.3d 178 (D.C. Cir. 2007).

\textsuperscript{245} Though the Supreme Court held in 1891 in \textit{In re Ross}, 140 U.S. 453 (1891), that the United States Constitution has no extra-territorial application, some scholars have read this case as standing for the narrower proposition that “although not all constitutional rights [extend] beyond U.S. territory, persons outside U.S. territory are still entitled to fundamental fairness in their trial.” Yin, \textit{supra} note 148, at 366.

\textsuperscript{246} See Rosen, \textit{supra} note 12, at 1078–79.
from the threat of terrorism, but this does not serve as a justification for ignoring the right altogether. Rather, “[t]he concept that . . . constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and . . . would destroy the benefit of a written Constitution and undermine the basis of our Government.”

The United States Constitution provides explicit procedural guarantees to protect against certain kinds of government action. However, those guarantees are more than just procedural protections. Provisions like the Fifth Amendment, which provides that, “no person shall . . . be deprived of life, liberty or property, without due process of law,” stands for the proposition that we, as Americans, will not stand for or be party to abusive and arbitrary government encroachment on the right to liberty. Importantly, recognizing detainees’ liberty rights does not require that detainees be released or even that detainees be afforded the gamut of constitutional protections. The preservation of liberty merely requires that the process afforded to detainees maintain a basic adversarial structure and conform to traditional constitutional values. Rather than weaken the argument for providing detainees a more legitimate process for challenging their detention, the government’s interest in securing the nation against the threat of terrorism without sacrificing the constitutional principles that underlie our system of government highlights the need for adequate constitutional protection for detainees.

247 Reid v. Covert, 354 U.S. 1, 14 (1957).
248 U.S. CONST. amend. V.
INTRODUCTION

Before he was convicted and incarcerated, Genarlow Wilson was a model teenager. He had no criminal record and a 3.2 GPA. He was also a star football player and homecoming king. College football coaches courted him regularly and offered full tuition scholarships. Genarlow Wilson was released from prison on October 26, 2007, after spending more than two years behind bars. How did this seemingly ideal teenager end up in prison
instead of sitting at home and debating over which college to attend? In December of 2003,\textsuperscript{6} Wilson and some of his teenage friends rented rooms at a motel and had a New Year’s Eve Party.\textsuperscript{7} During the party, a fifteen-year-old girl performed oral sex on Wilson, who was then seventeen years old.\textsuperscript{8} Wilson insisted that the girl not only willingly performed the act, but in fact, initiated the activity.\textsuperscript{9} Nonetheless, Wilson was charged with aggravated child molestation.\textsuperscript{10} He was offered a plea bargain, but “[h]e could not see himself admitting to something he did not do, becoming a registered sex offender, having that follow him for the rest of his life, and being forbidden even to live in the same house with his younger sister.”\textsuperscript{11} Consequently, Wilson was convicted of aggravated child molestation and received a mandatory sentence of ten years imprisonment without possibility of parole.\textsuperscript{12}

question occurred.

Humphrey v. Wilson, 282 Ga. 520 (Ga. 2007). The case was remanded to the habeas court for it to reverse Wilson’s conviction and discharge him from custody. \textit{Id.}

\textsuperscript{6} Gilbert, \textit{supra} note 1.


\textsuperscript{8} \textit{Id.}

\textsuperscript{9} Pitts, \textit{supra} note 2. Wilson characterized the sexual activity between himself and the girl as “consensual” or “voluntary.” \textit{Wilson}, 279 Ga. App. at 461.

\textsuperscript{10} \textit{Wilson}, 279 Ga. App. at 459. At the time of conviction, the minimum sentence was ten years in prison with no possibility of probation or parole and the maximum sentence was thirty years in prison. \textit{Humphrey}, 282 Ga. at 521.

\textsuperscript{11} Pitts, \textit{supra} note 2. GA. CODE ANN. §42-1-12 (2006) would require Wilson to register as a sex offender. \textit{Humphrey}, 282 Ga. at 521. GA. CODE ANN. §42-1-15 (2006) would prevent Wilson from living in the same house as his sister because it prohibits convicted sex offenders from living within “1,000 feet of any child care facility, church, or area where minors congregate.” \textit{Id.}

\textsuperscript{12} \textit{Wilson}, 279 Ga. App. at 459. GA. CODE ANN § 16-6-4(a) (2006) provides, “[a] person commits the offense of child molestation when he or she does any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person.” \textit{Id.} at 460. GA. CODE ANN § 16-6-4(c) (2006), the statute under which Wilson was convicted, provides that “[a] person commits the offense of aggravated child molestation when such person commits an offense of child molestation which act physically injures the child or involves an act of
According to his sentence, before his release from prison Wilson would have to provide prison officials with information, including his residence and his photograph. That information, along with the nature of his offense, would be forwarded to the sheriff’s office who would post the content around the county in which he lived and on the Internet. Further, under Georgia’s residency restriction laws, when Wilson was released, he would not be able to live or work within 1,000 feet of any child care facility, church, or other area where minors congregate.

The year after Wilson was sentenced, the Georgia state legislature enacted a law that made consensual oral sex between adolescents only a misdemeanor punishable by a one year sentence with no sex offender registration requirements. Thus, if the two had instead engaged in sexual intercourse, Wilson’s crime would have been a misdemeanor with only a one-year sentence. However, because the legislature decided not to make the law retroactive, it left Wilson in prison for over two years until the

sodomy.” Id. And under GA. CODE ANN. § 17-10-6.1 (2006), aggravated child molestation is a “serious violent felony” carrying a mandatory minimum sentence of ten years without possibility of parole. Id.

13 Humphrey, 282 Ga. at 521.

14 Id. (noting that upon release, Wilson would have had to provide his new address, his fingerprints, his social security number, his date of birth, and his photograph).

15 Id.

16 Id.; see also Brenda Goodman, Georgia Justices Overtune Curb on Sex Offenders, N.Y. TIMES, Nov. 22, 2007, at A26 (noting that although the amendment dealing with residency has been overturned by the Georgia Supreme Court, the provisions regarding employment and loitering are still in effect).

17 Gilbert, supra note 1; see also Humphrey, 282 Ga. at 522.


19 The legislature expressed the intent that “[t]he provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment.” H.B. 1059, 148th Gen. Assem., Reg. Sess. (Ga. 2006). The reasoning behind the law is that recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who
Georgia Supreme Court ended his sentence.20 Wilson is not the only teen who has suffered legal repercussions for his sexual activity.21 In 1996, Michael Peterson became a convicted sex offender in New Hampshire at age nineteen. Peterson was arrested and convicted for having sex at a party with a fifteen-year-old.22 Although he received a suspended sentence, he has had to register as a sex offender for the past eleven years.23 As a result of the state law governing sex offenders, Peterson, who is now married with children, cannot coach his three children’s teams or chaperone their school trips.24 Further, as a carpenter, Peterson is not allowed to work at sites near children because of residency restrictions.25 Laurie Peterson, Michael’s wife, acknowledges that her husband’s behavior at the time was not admirable, but nevertheless urged the New Hampshire Legislature to pass a bill that would prosecute fewer teenagers for consensual sex.26 The bill would also permit some people who were younger than twenty-one at the time they were arrested for consensual teenage sex acts to petition a judge to be removed from the state’s sex offender

present an extreme threat to the public safety. Many sexual offenders are extremely likely to use physical violence and to repeat their offenses; and some sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes . . . [and] this makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant.

Id.

20 Goodman, supra note 5. The Court noted that the “severe felony punishment and sex offender registration imposed on Wilson make no measurable contribution to acceptable goals of punishment.” Id. The decision by the Court was not unanimous. The dissenters argued that the decision represented a disregard for the legislature’s authority and claimed that “it would open the door for other felony offenders convicted of aggravated child molestation to be ‘discharged from lawful custody.’” Id.

21 Wendy Koch, Defining A Sex Predator, For Life, USA TODAY, July 25, 2007, at 3A.

22 Id.

23 Id.

24 Id.

25 Id.

26 Id.
NO CHILD LEFT BEHIND BARS

registry. Although the bill passed the House, it did not receive enough votes in the Senate to become law.

There are many individuals throughout the country with stories similar to those of Wilson and Peterson. In Connecticut, Jeff Davis, now twenty-two, was charged with a sex crime when he was eighteen years old for engaging in sexual acts with his serious girlfriend. Davis was a junior in high school when he met the fifteen-year-old girl in study hall at school. They started out as friends, then began to date, and fell in love. Davis says that they often talked about their plans for the future—how they planned to get married, buy a house, and create a life together. However, when the girl started paying less attention to her schoolwork, her father blamed Davis and Davis’s relationship with his daughter, and he reported Davis to the Newington police. Davis was arrested and convicted of second-degree sexual assault, even though his girlfriend told investigators that she and Davis were dating and

27 Lauren R. Dorgan, Wife: ‘He’s Not a Predator’, CONCORD MONITOR, May 24, 2007, available at http://www.concordmonitor.com/apps/pbcs.dll/article?AID=/20070524/REPOSITORY/705240323. Similar laws were enacted in Oregon in 2007. See 2007 Or. Laws Ch. 609 (“No sooner than two years, but no later than five years, after the termination of juvenile court jurisdiction over a person required to report . . . , the person may file a petition for relief from the duty to report.”).

28 Koch, supra note 21. HB 504, which some have called the “Laurie Peterson” bill, passed a State House committee 18-0 in March, 2007. Dorgan, supra note 27. It cleared a State Senate committee in May, 2007 on a 4–1 vote. Id. On May 24, 2007, an amendment was rejected on the State Senate floor and the bill was laid on the table. H. 504, 2007 Gen. Court, 116th Sess. (N.H. 2007). State Senator Joe Foster, who chairs the Senate committee that approved the bill, said that he had new concerns about it and thinks it needs more work. Dorgan, supra note 27. Other Senators said that they have heard concerns from prosecutors and police that the bill does not comply with the Adam Walsh Act, a federal law regarding sex offender registration. Id.


30 Id.
31 Id.
32 Id.
33 Id.
34 Id.
that she was a willing partner. If the age gap between the two teenagers had been less than two years, Davis would not have been arrested under the state’s second-degree sexual assault statute, known in Connecticut as the “Romeo and Juliet” law. Although he never served time in prison because his sentence was suspended, Davis is now serving ten years of probation.

As a result of his conviction, Davis was forced to register as a sex offender, which has made moving on with his life quite difficult. For instance, he has experienced harassment and has had problems finding work. Davis, who wants to become a firefighter, can only find work in warehouses or construction. Yet even in those areas, his search is often futile and hopeless. He

35 Munoz, supra note 29.
36 Id.
37 Id. Senior Assistant State’s Attorney Louis Luba, who prosecuted Davis’ case, said defense attorneys usually try bargaining for sentences that will keep their clients out of prison. Id. He also said that he tries to find a just resolution and considers a variety of factors including the age difference, whether there was an ongoing relationship that the victim’s parents consented to, and whether the younger teen lied about his or her age. Id.
38 Id. Probation conditions can restrict where a sex offender works and lives as well as the people with whom he or she socializes. Munoz, supra note 29. The conditions are often different for each offender, but many offenders are ordered to attend sex offender treatment and most must have their pictures on the state sex offender registry. Id. Davis is not the only teen convicted for having sex in Connecticut under the second-degree sexual assault statute. Id. Between 1999 and February 2007 in Connecticut, teenagers over the age of sixteen were convicted of 195 counts of the specific subsection that addresses teen sex. Id. The average sentence for each conviction was slightly less than two years spent behind bars, in addition to probation and required registration on Connecticut’s sex offender registry. Id.
39 Munoz, supra note 29. He moved in with his uncle in February of 2007, and almost immediately after he settled in, police officers arrived at the house requesting information for the sex offender registry. Id. They asked for pictures of him, his car, and his new home, and also knocked on his neighbors’ doors to warn them that a sex offender lived in the neighborhood. Id.
40 Id.
41 Id. On one occasion, someone printed out dozens of copies of Davis’ page from the sex offender registry and left them in front of his home. Id.
42 Munoz, supra note 29.
43 Id.
explains that even in his search for work in warehouses and construction, if he is able to get his foot in the door and secure an interview, employers almost always cut the interview short when they hear about his conviction as a sex offender.\textsuperscript{44}

These are merely three stories among the myriad of cases in which teenagers who engaged in consensual sexual acts with other teenagers have been arrested, prosecuted, convicted, and punished. The stories of Wilson, Peterson, and Davis elucidate the need to reform state statutory rape laws. These men had their lives altered because they engaged in activity as teenagers in which more than half of teenagers across the country participate.\textsuperscript{45} However, because the law criminalizes their actions, they went from being normal teenagers, with hopes of living fulfilling lives and pursuing their dreams, to being convicted sex offenders, with disappointment and despair clouding their existence. While statutory rape laws are absolutely imperative to protect minors from sexual predators and “those who would prey upon their vulnerability,”\textsuperscript{46} it is problematic for those same laws to criminalize consensual teenage sex\textsuperscript{47} because the harsh consequences that often result from convictions under these laws may lead to cruel and unusual punishment.\textsuperscript{48}

Although some people believe that teenage sex is immoral, the public’s view on morality should not be a component in determining the scope of the laws.\textsuperscript{49} As the Supreme Court held in \textit{Lawrence v. Texas}, “[t]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is

\begin{footnotesize}
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\item \textsuperscript{44} \textit{Id.}
\item \textsuperscript{45} A 1995 study revealed that, by the age of sixteen, 50\% of U.S. teenagers have had sexual intercourse. Michelle Oberman, \textit{Regulating Consensual Sex With Minors: Defining A Role For Statutory Rape}, 48 BUFF. L. REV. 703, 703 (2000).
\item \textsuperscript{46} \textit{Id.} at 710; see also Munoz, supra note 29 (“Sex offender laws were designed to protect people from predators—pedophiles, rapists and the like.”).
\item \textsuperscript{47} This term is used by the author to refer to sexual acts between teenagers who are at least 15 years old and with an age difference of four years or less between them.
\item \textsuperscript{48} Brickner, supra note 18.
\item \textsuperscript{49} \textit{Lawrence v. Texas}, 539 U.S. 558, 577 (2003).
\end{itemize}
\end{footnotesize}
not a sufficient reason for upholding a law prohibiting the practice..."50 Opponents of criminalizing consensual teenage sex in statutory rape laws have averred that teenage sex seems to be "more of a health or social issue than a crime."51 Widespread reform of statutory rape laws is essential because of the injustices endured by then-teenagers such as Wilson, Peterson, and Davis.52

As many laws stand now, the punishment for consensual teenage sex is disproportionate to the crime, and in fact may result in cruel and unusual punishment in violation of the Eighth Amendment.53 As such, statutory rape laws should be revised to address the problem of harsh consequences that result from convictions. Specifically, all states should implement age gap provisions in their laws.54 If jurisdictions insist on criminalizing acts of consensual teenage sex, the laws should be changed to classify the activity as a misdemeanor.55 In addition, the punishment for such a misdemeanor conviction should not include jail time or sex offender registration, as they constitute cruel and unusual punishment for engaging in consensual sexual activity.56

50 Id. at 577.
51 Munoz, supra note 29.
52 Maureen Downey, Genarlow Wilson is Free... But Other Victim's of Georgia's Sweeping Sex Offender Laws Are Not, ATLANTA J. & CONST., Oct. 28, 2007, at B6 (“But Wilson is not the only young offender caught in a maze of draconian sex laws... . Lawmakers must amend the sex offender registry law so that it distinguishes between two immature high school kids hooking up at a party to a pedophile molesting the toddler next door.”).
53 See Brickner, supra note 18 (“And while torture, drawing and quartering, public dissecting, burning alive and disemboweling have since been ruled by courts to be prohibited, in the area of sexual conduct, punishments that most would consider cruel and unusual continue to be supported by state legislators.”).
55 See Koch, supra note 21 (noting that seven states eased punishments for teenagers convicted of consensual sex in 2007).
56 See Gilbert, supra note 1 (classifying Genarlow Wilson’s sentence of ten years in prison with required sex offender registration upon release as “harsh” and noting that “[t]he Georgia court system must not be familiar with the eighth amendment.”).
Finally, such laws should be applied retroactively because many of the old laws require registration on sex offender registries for life, and there may be other individuals who are serving sentences for crimes which are no longer felonies. 57

This Note will address the flaws in current state statutory rape laws and the legislative remedies needed to prevent the unfairness and cruel and unusual punishment already endured by teenagers like Genarlow Wilson. Part I will provide a brief history of statutory rape laws and the rationales behind the laws. Part II will address the current status of consensual teenage sex and statutory rape laws. This part will consider whether consensual teenage sex is detrimental, the lack of uniform enforcement of sex offense laws, and the consequences of a conviction for acts of consensual teenage sex. Part III will discuss the Eighth Amendment and what constitutes cruel and unusual punishment. This part will argue that all acts of consensual teenage sex should not be legally sanctioned and that many state laws lead to cruel and unusual punishment under the Eighth Amendment. Finally, Part IV will discuss various reform ideas that would eradicate the problems caused by the current laws while preserving statutory rape laws for cases in which there is true sexual coercion or exploitation.

I. HISTORY OF STATUTORY RAPE LAWS

Statutory rape laws originated in thirteenth century England, and were first codified in English law in 1275. 58 These early laws prohibited sexual relations between adult males and young females under the age of twelve. 59 In the late sixteenth century, lawmakers


59 Daryl J. Olszewski, Statutory Rape in Wisconsin: History, Rationale, and The Need For Reform, 89 MARQ. L. REV. 693, 694 (2006). The “initial prohibitions . . . restrict[ed] only a male’s sexual relations with young females,
in England lowered the age of consent to ten. The laws were consistent with other laws in Europe and with other common law efforts to protect children from exploitation.

The United States adopted England’s statutory rape laws when it adopted the English common law, and initially did not change the age of consent. However, in the late nineteenth century, “campaigns were launched to increase the age of consent in an effort to further protect girls from male sexual aggression.” Accordingly, states increased the age of consent. In a further attempt to protect young, naïve girls from predators, “[s]ome states provided increased penalties for adult men who had sex with pre-pubescent girls, and [provided] lesser penalties when the male

and sought to ‘protect a father’s interest in his daughter’s chastity.’” Id. at 694–95. The apparent reasoning behind the laws was that a non-virgin traditionally was not as desirable for marriage, and she was “therefore less likely to bring financial reward to her father upon marriage.” Oberman, supra note 58, at 802. Thus, historically, statutory rape laws “aimed to protect the father’s property interest in his daughter, and were an embodiment of the legal perception of women and girls as ‘special property in need of special protection.’” Id. at 802. The states extended legal protection only to virgins, causing statutory rape law to serve “as a tool through which to preserve the common morality rather than to penalize men for violating the law.” Michelle Oberman, Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law, 8 DePaul J. Health Care L. 109, 121 (2004).

Oberman, supra note 59, at 119.

Oberman, supra note 58, at 801.


Olszewski, supra note 59, at 695. See also Oberman, supra note 59, at 119 (“Early American lawmakers set the age of consent at ten.”).

Olszewski, supra note 59, at 695. The campaigns were led by the Women’s Christian Temperance Union and various other feminist leaders who wanted to protect females from laws and cultural values that threatened their health and prosperity and made them subordinate in society. Oberman, supra note 58, at 803 (citing Jane E. Larson, Even a Worm Will Turn at Last: Rape Reform in Late Nineteenth-Century America, 9 Yale J.L. & Human. 1, 3–4 (1997))

Olszewski, supra note 59, at 695. Some states raised the age of consent as high as twenty-one. Id. However, the average age of consent was sixteen. Oberman, supra note 58, at 803.
was younger than the female.\footnote{Oberman, supra note 59, at 119.}

In the 1970s, feminists began to express concerns that statutory rape laws “perpetuated offensive gender stereotypes and restricted the sexual autonomy of young women.”\footnote{Oberman, supra note 58, at 807.} The reformers “saw sexuality as a vehicle of power that in complex ways kept women subordinated in society . . . .”\footnote{Id. at 803.} The feminists called for reforms to “make the laws gender neutral and thus remove the implication that only females are inherently vulnerable.”\footnote{Olszewski, supra note 59, at 695.}

Notably, while feminists called for reform of the statutory rape laws, they did not call for their complete abolition because they understood the importance of the laws in protecting young people from sexual coercion and exploitation.\footnote{Id. (“However, rather than seeking the abolition of statutory rape laws, those feminists generally called for reforms to make the laws gender neutral and thus remove the implication that only females are inherently vulnerable, but rather all juveniles are in need of protection.”).} As Professor Fran Olsen noted:

On the one hand, [statutory rape laws] protect females; . . . statutory rape laws are a statement of social disapproval of certain forms of exploitation . . . . On the other hand, statutory rape laws restrict the sexual activity of young women and reinforce the double standard of sexual morality.\footnote{Id. at 809 (“[T]hese vestiges of concern over securing male control over girls’ sexuality and protecting girls from harm are overshadowed by . . . powerful new functions driving the enforcement of statutory rape laws.”).}

These concerns show that there is a tension between the impulses underlying statutory rape laws.\footnote{Id.} Despite this tension, states have continued to enforce statutory rape laws.\footnote{Id. at 809.}

Today, while chastity concerns are no longer as prominent, states provide various other reasons to justify statutory rape laws. For instance, these laws are said to protect young people from

\begin{itemize}
\item \footnote{Oberman, supra note 59, at 119.}
\item \footnote{Oberman, supra note 58, at 807.}
\item \footnote{Id. at 803.}
\item \footnote{Olszewski, supra note 59, at 695.}
\item \footnote{Id. (“However, rather than seeking the abolition of statutory rape laws, those feminists generally called for reforms to make the laws gender neutral and thus remove the implication that only females are inherently vulnerable, but rather all juveniles are in need of protection.”).}
\item \footnote{Id. at 807.}
\item \footnote{Id. at 809 (“[T]hese vestiges of concern over securing male control over girls’ sexuality and protecting girls from harm are overshadowed by . . . powerful new functions driving the enforcement of statutory rape laws.”).}
\end{itemize}
coerced sexual activity,\textsuperscript{74} enforce morality,\textsuperscript{75} prevent teenage pregnancy,\textsuperscript{76} and reduce welfare dependence.\textsuperscript{77} Although states may see these as valid reasons for enforcing statutory rape laws, the goals these rationales aim to achieve can still be reached with revised laws.\textsuperscript{78}

\textsuperscript{74} Olszewski, \textit{supra} note 59, at 698–99. This reason is most often cited as a rationale for enforcing statutory rape laws because lawmakers think that the power disparity in a relationship between a child and an adult means that the child will be unable to resist the adult’s coercive influence. \textit{Id.} (citing Oberman, \textit{supra} note 45, at 757). Proponents of this rationale also argue that a teenager is incapable of meaningful consent and therefore any sexual conduct is nonconsensual and that a person who engages in sexual conduct with a teenager takes advantage of the teenager’s vulnerability. \textit{Id.}

\textsuperscript{75} Olszewski, \textit{supra} note 59, at 699. “Some people believe that any sexual conduct outside of marriage is inherently immoral. Juveniles, in nearly every situation, are prohibited from marrying and thus all sexual activity involving juveniles can be seen as immoral.” \textit{Id.}

\textsuperscript{76} \textit{Id.} Some people argue that prohibitions on sexual activities other than sexual intercourse are necessary because they may lead to sexual intercourse, and prohibitions on sexual intercourse that do not result in pregnancy are appropriate because there is an inherent risk of pregnancy. \textit{Id.} at 700. In the 1990s, studies indicated that adult men were the fathers of a high number of babies born to teenage mothers, and this fact created concern because girls who have babies as teenagers are less likely to be productive members of society—they are “less likely to complete high school, less likely to marry, less likely to be able to support their families, and more likely to require public assistance at various points in their lives.” Oberman, \textit{supra} note 58, at 808–09.


\textsuperscript{78} Olszewski, \textit{supra} note 59, at 700–01.
II. THE STATUS OF CONSENSUAL TEENAGE SEX AND STATUTORY RAPE LAWS

A. Consensual Teenage Sex—Is it Really So Detrimental?

Consensual teenage sex in the United States is astoundingly common.79 A 1995 study revealed that, by the age of sixteen, 50% of U.S. teenagers have had sexual intercourse.80 Another study shows that in the U.S., about 60% of unmarried eighteen-year-olds are sexually active.81 In fact, it is estimated that there are more than 7 million incidents of statutory rape every year.82 However, it is clear that most incidents are not prosecuted and do not lead to arrests and convictions.83

Even though "rates of sexual intercourse are higher today than they were forty years ago, there is little reason to believe that the high rates of adolescent sexual activity reflect a new trend."84 Instead, for many years, a large number of teenagers have engaged in sexual activity which is technically illicit, likely unaware of the illegality of their actions, and the criminal justice system has turned a blind eye.85 Prior to the 1990s, statutory rape laws were rarely enforced and often ignored.86 In the last years of the twentieth century, studies revealed that a majority of teen pregnancies were the result of sexual relations with adult men.87 As a result, interest

79 See Oberman, supra note 45, at 703.
80 See id.
82 Oberman, supra note 45, at 703–04. Because the current age of consent under most state statutes is sixteen or older, "each incident of sexual intercourse among that population is illicit—each constitutes a separate instance of statutory rape." Id.
83 See id. at 704 (“For any number of reasons, it would be unimaginable to attempt to prosecute every instance of sexual contact with minors.”).
84 Id. at 704.
85 Id.
86 Oberman, supra note 58, at 808.
87 Oberman, supra note 45, at 705.
in statutory rape legislation was reignited,88 and both federal and state governments created policies encouraging the prosecution of statutory rape.89 However, statutory rape laws should not be universally applied to all cases of teenage sexual activity because adolescent sexual activity is not inherently problematic.90

In fact, there is ample support for the position that adolescent sexual activity may actually be beneficial.91 “[L]iterature on adolescent sexuality suggests that adolescent sex can play a positive role in young people’s lives, both through the nature of the sexual experience itself, and through the potential for the experience to serve as a growth tool.”92 Researchers have argued that adolescent sexual experimentation “is one way in today’s society for young people to gain a sense of independence from parents, to begin the process of growing up and taking on adult roles.”93 These positive aspects of adolescent sexuality support the argument that adolescent sexual activity as a whole is not per se detrimental.94

Despite these arguments that sexual activity may be beneficial to young people, the issue of consent is a point of contention among supporters of existing statutory rape laws because many people believe that adolescents do not have the capacity to consent.95 However, there are many adults that might also fall into this category, “and the decision to treat intercourse as distinctive in this way may simply represent a revival of the old view that

88 Id.
89 Oberman, supra note 58, at 809.
90 Kitrosser, supra note 81, at 322–23.
91 Id.
92 Kitrosser, supra note 81, at 322. Some have suggested that adolescent sex may adequately “prepare an adolescent to deal with future relationships.” Id.
93 Id. at 323 (quoting SUSAN MOORE & DOREEN ROSENTHAL, SEXUALITY IN ADOLESCENCE 65 (1993)).
94 Id. at 323.
95 Sherry F. Colb, A Ten Year Sentence for Marcus Dwayne Dixon: The Pros and Cons of Statutory Rape Laws, FINDLAW’S WRIT, Feb. 11, 2004, http://writ.news.findlaw.com/colb/20040211.html. (“[A]t some level, we might have doubts about the competence of a minor to ‘consent,’ in a meaningful way, to sexual activity. Because of her youth, the minor might not fully appreciate the full physical and emotional implications of her decision.”).
‘maidens should be protected from the corruption of their virtue.’ Also, recent studies show that adolescents often “make meaningful choices through rational thinking about possible social behaviors.” In fact, studies from the 1970s and 1980s show that “fourteen-year-olds demonstrate adult levels of competency on various measures when making decisions about medical treatment, and that fifteen- and sixteen-year-olds generally have a great capacity for abstract and ideological political thought.” Further, and significantly, “[t]his reasoning capability often extends to decision-making about sexual activity.” Overall, it is too simplistic to propose that adolescents typically cannot make reasoned decisions regarding consensual sexual activity in all instances.

However, even in the face of this evidence, many members of the government and society still believe that statutory rape laws are necessary to regulate adolescent sexual activity. Due to the recent concerns regarding teen pregnancy, there has been a noticeable governmental effort to “reinvigorate the enforcement of statutory rape laws.” This push has led lawmakers to consider whether the criminal law should regulate adolescent sexual behavior

96 Id.
98 Id. at 1227–28.
99 Id. at 1228. Other studies and evidence also show that many teenagers make voluntary choices to engage in sexual activity. Id. at 1228–29 (citing GAIL ELIZABETH WYATT ET AL., SEXUAL ABUSE AND CONSENSUAL SEX 23 (1993)).
100 Kitrosser, supra note 81, at 289 (“[T]o place all sexual activity in certain age-based categories under the statutory umbrella of ‘assault’ or ‘rape’ misses the real issue, because it fails to isolate, name, and target those instances of sex that are coercive and that should, for that reason, be subject to criminal punishment.”).
101 See, e.g., Koch, supra note 21 (noting that Senator Eric Johnson, a Republican in Georgia, believes Genarlow Wilson was fairly punished); see also Munoz, supra note 29 (stating that Rep. Arthur O’Neill, a Republican in Kansas, agreed that current laws “have resulted in gut-wrenching stories,” but the legislature should not change the law so these teenagers do not get arrested).
102 Oberman, supra note 45, at 706.
and if so, how the law can regulate such behavior.\footnote{Id.} When considering the relationship between the criminal law and adolescent sexual behavior, lawmakers should bear in mind that “the laws also shape attitudes and are, in turn, shaped by prevailing social mores.”\footnote{Kitrosser, supra note 81, at 326 (quoting \textit{Susan Moore & Doreen Rosenthal, Sexuality in Adolescence} 77–78 (1993)).} Laws which are “too out of step with current thinking” are less likely to be obeyed or to significantly influence whether teenagers decide to engage in sexual activity.\footnote{Id.} The prevailing modern view among lawmakers, judges, attorneys, scholars, and members of society is that adolescent sexual behavior is not completely destructive and should not be punished as a serious criminal offense.\footnote{See Kitrosser, supra note 81 (arguing that the laws should focus on the destructive norms of adolescent sexuality rather than adolescent sexuality as a whole); Gilbert, supra note 1 (noting that Judge Thomas Wilson said that the fact that Genarlow Wilson was sentenced to spend ten years in prison was a “grave miscarriage of justice”).}

\subsection*{B. Lack of Uniform Enforcement}

Another issue with applying statutory rape laws to consensual teenage sex is that the laws are not currently enforced uniformly throughout the states and even within the states.\footnote{See Oberman, supra note 45, at 706 (noting that statutory rape laws are currently “being selectively enforced in the absence of any coherent rationale”).} For example, in the same courthouse where Genarlow Wilson was fighting for his innocence in his trial, a twenty-seven-year-old teacher was convicted for having sex with a seventeen-year-old student, which is the type of crime statutory rape laws are intended to prevent.\footnote{Pitts, supra note 2.} However, in contrast to Wilson’s ten year sentence, the teacher received just three years’ probation and 90 days in jail.\footnote{Id.} Similarly, Wendy Whitaker, a woman in Georgia who had been convicted for the same crime as Wilson when she was seventeen, was convicted for engaging in consensual oral sex with a fifteen-year-old classmate

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\footnote{Id.} \footnote{Kitrosser, supra note 81, at 326 (quoting \textit{Susan Moore & Doreen Rosenthal, Sexuality in Adolescence} 77–78 (1993)).} \footnote{Id.} \footnote{See Kitrosser, supra note 81 (arguing that the laws should focus on the destructive norms of adolescent sexuality rather than adolescent sexuality as a whole); Gilbert, supra note 1 (noting that Judge Thomas Wilson said that the fact that Genarlow Wilson was sentenced to spend ten years in prison was a “grave miscarriage of justice”).} \footnote{See Oberman, supra note 45, at 706 (noting that statutory rape laws are currently “being selectively enforced in the absence of any coherent rationale”).} \footnote{Pitts, supra note 2.} \footnote{Id.}
\end{flushright}
while on school property, but her sentence was for five years of probation.\textsuperscript{110} This lack of uniformity in enforcement of the current laws is problematic because innocent teenagers may be subject to harsh treatment due to poor displays of prosecutorial discretion.\textsuperscript{111}

There are various reasons why states selectively enforce the laws.\textsuperscript{112} Regardless of their rationales, this Note argues that such selective enforcement is unreasonable, because it makes it difficult for teenagers to know the scope of the laws.

\textbf{C. Consequences of Conviction for Acts of Consensual Teenage Sex}

\textit{1. Strong Labels and Classifications}

Just as the enforcement of statutory rape laws differs among states, so too does the label for the crime that is attached to acts of consensual teenage sex.\textsuperscript{113} In Georgia, an act of consensual teenage sex may be prosecuted as statutory rape, child molestation, or aggravated child molestation depending on certain factors.\textsuperscript{114} In

\textsuperscript{110} McDonald, \textit{supra} note 57. Wendy Whitaker pleaded guilty to sodomy and was sentenced to five years probation. \textit{Id.}

\textsuperscript{111} See Colb, \textit{supra} note 95 ("A remaining concern is the worry about racism specifically, and discrimination more generally, that arises whenever officials are vested with a large amount of discretion.").

\textsuperscript{112} Oberman, \textit{supra} note 45, at 735 (noting that states choose certain cases to prosecute in pursuit of their fiscal self-interest); see also Pitts, \textit{supra} note 2 ("[T]here are major disparities in the treatment of black kids and white ones facing Georgia justice . . . [T]he [27 year old] teacher who got off with a wrist slap [for having sex with a 17 year old student] was—big surprise—white.").

\textsuperscript{113} See Act of Apr. 26, 2006, secs. 10–11, 2006 Ga. Laws 571 (codified as amended at GA. CODE ANN. §§ 16-6-3, 16-6-4 (2007) (teenage sex may be prosecuted as statutory rape, child molestation, or aggravated child molestation); Munoz, \textit{supra} note 29 (teenage sex may be prosecuted as sexual assault).

\textsuperscript{114} GA CODE ANN. §§ 16-6-3, 16-6-4 (2007). A person commits the offense of statutory rape when he or she engages in sexual intercourse with anyone under the age of 16 who is not his or her spouse. §16-6-3. A person commits the offense of child molestation when he or she does any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of themselves or the child. § 16-6-4. A
other states, such as Wisconsin, consensual teenage sex may be prosecuted as sexual assault.\textsuperscript{115} In Massachusetts, a person may be prosecuted for rape if the other individual is less than sixteen years old.\textsuperscript{116} These labels are accompanied by stigma that can cause immense psychological damage to teenagers who engage in consensual teenage sex, and such disgrace is an additional punishment which is not proportional to the crime.\textsuperscript{117}

2. Lack of Retroactivity

Many states have revised their laws to include age-gap provisions\textsuperscript{118} and to classify statutory rape as a misdemeanor.\textsuperscript{119}

person commits the offense of aggravated child molestation when he or she commits an offense of child molestation which physically injures the child or involves sodomy. § 16-6-4.

\textsuperscript{115} WIS. Stat. Ann. § 948.02(2) (West 2007) ("Second degree sexual assault. Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years is guilty of a Class C felony.").

\textsuperscript{116} See MASS. Gen. Laws ch. 265, § 23 (2007) ("Whoever unlawfully has sexual intercourse or unnatural sexual intercourse, and abuses a child under sixteen years of age shall, for the first offense, be punished by imprisonment in the state prison . . . . ").


\textsuperscript{118} Age-gap provisions provide that sexual conduct involving persons who are close in age is either not criminal or punished at a lower level. See Olszewski, supra note 59, at 706.

For example, Georgia amended its law to provide that if the victim is at least fourteen but less than sixteen years old and the person convicted of statutory rape is eighteen years old or younger and is no more than four years older than the victim, the person will be guilty of a misdemeanor, rather than felony statutory rape.120 While these amendments and revisions reducing convictions for consensual teenage sexual acts are a step in the right direction, the laws still leave many people either in prison or forced to register as sex offenders if they were convicted and sentenced before the laws took effect.


This is especially unfair in light of the fact that other laws, including laws relating to sex offenses, are applied retroactively.\textsuperscript{121} For example, in Georgia, a 2006 amendment “retroactively bar[red] anyone on the state’s sex offender registry from living, working or loitering within 1,000 feet of a school bus stop or church.”\textsuperscript{122} As a result of the amendment, people who were in compliance with the law had to completely uproot themselves and their families.\textsuperscript{123} While the Georgia Supreme Court struck down the law in November of 2007,\textsuperscript{124} legislators noted that they would likely amend the statute and reintroduce the legislation in January.\textsuperscript{125} Legislators are unable to justify the retroactive application of laws that provide for further punishment for sex offenders who have already served their sentence in light of the fact that the current statutes for “sex offenders”—including teenagers who engage in consensual sex—provide for less severe penalties which may not include sex offender registration.

\textsuperscript{121} See McDonald, \textit{supra} note 57. In Florida, a sex offender whose victim is under eighteen years old cannot live where children congregate or within 1,000 feet of schools, parks, playgrounds, and public school bus stops. FLA. STAT. §947.1405(7)(a)(2) (2007). In California, voters passed Proposition 83 in 2006, which prohibits any registered sex offender from living within 2,000 feet of any school, daycare facility, or place where children gather. HUMAN RIGHTS WATCH, \textsc{No Easy Answers: Sex Offender Laws in the US} \textsc{112} (2007). The law applies to all registered sex offenders. \textit{Id.}

\textsuperscript{122} McDonald, \textit{supra} note 57.

\textsuperscript{123} \textit{Id.}

\textsuperscript{124} Goodman, \textit{supra} note 16.

\textsuperscript{125} \textit{Id.} Notably, the ruling only applies to the residency restrictions of the law. The provisions that bar sex offenders from working or loitering in places where children gather are still in effect. \textit{Id.} In fact, in January of 2008, Georgia legislators introduced HB 908, in order to repeal certain provisions relating to residency and employment restrictions for certain sexual offenders; to provide for restrictions on where sexual offenders and sexually dangerous predators may reside, work, volunteer, or loiter; to provide for a definition; to provide for punishment; to provide for exemptions from certain residency and employment restrictions; to provide for civil causes of action; to provide for applicability; to provide for related matters; to repeal conflicting laws; and for other purposes.

3. Sex Offender Registration Requirements

Teenagers who are convicted of sexual assault, child molestation, or statutory rape must register as sex offenders under both state law \(^{126}\) (in states where the offenses were and are still felonies) and federal law. \(^{127}\) The Adam Walsh Act, which became effective on July 27, 2006, requires each jurisdiction to maintain a jurisdiction-wide sex offender registry conforming to the requirements laid out in the Act. \(^{128}\) Although there is a provision for consensual teenage sex, \(^{129}\) the law applies retroactively. \(^{130}\) Therefore, those people who were convicted before 2006 must continue to register according to the requirements. \(^{131}\) Under the Act, a teenager convicted of any sex offense \(^{132}\) will remain on the

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\(^{126}\) Koch, \textit{supra} note 21 (noting that Matthew Shettles, a teenager convicted for having sex with his high school girlfriend when he was 18 and she was weeks away from turning 15, “has had to register in Oregon whenever he moved, got a new job, or made other life changes”); Munoz, \textit{supra} note 29 (noting that in Connecticut, Jeff Davis is forced to provide information on the state’s sex offender registry).

\(^{127}\) Human Rights Watch, \textit{supra} note 121, at 2.

\(^{128}\) 42 U.S.C.A. § 16912 (West 2007). States will probably adhere to the provisions of the Act, because it compels them to “either dramatically increase their registration and community restrictions or lose federal law enforcement grant money.” Human Rights Watch, \textit{supra} note 121, at 12. Another significant fact is that federal law is only a floor, and states may increase their registration and notification requirements if they chose to do so. \textit{Id.}

\(^{129}\) 42 U.S.C.A. § 16911(5)(C) (West 2007) (“An offense involving consensual sexual conduct is not a sex offense for the purposes of this subchapter if the victim was an adult . . . or if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.”).


\(^{131}\) \textit{Id.}

\(^{132}\) “Sex offense” is defined as

(i) a criminal offense that has an element involving a sexual act or sexual contact with another; (ii) a criminal offense that is a specified offense against a minor; (iii) a Federal offense . . . (iv) a military offense . . . ; or (v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

national registry for life, and will have to register with authorities every three months, every six months, or every year, depending on the classification of the crime.\(^{133}\) Jurisdictions are instructed to make all the information readily accessible on the Internet,\(^{134}\) and in order to be in compliance with the law to receive federal funding, they must provide extensive information.\(^{135}\) This Note argues that these requirements are extremely burdensome and constitute an additional, unreasonable punishment for teenagers who engage in consensual sex.

Currently, at least twenty-nine states require individuals to register as sex offenders for engaging in consensual teenage sex.\(^{136}\)

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\(^{133}\) Jones, \textit{supra} note 130, at A1.

Tier III registrants are those who committed a sex crime punishable by more than one year in prison and comparable or more severe than aggravated sexual abuse, abusive sexual contact with a child under 13, kidnapping of a child by someone other than the guardian, any sex crime occurring after the offender was a Tier II offender or an attempt or conspiracy to commit such an offense. Tier II registrants are those who are not a Tier III offender and whose offense is against a minor, is punishable by imprisonment of more than one year, and is comparable to or more severe than sex trafficking, coercion and enticement, transportation with intent to engage in criminal sexual activity, abusive sexual contact, involves the use of a minor in a sexual performance . . . or if the sex offense occurs after the offender becomes a Tier I sex offender. A Tier I sex offender is defined as a sex offender other than a Tier II or Tier III sex offender.

42 U.S.C.A. § 16911(2)-(4) (West 2007)

\(^{134}\) 42 U.S.C.A. § 16918 (West 2007).

\(^{135}\) 42 U.S.C.A. § 16914 (West 2007). This section requires the offender to provide his or her name, social security number, address of each residence at which he or she will reside, the name and address of any place where the offender is or will be an employee, the name and address of any place where the offender is or will be a student, and the license plate number and a description of any vehicle owned or operated. \textit{Id}. The section also requires the jurisdiction to provide a physical description of the offender, the text of the provision of law defining the criminal offense for which the offender is registered, the criminal history of the offender, a current photograph of the offender, a set of fingerprints and palm prints, a DNA sample, and a photocopy of a valid driver’s license or identification card. \textit{Id}.

\(^{136}\) The states are: Alabama, ALA. CODE §§ 13A-6-63, 13A-11-200 (2008); Alaska, ALASKA STAT. §§ 11.41.434, 12.63.010 (2008); Arizona, ARIZ. REV.
Further, in eleven states, there are no “Romeo and Juliet exceptions” for consensual teenage sex. Thus, in those states, any teenager who has sex with a person below the age of consent could be convicted and required to register as a sex offender, regardless of whether it was consensual.

Proponents of community notification argue that sex offender registries make people feel protected by having knowledge which purportedly will equip them to take more safety precautions. In fact, the original policy underlying the need for registries was concern for public safety. In Smith v. Doe, the Supreme Court explained that sex offender registration was not intended as an additional punishment for someone convicted of a sexual offense,


137 Human Rights Watch, supra note 121, at 73.
138 Id.
139 Jones, supra note 130.
but rather as a civil regulation imposed for the narrowly defined interest in protecting the public safety.\textsuperscript{140}

However, “proponents of these laws are not able to point to convincing evidence of public safety gains from them.”\textsuperscript{141} In a recent report on sex offender laws in the United States, Human Rights Watch has reported that there “is little public safety purpose served by imposing registration requirements on those who pose a minimal risk to the community.”\textsuperscript{142} There are no persuasive arguments for why these teenagers should be forced to register because there are no public safety gains, yet there are harsh consequences for those teenagers who are placed on the registries for engaging in acts of consensual sex.

For individuals convicted of a sex offense for engaging in consensual teenage sexual acts, the registration requirements are another form of punishment with grave repercussions.\textsuperscript{143} One consequence of community notification is that as these teenagers become adults, “they may struggle to stay in the mainstream because they have a hard time finding and holding jobs.”\textsuperscript{144} Not only do they have difficulty finding jobs in the professional arena, but the prospect of securing a job at any business that performs background checks is bleak.\textsuperscript{145} Thus, convictions for sexual offenses “equate directly with job loss and [loss of] employment opportunities, . . . and a general inability to provide for a future family through gainful employment and parental involvement (volunteering, coaching, and chaperoning) in the lives of future

\begin{footnotesize}
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\item[\textsuperscript{140}] 538 U.S. 84 (2003).
\item[\textsuperscript{141}] HUMAN RIGHTS WATCH, \textit{supra} note 121, at 3.
\item[\textsuperscript{142}] \textit{Id.} at 46.
\item[\textsuperscript{143}] See Catherine L. Carpenter, \textit{The Constitutionality of Strict Liability in Sex Offender Registration Laws}, 86 B.U. L. REV. 295, 369–70 (2006) (“In the case of the strict liability offender, who has never been judged dangerous to the community and who has never had the opportunity to meaningfully contest inclusion in the registry, the punitive impact outweighs the civil nonpunitive purpose of the registration statute.”).
\item[\textsuperscript{144}] Jones, \textit{supra} note 130; see also Munoz, \textit{supra} note 29 (Defense attorney Fanol Bojka said “I’ve seen one too many kids lose their futures because of these [probation and registration] conditions. You label a kid a sex offender at 18 and you’ve limited what the kid can do with his life.”).
\item[\textsuperscript{145}] Jones, \textit{supra} note 130.
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children.\footnote{146} In addition to these difficulties that registered sex offenders might experience, they might also be subject to legal residency restrictions.\footnote{147} States and municipalities have increasingly been passing laws “that expressly forbid [registered sex offenders] from living near places where children gather.”\footnote{148} Approximately 400 municipalities across the country have enacted local zoning ordinances restricting where sex offenders can live.\footnote{149} Georgia is one state that has applied residency restrictions. Ironically, the Attorney General who argued that the state’s “Romeo and Juliet” provision should not be applied retroactively simultaneously argued that the Legislature should retroactively bar “anyone on the state’s sex offender registry from living, working or loitering within 1,000 feet of a school bus stop or church.”\footnote{150}

Representatives in Georgia have not been shy about the reasons behind these laws. Georgia State House Majority Leader Jerry Keen, co-sponsor of the bill providing for residency restrictions, stated, “[m]y intent personally is to make it so onerous on those that are convicted of these offenses . . . they will want to move to another state.”\footnote{151} Although part of the law has been struck down by the Georgia Supreme Court, legislators intend to redraft the law and continue implementing residency restrictions.\footnote{152}

\footnote{146} Peterson, supra note 117. In a recent report on sex offender registration, Human Rights Watch found that “private employers are reluctant to hire sex offenders even if their offense has no bearing on the nature of the job.” HUMAN RIGHTS WATCH, supra note 121, at 81. “Those who tell prospective employers that they are registered sex offenders cannot get hired, and those who do not tell their employers are eventually fired if and when employers find out.” Id.

\footnote{147} HUMAN RIGHTS WATCH, supra note 121, at 100. (“At least 20 states have enacted laws that prohibit certain sex offenders from living within specified distances of places where children congregate.”).

\footnote{148} Id.

\footnote{149} Id. at 114. As of September 2007, at least twenty states had enacted laws that restrict where registered sex offenders may live. See id. at 100.

\footnote{150} McDonald, supra note 57.

\footnote{151} HUMAN RIGHTS WATCH, supra note 121, at 100 (citing Dick Pettys, Republicans Unveil First Draft of Proposed Sex Offender Law, ASSOCIATED PRESS, Sept. 28, 2005).

\footnote{152} Goodman, supra note 16.
residency restriction laws, individuals listed on state registries for engaging in consensual teenage sex will be forced to move to another area of the state or out of the state in which they reside.\textsuperscript{153} If they do not relocate, they may face arrest or prosecution.\textsuperscript{154} For those individuals who are convicted for acts of consensual teenage sex and serve what is already a harsh sentence for their conviction, such additional punishment seems extremely harsh and disproportionate to the crime.\textsuperscript{155}

Another consequence of registration for these individuals is that they “find themselves subject to the shame and stigma of being identified as sex offenders on online registries, in some cases for the rest of their lives.”\textsuperscript{156} As a result of the label and the requirement to register as a sex offender, many of these individuals experience “despair and hopelessness”\textsuperscript{157} and some have even committed suicide.\textsuperscript{158} They are often ostracized from their communities.\textsuperscript{159}

Sometimes, individuals or communities resort to vigilante violence against those who are registered sex offenders, even if they are on the registries for acts of consensual teenage sex.\textsuperscript{160} Registrants reported a range of vigilantism to authorities, including “having glass bottles thrown through their windows, being... physically assaulted while the assailants yelled ‘You like little children, right?’,... people repeatedly ringing the doorbell and pounding on the sides of the house late at night,” and threats of

\textsuperscript{153} McDonald, \textit{supra} note 57.
\textsuperscript{154} Id.
\textsuperscript{155} See Downey, \textit{supra} note 52 (“The registry is a prison sentence in its own right.”); see also Alex B. Eyssen, \textit{Does Community Notification for Sex Offenders Violate the Eighth Amendment’s Prohibition Against Cruel and Unusual Punishment? A Focus on Vigilantism Resulting from “Megan’s Law,”} 33 \textit{St. Mary’s L.J.} 101, 135 (2001) (“Thorough analysis of community notification laws... demonstrate that such programs are indeed punishment, regardless of any supposed regulatory intent.”).
\textsuperscript{156} HUMAN RIGHTS WATCH, \textit{supra} note 121, at 66.
\textsuperscript{157} Id. at 78 (citing Jill Levenson & Leo Cotter, \textit{The Effects of Megan’s Law on Sex Offender Reintegration}, 21 \textit{J. Contemp. Crim. Just.} 298–300 (2005)).
\textsuperscript{158} HUMAN RIGHTS WATCH, \textit{supra} note 121, at 78–79.
\textsuperscript{159} Id.
\textsuperscript{160} Id. at 87–88.
imminent death. Some vigilantism has been extreme. For example, individuals listed on sex offender registries have been killed because their information was accessed on the Internet.

Many registered sex offenders “have been targets of violence from strangers who take it upon themselves to ‘eliminate’ sex offenders from communities.” In New Hampshire, Lawrence Trant set fire to the homes of several registered sex offenders and stabbed another registrant outside of his home. Donald Keegan was arrested in New York for plotting to blow up a home where four convicted sex offenders were living. In Bellingham, Washington, Anthony Mullen killed two convicted sex offenders he found on the state’s online registry. Mullen posed as an FBI agent to enter the victims’ homes, “under the guise of warning them that they were on a ‘hit list’ on the internet.” Once inside, he then shot both of them in the head.

Only fourteen states and the District of Columbia have statutes that “specifically prohibit the misuse of registry information for purposes of harassment, discrimination, or acts of vigilantism.”

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161 Id.
162 Jeff Tuttle, *Vigilante Understands Marshall*, BANGOR DAILY NEWS, May 20, 2006, at 1. For example, in 2006, a 20-year-old Canadian man with a list of 29 names and addresses from the Maine Sex Offender Registry went to the homes of two convicted sex offenders, shooting and killing both of them. Id. Both of the men were strangers to the killer, Stephen Marshall. He found their names on the state’s website. One of the men was on the website because he was convicted for statutory rape for having sex with his girlfriend two weeks before her sixteenth birthday when he was nineteen. Jones, supra note 130.

163 HUMAN RIGHTS WATCH, supra note 121, at 89.
164 Tuttle, supra note 162.
165 HUMAN RIGHTS WATCH, supra note 121, at 89.
166 Tuttle, supra note 162.
167 HUMAN RIGHTS WATCH, supra note 121, at 89.
168 Tuttle, supra note 162.
169 HUMAN RIGHTS WATCH, supra note 121, at 90. States with prohibitions include: California, CAL. PENAL CODE §290.4(c) (2008); Connecticut, CONN. GEN. STAT. §54-258a (2008); Idaho, IDAHO CODE §18-8326 (2008); Hawaii, HAW. REV. STAT. §846E-3(g) (2007); Kentucky, KY. REV. STAT. §17.580(3) (2007); Massachusetts, MASS. GEN. LAWS. ch.6, §178N (2008); Mississippi, MISS. CODE ANN. §45-33-51 (2007); New Jersey, N.J. STAT. §2C:7-16(b) (2007); New York, NY CORRECT. LAW §168-q(2)
The Adam Walsh Act has a provision that requires states to include a “warning that information should not be used to unlawfully injure, harass, or commit a crime against any individual named in the registry or residing or working at any reported address.” However, it does not require that states specifically prohibit the misuse of the information and make it illegal. Since there is nothing that specifically prohibits people from harassing and attacking individuals on the sex offender registries, individuals whose names appear on the registries for engaging in consensual teenage sex may easily become targets.

III. STATUTORY RAPE LAWS AND THE EIGHTH AMENDMENT

The Eighth Amendment to the United States Constitution provides, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The amendment is applicable to the states through the Fourteenth Amendment, and it affirms the rights of individuals not to be subject to excessive punishments. This right derives from the idea that punishment for a crime should be proportional to the offense. Punishment is considered cruel and unusual if it “subjects the individual to a fate of ever-increasing fear and [death].”


171 Id. ("The warning shall note that any such action could result in civil or criminal penalties.") (emphasis added).
172 HUMAN RIGHTS WATCH, supra note 121, at 93 (noting that community members have used notification information to keep registered sex offenders from moving into their neighborhoods and pushing them to leave if they already live there).
173 U.S. CONST. amend. VIII.
However, the Supreme Court has recognized that the words of the amendment “are not precise, and that their scope is not static. Thus, the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”

In Thompson v. Oklahoma, a plurality of the Court held that execution of any offender under the age of sixteen at the time of the crime is unconstitutional. Significantly, the Court stressed that “[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.”

Throughout all of the cases regarding cruel and unusual punishment, the Supreme Court has looked to the number of states that reject certain punishments to determine whether there is a national consensus. “Objective indicia” of society’s standards may be found in legislative enactments and state practice. With respect to finding a national consensus, “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.” A majority of states have either decriminalized consensual teenage sex or reduced the crime to a

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177 Trop v. Dulles, 356 U.S. 86, 102 (1958) (“He knows not what discriminations may be established against him, what proscriptions may be directed against him.”).
178 Id. (internal citations omitted).
180 Id. at 835.
181 See, e.g., Stanford v. Kentucky, 492 U.S. 361 (1989) (concluding that the Eighth and Fourteenth Amendments did not proscribe the execution of juvenile offenders over fifteen but under eighteen when 22 of the 37 death penalty states permitted the death penalty for sixteen-year-old offenders and 25 of the 37 states permitted the death penalty for seventeen-year-old offenders); Penry v. Lynaugh, 492 U.S. 302 (1989) (holding that the Eighth Amendment did not mandate a categorical exemption from the death penalty for the mentally retarded because only two states had enacted laws on the subject); Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the execution of the mentally retarded is cruel and unusual punishment after finding that only a minority of states permitted the practice).
183 Id. at 565 (citing Penry, 492 U.S. at 315).
Thus, the states are moving toward reducing the punishment for such acts. As noted in Roper v. Simmons, there is “sufficient evidence that today our society views juveniles, . . . as ‘categorically less culpable than the average criminal.’” Therefore, the punishment meted out to juveniles should not be as harsh as those given to adults who are more culpable, especially to adults who prey on children.

The Supreme Court maintains that deference should be paid to state legislatures in determining punishments. States may impose sentences with a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. However, punishments imposed by certain states for acts of consensual teenage sex are too harsh to serve any of those justifications. “[W]hile torture, drawing and quartering, public dissecting, burning alive and disemboweling have since been ruled by courts to be prohibited, in the area of sexual conduct, punishments that most would consider cruel and unusual continue to be supported by state legislators.”

The current statutory rape laws in Kansas, "Aggravated indecent liberties with a child is: (1) sexual intercourse with who is more than 14 years of age but less than 16 years of age . . . Aggravated indecent liberties with a child . . . is a severity level 3, person felony." KAN. STAT. ANN. § 21-3504 (2007).

Unlawful voluntary sexual relations is engaging in voluntary: (1) Sexual intercourse; (2) sodomy; or (3) lewd fondling or touching with a
Massachusetts,\(^{192}\) Michigan,\(^{193}\) South Carolina,\(^{194}\) and Wisconsin\(^{195}\)

child who is 14 years of age but less than 16 years of age and the offender is less than 19 years of age and less than four years of age older than the child and the child and the offender are the only parties involved and are members of the opposite sex.

\(^{192}\) KAN. STAT. ANN. § 21-3522 (2007). Unlawful voluntary sexual relations is a felony. § 21-3522; see also 2007 KANSAS LAWS CH. 183 (amending the 2006 laws providing requirements for sex offender registration).

\(^{193}\) MASS. GEN. LAWS. ch. 265, § 23 (2007) ("Whoever unlawfully has sexual intercourse or unnatural sexual intercourse, and abuses a child under sixteen years of age shall, for the first offense, be punished by imprisonment in the state prison for life or for any term of years, or, except as otherwise provided, for any term in a jail or house of correction, and for the second or subsequent offense by imprisonment in the state prison for life or for any term of years, but not less than five years; provided, however, that a prosecution commenced under the provisions of this section shall not be placed on file or continued without a finding."); see also MASS. GEN. LAWS ch. 272, § 4 (2007) ("Whoever induces any person under 18 years of age of chaste life to have unlawful sexual intercourse shall be punished by imprisonment in the state prison for not more than three years or in a jail or house of correction for not more than two and one-half years or by a fine of not more than $1,000 or by both such fine and imprisonment."); see also MASS. GEN. LAWS ch. 6 §§ 178C-Q (2007) (providing requirements for sex offender registration).

\(^{194}\) "A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist: (a) That other person is at least 13 years of age and under 16 years of age." MICH. COMP. LAWS ANN. § 750.520d (West 2007). Criminal Sexual conduct in the third degree is a felony punishable by imprisonment for not more than 15 years. Id. In addition, “Any man who shall seduce and debauch any unmarried woman shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years.” MICH. COMP. LAWS ANN. § 750.532 (West 2007); see also MICH. COMP. LAWS. ANN. 28.722 (West 2007) (providing requirements for sex offender registration).

\(^{195}\) S.C. CODE ANN. § 16-15-140 (2007) ("It is unlawful for a person over the age of fourteen years to willfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child. A person violating the provisions of this section is guilty of a felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than fifteen years, or both."). "A person is guilty of criminal sexual conduct in the second degree if the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and . . . is older than the victim."
violate the Eighth Amendment prohibition on cruel and unusual punishment because the statutes punish consensual teenage sex as felonies, impose lengthy prison sentences, and require convicted individuals to register as sex offenders. The large number of states that have revised their laws to include age-gap provisions and to decriminalize consensual teenage sexual acts shows a national consensus that punishing these acts as a felony with required sex offender registration is cruel and unusual punishment. In addition, the international community has recognized that many laws created cruel and unusual punishments for engaging in consensual teenage sex. Not only is the original punishment of jail time or probation disproportionate to the crime of consensual teenage sex, but these states also have laws that require these individuals to register as sex offenders upon release.


“Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years is guilty of a Class C felony.” WIS. STAT. ANN. §948.02 (West 2007). See also WIS. STAT. ANN. § 301.45 (West 2007) (providing requirements for sex offender registration).

Currently, 47 states include age-gap provisions, but amongst those states with such provisions, some states still make consensual teenage sex a crime, albeit less of a crime. See Age of Consent Chart for the US—2008, supra note 54.

In June of 2007, the Congress of Peru reformed the statutory rape laws to declare that having consensual sexual relations with a person fourteen years old or older is legal. Statutory Rape Law Reformed in Peru, LIVINGINPERU.COM, http://www.livinginperu.com/news-4116-politics-statutory-rape-law-reformed-peru (last visited Jan. 24, 2008). Before this reform, a person could be charged with statutory rape and be sentenced to up to thirty years in prison for having sexual relations with a person under the age of sixteen. Id. In Canada, “the Criminal Code provides that any person who, for sexual purposes, touches any part of the body of a person under the age of 14 is guilty of the offense of sexual interference . . . . However, if the accused person is between the ages of 12 and 16 and the victim is less than two years younger than the accused and consented to the activity, it is not considered a crime.” Susan A. Herman, Rape Law, Microsoft Encarta Online Encyclopedia 2007, http://encarta.msn.com/text_ 761564013__2/Rape_(law).html (last visited Mar. 12, 2008).

See 2007 Kan. Sess. Laws Ch. 183 (amending the 2006 laws providing requirements for sex offender registration); MASS. GEN. LAWS ch. 6 §§ 178C-Q (2007) (providing requirements for sex offender registration); MICH. COMP.
The registration laws “subject[] the individual to a fate of ever-increasing fear and distress.” As discussed earlier, registration laws not only subject individuals to ostracism and depression, but also to vigilante violence—all are additional forms of punishment. In addition, states that refuse to apply their new laws retroactively also violate the Eighth Amendment since individuals convicted before the laws are amended will have to serve their sentences and then suffer an additional punishment by being forced to register upon release. However, if states consider necessary reforms, the laws can conform to the requirements of the Eighth Amendment.

IV. NECESSARY REFORMS

A. Apply New Laws Retroactively

Some states modified their laws to reflect the view that adolescent consensual sex is not a serious crime and should not be punished as a felony with extensive sentences and forced registration requirements. However, the new laws leave many

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LAW. ANN. §28.722 (West 2007) (providing requirements for sex offender registration); S.C. CODE ANN. § 23-3-430 (2007) (providing requirements for sex offender registration); Wis. STAT. ANN. § 301.45 (West 2007) (providing requirements for sex offender registration).


200 HUMAN RIGHTS WATCH, supra note 121, at 79, 87–88. See also Carpenter, supra note 143, at 369–70.

201 See Downey, supra note 52 (writing that in Georgia, the Legislature changed the statutory rape law so that consensual teenage sex is only a misdemeanor, but “the Legislature did nothing to help the teenagers tripped up by the old law.”).

202 See Gramlich, supra note 185. A new law in Florida allows teenagers involved in consensual sexual activity with no more than four years between them to petition to have their names removed from both state and national sex offender registries. Id. In Indiana, lawmakers changed the law to decriminalize consensual sex between adolescents if a court determines they are in a “dating relationship” and are within four years of age. Id. In Georgia, H.B. 1059, enacted in 2006, reduces the classification of statutory rape from a felony to a misdemeanor by including an age-gap provision. 2006 Ga. Laws 571.
individuals who were previously convicted without any remedy.\textsuperscript{203} Therefore, it is important to apply the new laws retroactively. If the laws are not applied retroactively, many individuals who were convicted for engaging in consensual teenage sex will still be subject to punishment that is disproportionate to the crime.

In its report on sex offender registration, Human Rights Watch makes some appropriate suggestions.\textsuperscript{204} The report recommends that “[s]tates should institute mechanisms by which offenders are removed from registries if they are exonerated; their convictions have been overturned, set aside, or otherwise vitiated; or if their conduct is no longer considered criminal.”\textsuperscript{205} As for residency restrictions, the report proposes that the laws should not apply to entire classes of former offenders.\textsuperscript{206} In Georgia, the Attorney General has argued that the law changing consensual teenage sex to a misdemeanor with no registration requirement cannot be applied retroactively, but that the retroactive residency restrictions are legal.\textsuperscript{207} If laws regarding residency restrictions for sex offenders may be applied retroactively, it is only fair that the laws concerning their convictions and sentences should also have retroactive application.

B. Change the Laws to Make Explicit Distinctions Between Sexual Predators and Adolescents Engaging in Consensual Sex

One of the most feasible and appropriate potential reforms of statutory rape laws is for states to differentiate between dangerous offenders and adolescents engaging in consensual acts. Such distinctions are important because “[a] teenager could have a

\textsuperscript{203} See, e.g., Goodman, supra note 5. Since the Georgia legislature refused to apply its new statutory rape laws retroactively, Genarlow Wilson spent over two years in prison until the Georgia Supreme Court ruled that his sentence constituted cruel and unusual punishment and released him on October 26, 2007. \textit{Id.}

\textsuperscript{204} \textsc{Human Rights Watch}, supra note 121.

\textsuperscript{205} \textit{Id.} at 15–16.

\textsuperscript{206} \textit{Id.} at 19.

\textsuperscript{207} McDonald, supra note 57.
lifetime of hell because of a misplaced tag [as a sex offender]. On the other hand, society could have a hellish situation if we don’t identify the right people.” 208 The right people to be identified are sexual predators who prey on young children instead of teenagers engaging in consensual sex with their classmates. 209

This year, laws enacted “in Connecticut, Florida, Indiana and Texas, along with a bill waiting for the governor’s approval in Illinois, try to draw clearer distinctions between sexual predators and adolescents who pose less of a risk, such as those caught in so-called ‘Romeo and Juliet’ relationships.” 210 These state policies “take different approaches but share a goal of preventing low-risk adolescents from facing the same penalties as serious predators.” 211

Florida’s new policy permits individuals to petition to have their names removed from state and national sex offender registries if they engaged in consensual sexual acts with a person no more than four years younger than them. 212 This law is similar to the law proposed by Laurie Peterson in New Hampshire and defeated by legislators in the Senate. The Illinois bill would ensure that juvenile sex offenders are not added to the state’s adult registry.” 213 In Indiana, the law calls for the courts to take a more involved and detailed approach in each case because the law “decriminalizes consensual sex between adolescents if they are found by a court to be in a ‘dating relationship’ with an age difference of four years or less.” 214 Under that law, “[c]ourts will also have discretion to determine whether violators should be included in the state’s sex

208 Gramlich, supra note 185 (internal citation omitted).
209 Koch, supra note 21 (quoting Oklahoma state Rep. Gus Blackwell as saying, “[w]e’re trying to get pedophiles, not teenagers in a consensual relationship.”).
210 Gramlich, supra note 185 (in Connecticut, lawmakers widened the age gap from two years to three, and Texas revamped its risk-assessment system that previously allowed some teenagers who had consensual sex with a younger person to receive a higher risk rating than serious sexual predators).
211 Id.
212 Id.
213 Id.
214 Id.
offender registry.” These reforms allow states to use their statutory rape laws to catch sexual predators without leaving a permanent taint on the lives of adolescents who engage in consensual teenage sex, and therefore, all states should revise their laws similarly.

In reforming the laws to create clear distinctions between sexual predators and teenagers, states should look to a new program that was adopted in Dane County, Wisconsin. The program considered the opinions of the community and the goals that are served by punishment. The Dane County State’s Attorney office began by looking into the community’s values and opinions on statutory rape cases. Members of an advisory group told prosecutors that first-time young offenders should be educated and efforts should be made to focus on prevention rather than mere punishment. The members of the community were worried that prosecutors were not distinguishing young statutory rape offenders from predatory rapists and child molesters.

As a result of their meetings and discussions with the community members, the prosecutors developed an “alternative disposition program for younger offenders.” An integral aspect of the program is that individuals convicted of statutory rape offenses may choose to attend a nine-week class in sex education in lieu of a prison sentence or probation. Significantly, if they successfully complete the course, their conviction will not become part of their criminal record. The program “reflects a balance between the law’s capacity to set an exceedingly harsh punishment for this crime, and the law’s obligation to take seriously the harm that it is designed to remedy.”

215 Id.
216 Oberman, supra note 45, at 773.
217 Id. at 774.
218 Id.
219 Id.
220 Id.
221 Id.
222 Id.
223 Id.
224 Oberman, supra note 45, at 774.
C. Change the Laws on Sex Offender Registration

In addition to changing the penalties for consensual teenage sex, states should also amend their sex offender registration laws so that the lists only include sexual predators. Currently, teenagers in many states are subjected to sex offender laws “for conduct that, while frowned upon, does not suggest a danger to the community, including consensual sex.” Teresa Younger, executive director of the Connecticut Civil Liberties Union, argues that the public should only receive information that they need to know, and that a list of names and addresses and pictures does not necessarily provide such information. The state should screen the information that goes on to the website because individuals listed are not just the dangerous scary rapists. This is a situation potentially of a 19-year-old who has consensual sex with a 15-year-old, then is prosecuted for statutory rape, serves nine months in jail, and is now a registered sex offender. That doesn’t help the citizens of Connecticut know if he is violent or not violent.

States should model sex offender registration laws after the laws enacted in Minnesota, which provide for community notification only on a need-to-know basis. The law states that “[t]he extent of the information disclosed and the community to whom disclosure is made must be related to the level of danger posed by the offender . . . and to the need of community members for information to enhance their individual and collective safety.” Public safety will still be protected if states utilize community notification on a need-to-know basis.

Sex offender registries are intended to make the public aware of

224 Human Rights Watch, supra note 121, at 8.
226 Id. Ms. Younger’s group advocated for hearings for convicted sex offenders so they could be assessed for levels of “dangerousness.” Id.
227 Human Rights Watch, supra note 121, at 11.
228 Id.
229 Id. at 12.
sexual predators, not teenagers who engage in adolescent sex.\textsuperscript{230} Unfortunately, as many child safety and rape prevention advocates believe, states are pouring money into “registration and community notification programs that do not deal with the real causes of sexual abuse and violence.”\textsuperscript{231} Unlimited online access to registry information encourages people to ostracize former offenders, making it less likely that they will be able to reintegrate into communities.\textsuperscript{232} This community response “subjects the individual to a fate of ever-increasing fear and distress,” and is therefore cruel and unusual punishment.\textsuperscript{233}

In order to address some of these problems, states should reform their laws regarding sex offender registries. Offenders who have committed minor, non-violent offenses, such as consensual teenage sexual activity, should not be required to register.\textsuperscript{234} If individuals have previously been required to register, states should remove them from the registry if they are exonerated, if their convictions are overturned or set aside, or if their conduct is no longer considered criminal.\textsuperscript{235} If individuals convicted of a crime for engaging in consensual teenage sex are not required to register, they will not be subject to additionally harsh punishment.

\begin{footnotes}
\footnotetext{230}{See Koch, \textit{supra} note 21.}
\footnotetext{231}{\textsc{HUMAN RIGHTS WATCH}, \textit{supra} note 121, at 10.}
\footnotetext{232}{\textsc{Id.} at 9.}
\footnotetext{233}{\textsc{Trop v. Dulles}, 356 U.S. 86, 102 (1958).}
\footnotetext{234}{\textsc{HUMAN RIGHTS WATCH}, \textit{supra} note 121, at 15; \textit{see also} Downey, \textit{supra} note 52 (“Lawmakers must amend the sex offender registry law so that it distinguishes between two immature high school kids hooking up at a party to a pedophile molesting the toddler next door.”).}
\footnotetext{235}{\textsc{HUMAN RIGHTS WATCH}, \textit{supra} note 121, at 15; \textit{see also} Goodman, \textit{supra} note 5 (The Georgia Supreme Court noted that “[t]he severe felony punishment and sex offender registration imposed on Wilson make no measurable contribution to acceptable goals of punishment.”).}
\end{footnotes}
CONCLUSION

Consensual teenage sex should not be criminalized because, in contrast to what many proponents of statutory rape laws argue, adolescent sexual activity may be beneficial to teenagers. However, if states insist on regulating such acts, they must craft the laws so that they do not subject teenagers to cruel and unusual punishment for their actions. Currently, the laws of at least five states appear to subject teenagers to cruel and unusual punishment because the statutes carry a felony conviction with a prison sentence. While it might be argued that a prison sentence alone cannot constitute cruel and unusual punishment, a conviction for statutory rape, child molestation, or sexual assault carries an additional component. The convictions often require these teenagers to register as sex offenders for a period of years or for the rest of their lives, thus subjecting them to further punishment. States must change their laws in order to protect teenagers from receiving harsh punishments such as jail sentences for engaging in consensual sex.

These states should follow suit with other states that have revised the laws in order to completely decriminalize such acts or to classify consensual teenage sex as a misdemeanor with less severe punishment. Subjecting teenagers to such punishment simply because legislators believe that teenage sex is immoral is not justified by any theory of punishment. “Although juvenile sexual conduct is not to be encouraged, the current prohibitions and punishments are unnecessarily harsh and overreaching and fail to take into account contemporary reality.”

Revising the laws does not necessarily mean that the states will be condoning sex between teenagers. Instead, the states will be using the laws to prosecute the true targets of the laws—sexual predators. States that have revised their laws to provide for lesser penalties should apply the new laws retroactively so individuals who were convicted under old laws are not subject to registration.

236 See Kitrosser, supra note 81, at 322.
237 Olszewski, supra note 59, at 710.
requirements and residency restrictions. Those states that have not yet revised their laws should change the laws to make explicit distinctions between sexual predators who pose a threat to children and adolescents engaging in consensual sex. In addition, states should change their laws on sex offender registration to guarantee that adolescents who engaged in consensual teenage sex are not included and therefore not subject to lifelong stigma and vigilante violence. It is imperative that states employ these reforms so they can eliminate injustice and ensure that their laws do not violate the Eighth Amendment ban on cruel and unusual punishment.

238 See supra notes 202–07 and accompanying text.
239 See supra notes 208–23 and accompanying text.
240 See supra notes 224–35 and accompanying text.
TEACHING AN OLD POLICY NEW TRICKS: 
THE 421-A TAX PROGRAM AND THE FLAWS OF TRICKLE-DOWN HOUSING

Seth B. Cohen*

INTRODUCTION

In his 1890 tenement housing exposé How The Other Half Lives, journalist and photographer Jacob Riis remarked:

There are three effective ways of dealing with the tenements: By law. By remodeling and making the most out of the old houses. By building new, model tenements. Private enterprise . . . just do the lion’s share under these last two heads . . . but the State may have to bring down the rents . . . by assuming the right to regulate them . . . .

Despite decades of legislation, the challenge of affordable housing remains a hallmark of living for New York City (“City”) residents who earn low-income wages. Riis’ concerns over housing

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2 Various state and federal programs have different definitions of “low-income.” The federal government generally defines “low-income” as 80% or less of the Area Median Income (“AMI”). Public Health and Welfare Act § 10, 42 U.S.C. § 12704 (1994). The AMI for the New York City area is currently
were mainly those of overcrowding and substandard conditions.\(^3\) Today, though, unaffordability is the chief concern for housing advocates.\(^4\) Statistics demonstrate the sobering fact of the City’s high cost of living: At the most general level, New York City (“City”) is ranked 9th highest in a nationwide survey of monthly rental costs ($909 per month), but a substantial portion of the population has difficulty paying their rental bill because the City’s median household income is only $43,434.\(^5\) Additionally, more than half of City households spend over 30% of their income on housing,\(^6\) but for renters, the situation is even more serious; almost one-third of all City families that rent their homes spend over 50% of their income solely on housing.\(^7\) For those earning low-income wages, the problem is only intensified: among this group of renters, $70,900 for a four-person family; low-income for a four-person family is approximately $56,700. See DEP’T OF HOUS. & URBAN DEV., FY2006 NEW YORK INCOME LIMITS 1, http://www.huduser.org/Datasets/IL/IL06/ny_fy2006.pdf [hereinafter HUD, NEW YORK].

\(^3\) See RIIS, supra note 1, at 1.


the majority of their income is devoted to paying rent.\footnote{AMY \textsc{Armstrong et al.}, \textsc{Furman Ctr. for Real Estate \& Urban Pol’y}, \textsc{State of New York City’s Housing and Neighborhoods} 2006, at 36 (2006), \textit{available at} http://furmancenter.nyu.edu/SOC2006.htm [hereinafter \textsc{Furman, Housing}] (noting that the median rent burden for unsubsidized low-income renters was 50.4\% in 2005).}

Population projections predict an additional 1.2 million New Yorkers by 2025.\footnote{\textsc{Comptroller, Overview}, \textit{supra} note 4, at 1. The predicted growth is largely attributable to continued immigration to the City as well as increased rates of reproduction. Sam Roberts, \textit{Coming Soon, 9 Million Stories in the Crowded City}, \textsc{N.Y. Times}, Feb. 19, 2006, \textsection 1, at 33.} The City has estimated that an additional 172,000 units of housing, “above the 210,000 already in development, planned, or being preserved[,]” will be needed just to meet the demand.\footnote{Ken Fisher, \textit{Complex Policy Choices In Managing Growth}, \textsc{N.Y. L.J.}, Jan. 16, 2007, \textsection 8, col. 1.} However, given the current robust housing market in the City\footnote{\textsc{Comptroller, Overview}, \textit{supra} note 4, at 1 (“The number of new housing permits . . . has grown steadily and dramatically [and a] Citywide surge in market rate housing construction has been accompanied by large increases in residential . . . property values.”). No doubt, the City is unique in this regard, as much of the rest of the country is experiencing a housing market slump and the market in the City has reached a plateau as of late. Diana Cardwell \& Ray Rivera, \textit{Long Robust, Gains in New York City Property Values Start to Flatten Out}, \textsc{N.Y. Times}, Jan. 16, 2008, at B1. These predictions are based on an assumption that the demand for housing in the City will continue to rise.} and a rapidly shrinking number of available affordable apartments,\footnote{\textsc{Planyc}, \textit{supra} note 6 (“According to the Furman Center, the number of apartments affordable to low- and moderate-income New Yorkers shrank by 205,000 units between 2002 and 2005.”). This decline in affordable rentals was attributed to several factors, including a construction industry lagging behind a growing population, immigration, and the fact that “much of the new housing has been for people with higher incomes, and most of it has been for sale, not for rent.” Janny Scott, \textit{Housing Tighter for New Yorkers of Moderate Pay}, \textsc{N.Y. Times}, June 16, 2006, at A1.} the affordable housing crisis will only continue to get worse without government intervention.

Scholars have identified four basic reasons for national or local governments to support subsidization of housing rather than relying on a deregulated housing market:\footnote{J. Peter Byrne \& Michael Diamond, \textit{Affordable Housing, Land Tenure}} First, housing is a “basic...
human need” that society is morally obliged to help provide; second, subsidizing decent affordable housing is a better option than simply providing public money to eligible recipients; third, the negative externalities on society that come with inadequate housing are mitigated by subsidization; and fourth, the market alone will not provide adequate affordable housing.

The City is no stranger to these rationales for providing public housing, having long leveraged the law to provide better housing opportunities for the poor. In fact, the City championed the “nation’s first tenement laws, [its] first comprehensive zoning ordinance, and [created] its first public housing project.” Congress eventually followed the City’s initiative when it enacted the Public Housing Act of 1937 and the Housing Act of 1949, which declared “a national policy of ‘a decent home and a suitable living environment for every American family.’” In the face of federal budget reductions for housing programs, however, the heavy lifting of “housing assistance now is accomplished primarily through a variety of indirect subsidies moving through state and

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14 Id. at 530. The authors note the essential nature of housing as a shelter against the elements and as a social “center of . . . family life.”

15 Id. Byrne and Diamond note a variety of paternalistic reasons for their claim, including: mistrust in simply giving recipients public money to use; creation of a durable community asset; benefits to the dependents of the recipients; indirect positive affects to the recipient, and the ability for beneficiaries to put money toward other needs such as education and health.

16 Id. at 530–31. Echoing Jacob Riis, the authors point to such negative externalities as crime and disease. Id. at 530. Given ever-rising costs in producing and preserving housing, the market will naturally tend to favor wealthier individuals in order to offset the production cost and profit from housing development.


18 Id.

19 Byrne & Diamond, supra note 13, at 543.

20 Id.

21 Id.
local governments and private developers.”

By harnessing federal, state, and local resources, the City has demonstrated its commitment to ensure affordable housing development and preservation. As part of an ambitious 10-year plan, the City aims to “[p]reserve 73,000 units of affordable housing for 220,000 New Yorkers, [including those] where subsidies are set to expire in the near future[,] and [c]reate 92,000 units of affordable housing for 280,000 New Yorkers.” Over the next ten years, it has been estimated that the City will use $3.2 billion of its own funds to renovate distressed buildings, provide $500 million in tax-exempt bonds to create and maintain low- and moderate-income housing, and administer over $1 billion in federal funds to provide funds for housing cost vouchers, low-income housing tax credits, and other programs. The high levels of affordable housing the City is pledging to create or preserve, coupled with significant amounts of money being directed toward the problem, demonstrate that the City is serious about affordable housing.

Another non-traditional (and little-analyzed) method that New York State has used to try to foster affordable housing production in the City is to entice private developers with tax incentives for building such units, thus integrating Riis’ propositions. These tax incentives, named for the Section 421-a of the New York Real Property Tax Law provision that establishes them, have come to be known as the 421-a program.

22 Id.
24 Id. at 3.
26 See Riis, supra note 1, at 223–24. Generally speaking, the 421-a program was started in 1971 and now grants real-estate developers tax exemptions on their property in exchange for creating certain levels of affordable-housing. See infra Parts I and II.
27 N.Y. REAL PROP. TAX LAW § 421-a (McKinney 2007).
In August 2007, the 421-a program was reauthorized with several new amendments.\(^2^8\) The revised program took effect on December 28, 2007, and will be reexamined in 2010.\(^2^9\) On his approval, former Governor Eliot Spitzer announced that the new legislation “[w]ill . . . [m]ore effectively promote the construction of affordable housing in the neighborhoods that need it most . . . [and] will build on our efforts to solve the housing crisis that has pushed too many working New Yorkers out of the middle class and prevented those struggling . . . from economic security.”\(^3^0\)

As evidenced by the former Governor’s remarks, three objectives drive the 421-a program.\(^3^1\) Two objectives, “decent shelter” and “wealth creation” for recipients in the form of lower rent and retained earnings, remain explicit programmatic objectives; implicit in the program, though, is a third objective: the “efficient use of public funds” in terms of balancing the costs, financial and otherwise, to the public with the benefits.\(^3^2\) Supporters laud the new measures as providing vital and innovative tools to increase the availability of affordable units and meet the increasing demand.\(^3^3\) Critics, however, question the efficacy of the tax abatement program altogether and cast the new law as nothing but a giveaway to developers at the public’s expense.\(^3^4\)


\(^3^0\) Spitzer, supra note 28.

\(^3^1\) Byrne & Diamond, supra note 13, at 531 (“[T]here are eight possible objectives of subsidized housing . . . : 1) decent shelter; 2) wealth creation; 3) social integration; 4) urban vitality; 5) civic engagement; 6) training; 7) institution building; and 8) efficient use of public funds.”).

\(^3^2\) Id.

\(^3^3\) See Spitzer, supra note 28.

\(^3^4\) See, e.g., PRATT CTR. FOR COMMUNITY DEV., UNDERSTANDING THE NYC “421-A” PROPERTY TAX EXEMPTION PROGRAM 6, available at
This Note will examine the 421-a program, its intended effects, and whether the new measures are indeed crafted to increase the availability of affordable housing and meet the increasing demand more effectively. Part I presents a history of 421-a legislation, discusses its evolution over the past four decades, and outlines what it has accomplished. Part II explores the newly passed legislation and compares the previous version of 421-a to the current one. Finally, Part III analyzes the efficacy of the new program in light of its policy goals. Ultimately, this Note will argue that while the amended 421-a program contains positive substantive changes, it nevertheless fails to effectively promote affordable housing construction and instead continues to grant incentives for any housing construction.

Other City programs that advance affordable housing notwithstanding, the 421-a program in a large part retains its original 1985 framework and its focus on creating incentives for developers. As a result, scarce public funds will continue to be used inefficiently: limited “decent shelter” will be constructed, and “wealth creation” for families earning low-income will necessarily continue to be hampered. Further, the inherent tensions and tradeoffs between the program’s twin goals of housing development and affordable housing construction, as well as between its three policy objectives—decent shelter, wealth creation, and efficient use of public funds—will continue to undermine the very policies the program purports to serve. These programmatic imbalances will prevent the 421-a program from becoming a truly powerful and forward-looking affordable housing creation mechanism.

http://www.habitatnyc.org/pdf/advocate/Pratt421a.pdf [hereinafter PRATT, UNDERSTANDING]. While the new amendments build on the 421-a program, these and other critics nevertheless contend that more stringent requirements regarding affordable housing creation should, and could, have been adopted without harming the City’s real estate market. See infra Part II.

35 Byrne and Diamond define housing subsidies as “wealth creation” because they “aim to alleviate poverty [by] transferring resources to the recipient in the form of less expensive housing rather than cash.” Byrne & Diamond, supra note 13, at 541.

36 Byrne & Diamond, supra note 13, at 561 (“[T]ensions among goals of decent housing and other social benefits are endemic in subsidized housing.”).
I. History of the 421-a Program to 2006

A. The 421-a Program: 1971-1985

1. Context and Legislation

As originally conceived, the 421-a program had nothing to do with enhancing affordable housing opportunities. When Mayor John Lindsay received state legislative approval of the first 421-a provision in 1971, New York City was a vastly different place than it is today. The City was experiencing a weak housing market and was in the midst of a fiscal crisis. It had recently lost close to 90,000 jobs. In addition, 1970 marked the beginning of a decade-long population decline that would see more than 10% of its seven million residents flee. Mayor Lindsay’s 421-a program was

37 See N.Y. REAL PROP. TAX LAW § 421-a (McKinney 1971) (amended 2007). No mention of affordable housing is made in the original legislation.

38 NEW YORK CITY DEP’T OF HOUS. PRES. & DEV., RECOMMENDATIONS OF THE 421-A TASK FORCE 1 (2006), available at http://www.nyc.gov/html/hpd/downloads/pdf/421ataskforcereporfinal4.pdf [hereinafter HPD, TASK FORCE]. The City’s power to enact local law is “derived from the New York State Constitution, Article IX, as implemented by, and spelled out in, the Municipal Home Rule Law.” However, a local law related to a “state concern” such as housing may not be adopted unless “authorized specifically by the Municipal Home Rule Law . . . or unless the State Legislature has specifically granted such power to the City.” NEW YORK STATE DEP’T OF STATE, REVISING CITY CHARTERS IN NEW YORK STATE 3 (2006), available at http://www.celdf.org/NewYorkHomeRuleandMunicipalGovernment/tabid/295/Default.aspx (follow “Revising City Charters” hyperlink) [hereinafter DOS, REVISING].


intended as an opt-in program for developers to stimulate construction during an economic recession by promoting new construction of any multi-family housing developments through the use of tax abatements to developers, regardless of whether they were affordable or market-rate.\textsuperscript{42}

Specifically, new residential construction of multi-family homes on vacant or underutilized land was granted a full “tax exemption on the increased value during the period of construction and for 10 years thereafter.”\textsuperscript{43} For example, a developer who purchased property for $1 million and developed a building worth $10 million on the land would only be taxed on the $1 million initial investment and not on the $9 million in improvements.\textsuperscript{44} One stipulation of the 421-a program, however, provided benefits to the public as well: 421-a residential units had to be leased at 85% of market-rate rents and were subject to rent stabilization for the duration of the exemption.\textsuperscript{45} As a result, apartments in a building developed under the 421-a program could only be leased at a

\textsuperscript{42} HPD, TASK FORCE, supra note 38, at 1 (“421-a was initially established in an environment of declining property values and a dearth of development activity. The incentive was intended to stimulate new development during a period of slow housing production and declining population citywide.”). The program was not mandatory; if a developer determined that it was a better business decision to build without taking advantage of the 421-a tax incentive, they could still do so.


\textsuperscript{45} Id. at 5. Rent stabilization refers to rent being frozen at a specific amount for the duration of the tax exemption. See infra notes 106–15 and accompanying text.
maximum of 85% of the full market value of the apartment.\textsuperscript{46} While the original 1971 version of the 421-a program was not intended to be an engine for affordable housing, it had one implicit objective similar to that of later versions of the program that were explicitly focused on affordable housing: the efficient use of public funds by the balancing of interests involved.\textsuperscript{47} The original 421-a program attempted to create more housing in the City and energize the economy, while at the same time foregoing a certain amount of tax revenue that would otherwise be collected for public use.\textsuperscript{48}

2. \textit{Tax Abatements and Exemptions}

The use of tax abatements (taxes that are incrementally scaled in) and exemptions (complete tax avoidance) as motivators for economic development is relatively straightforward: with reduced or entirely avoided taxes, a significant portion of the costs associated with developing and managing the property will be offset, thus inducing developers to build.\textsuperscript{49} Tax exemptions remove all tax liability for a given period, while tax abatements encourage housing production by “providing a declining exemption on the new value that is created” by the development.\textsuperscript{50}

Under a tax abatement (or “partial tax exemption”) scheme, the

\textsuperscript{46} N.Y. \textsc{Real Prop. Tax Law} § 421-a(1) (McKinney 1971) (amended 2007) (“Rents to be charged upon initial occupancy . . . shall be at least fifteen percent less than the rents prevailing for comparable [units].”).

\textsuperscript{47} See Byrne & Diamond, supra note 13, at 531.

\textsuperscript{48} See \textsc{Pratt, Understanding}, supra note 34, at 4.

\textsuperscript{49} Indeed, tax incentives “have long been a tool to both redistribute wealth and to inhibit uses or behavior that the government seeks to suppress.” \textit{The Future of Section 421-a of the Real Property Tax Law and Affordable Housing Development: Public Hearing on \textsc{Real Prop. Tax Law} § 421-a Before the Assembl. Standing Comm. on Housing}, 2007 Leg., 230th Sess. 146 (N.Y. 2007) [hereinafter \textit{Public Hearing}] (statement of Jerilyn Perine, Executive Director of the Citizens Housing and Planning Council) (on file with the author).

\textsuperscript{50} New York City Department of Finance, Tax Reduction & Rebate Programs, http://home2.nyc.gov/html/dof/html/property/property_tax_reductions.shtml (last visited Mar. 16, 2008). Thus, by matching such tax “credits” against tax liabilities, a developer’s overall property tax is reduced. \textit{Id.}
taxes that a developer must pay are slowly phased in over a number of years.\textsuperscript{51} Abatements are then another way to “ensure that a property owner’s costs are not increased as a result of the improvements by deferring the increased property taxes which result from improvement-related increases in property values.”\textsuperscript{52}

\textbf{B. 1985–2006: Affordable Housing Production as a Concurrent Goal of 421-a}

Between 1971 and 1984, approximately 200,000 new housing units were created in the City;\textsuperscript{53} nine percent of those, or 18,000 apartments, were financed under the 421-a exemption.\textsuperscript{54} Notwithstanding the rather limited use of 421-a, there was a growing consensus that the costs were outweighing the benefits, rendering the program inefficient.\textsuperscript{55} First and foremost was the concern that the tax exemption program was unjustifiably advantageous to luxury developers and that communities in Northern Manhattan and the outer boroughs were not benefiting enough under the law.\textsuperscript{56} In response, the New York State Legislature endorsed a 1985 City Council proposal that transformed the program, thereby grafting another policy goal to the program’s original objective.\textsuperscript{57}

No longer would 421-a simply encourage new housing construction in the City; now, it would also “ensure that a portion

\textsuperscript{51} Id. (“[The 421-a program provides] a declining exemption on the new value created by the improvement.”).


\textsuperscript{54} Under IBO calculations, 421-a has helped finance construction of 87,000 apartments since 1971. Since 1985, roughly 69,000 units were created under 421-a. Thus, between 1971 and 1985, 18,000 units were created under the program. See IBO, \textit{Fiscal, supra} note 44, at 1, 4.

\textsuperscript{55} See \textit{Pratt, Understanding, supra} note 34, at 4.

\textsuperscript{56} \textit{CHPC, Enhance, supra} note 43, at 5.

\textsuperscript{57} Id.
of new[, multifamily] housing [would] be ‘affordable’ to low- and moderate-income New Yorkers.”58 As a result, 421-a encapsulated two more objectives traditionally seen in affordable housing programs—decent shelter (i.e., new or updated apartments), and wealth creation (i.e., a reduced rent burden), that would be specifically targeted at families earning low-income wages.59

1. Defining “Affordable” Housing and “Low-Income”: Area Median Income

One of the priorities the post-1985 421-a statute advances is affordable housing production for individuals and families earning low-income.60 These essential terms, though, are defined in various ways depending on the particular policy goals of a given program. Both federal and local determinations of what is “affordable” for a given locale rely in part on equations involving Area Median Income (“AMI”), which is calculated by the United States Department of Housing of Urban Development.61 AMI represents the median income for a geographic region over a given year,62 and is used to set maximum income limits for various affordable housing programs.63

The use and reliance on AMI in the calculations of affordability will depend on programmatic policy goals. For instance, the federal government defines “affordable” rent as that which does “not exceed 30[%] of the adjusted income of a family [of four] whose income equals 65[%] of the [AMI] for the area.”64 By contrast, the

58 IBO, FISCAL, supra note 44, at 2.
59 Byrne & Diamond, supra note 13, at 531.
60 IBO, FISCAL, supra note 44, at 2.
62 Id. at 8–9.
63 IBO, FISCAL, supra note 44, at 2–3. This includes the negotiated certificates developers can elect to purchase through the 421-a program and the base rents for on-site affordable housing. Id.
City, ultimately defined affordable rent for a family of four as not exceeding 30% of 80% AMI, resulting in less eligible recipients than the traditional federal definition would have allowed because of a higher income threshold.

While the AMI appears to be a straightforward calculation, the geographic area that it considers has a substantial impact on the resulting definition of affordability. Significantly, the geographic region that is used to calculate the City’s AMI includes not only the five boroughs that comprise the City, but also wealthier surrounding counties including Nassau, Suffolk, Putnam and Richmond. This boosts the stated AMI for the New York metropolitan area to $70,900, even though in the true median income in the five boroughs is only $43,434, and even less depending on particular boroughs or neighborhoods within boroughs.

This HUD-defined AMI is a controlling variable in the 421-a program. Since HUD’s AMI calculation is crucial in determining

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65 The 421-a program did not specifically define affordability in the law. The pre-2007 statute merely stated that within certain boundaries, tax incentives would be granted only if “twenty percent of the units [were] affordable to families of low and moderate income.” N.Y. REAL PROP. TAX LAW § 421-a(2) (McKinney 2005); NEW YORK CITY, CODE § 11-245(b)(2) (2006).

66 See IBO, FISCAL, supra note 44, at 3 (“[F]or the affordable units built in 80/20 projects . . . incomes cannot exceed 80 percent of the area median income, and rent is set at 30 percent of that ceiling.”).

67 See generally, N.Y. REAL PROP. TAX LAW § 421-a (McKinney 2007). For instance, section (7)(c)(i) states that “not less than twenty percent of the units . . . must . . . be affordable to . . . families whose incomes . . . do not exceed sixty percent of the area median incomes . . . .” (emphasis added). The current 421-a statute contains many such references to area median income. § 421-a.


69 HUD currently calculates the AMI for the New York City metropolitan area as $70,900 for a family of four. HUD, NEW YORK, supra note 2.

70 FURMAN, HOUSING, supra note 8, at 3.

71 See, e.g., N.Y. REAL PROP. TAX LAW § 421-a(1)(a)(ii)(C)(b) (McKinney 1985) (amended 2007) (providing that tax exemptions were not available within certain areas unless the Department of Housing Preservation and Development, which used the HUD-defined AMI as its benchmark “had certified that twenty
the maximum allowable income a family can make and still be eligible for 421-a rent stabilized apartments, the HUD definition of “low-income” becomes a fundamental variable as well. HUD defines “low-income households” as those households that do not earn more than 80% of the median family income for a four-person family. Thus, “low-income” for the City, and for the 421-a program, is currently calculated to be $56,700. As noted above, though, this low-income calculation inaccurately reflects the reality in the City because it takes into account wealthier surrounding areas.

2. The 421-a Program: 1985-2006

Two substantive elements particularly distinguished the 1985 law and its subsequent amendments from the original 421-a plan and illustrated the Legislature’s shift from merely encouraging market rate housing projects to specifically stimulating affordable development. First was the creation of the Geographic Exclusion Area (“exclusion zone”), an area within which developers seeking to build had to meet additional requirements tied to affordable housing production in order to be eligible for a tax benefit. Second was the correlation of the duration of the tax exemption to specific percent of the units [would] be affordable to families of low and moderate income”.

Id. The same holds true for more recent versions of the 421-a program. See, e.g., N.Y. REAL PROP. TAX LAW § 421-a(7)(c)(1) (McKinney 2007) (“[Providing no tax incentives in certain areas unless] twenty percent of the units in the multiple dwelling must . . . be affordable to and occupied or available for occupancy by individuals or families whose incomes at the time of initial occupancy do not exceed sixty percent of the area median incomes adjusted for family size . . . .”).

HUD, INCOME, supra note 61, at 1.

“Very-low-income” is defined as not exceeding 50% of the AMI. HUD, INCOME, supra note 61, at 1. Given the City AMI, “very low-income” is currently $35,450 for a family of four. HUD, NEW YORK, supra note 2, at 1.

N.Y. REAL PROP. TAX LAW § 421-a(7) (McKinney 2007) (“[B]enefits of this section shall not be available for new multiple dwellings located in a geographic exclusion area . . . unless they comply with the provisions of this subdivision . . . .”).
area, thereby creating greater incentives for developers to develop housing in certain locations over others.\textsuperscript{76}

\textit{a. Geographic Exclusion Area—On-Site Development or Negotiable Certificates}

To ensure that developers did not simply develop under the 421-a program in areas with the highest market-rate value, legislators sectioned off an area within which developers could not take advantage of 421-a “as-of-right,” referred to as the “exclusion zone.”\textsuperscript{77} Certain restrictions were applied to developers looking to build within that area to ensure that any developments in the exclusion zone would add a net benefit to the goal of affordable housing. The exclusion zone encompassed approximately the middle portion of Manhattan and was comprised of neighborhoods that were traditionally strong housing markets in the City.\textsuperscript{78} The exclusion zone was roughly circumscribed by Ninety-Sixth Street as the northern boundary, Fourteenth Street as the southeastern boundary, and Houston Street as the southwestern boundary.\textsuperscript{79}

Outside the exclusion zone, developers were still granted tax incentives as-of-right—whether or not they built affordable housing units—and rent was generally set by the market-rate for the area.\textsuperscript{80} Within the exclusion zone, though, developers were no longer granted benefits “as-of-right,” but instead had to meet one of two conditions in order to take advantage of the tax benefits: either

\textsuperscript{76} Between 1985 and 2006, the New York State Legislature made several technical revisions to the 421-a program. However, the basic framework of the law remained largely unchanged. Where substantive changes were made post-1985, those changes will be addressed. See CHPC, \textsc{Enhance}, supra note 43, at 5.

\textsuperscript{77} See \textsc{N.Y. Real Prop. Tax Law} § 421-a(7) (McKinney 2007).

\textsuperscript{78} HPD, \textsc{Task Force}, supra note 38, at 2.


\textsuperscript{80} HPD, \textsc{Task Force}, supra note 38, at 2. Areas outside of the exclusion zone were not as potentially lucrative as areas within the zone given market-rates for the middle section of Manhattan were generally higher than that of upper Manhattan and the outer boroughs. \textit{Id.}
designating one-fifth of on-site units as affordable for individuals and families earning low-income wages, designating one-fifth of on-site units as affordable for individuals and families earning low-income wages, or contributing to affordable housing elsewhere by purchasing negotiable certificates from off-site affordable housing developers, in effect “buying” the tax incentive. Since the total amount of subsidies a developer could accumulate was unlimited, an exclusion zone developer could hypothetically accumulate enough certificates to completely offset their development.

Under the first, on-site option, developers building under 421-a had to set aside 20% of the units in the development to families earning no more than $56,700. Additionally, developers could only charge $17,010 per year in rent for those affordable units. Under the second, negotiable certificate option, market-rate developers seeking to build only market-rate units within the exclusion zone could purchase transferable real estate tax abatement certificates from affordable housing developers building outside the exclusion zone. This negotiable certificate option allowed market-rate developers within the exclusion zone to indirectly increase the City’s affordable housing stock by financing the construction of affordable housing units in other parts of the City, outside the

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81 This conditional incentive is also known as an “80/20” market-rate/affordable-rate mix; 20% of the units must be marketed to those earning low-income wages, while the other 80% can be market-rate. PRATT, SUBSIDIZE, supra note 39, at 3. Slightly different conditions apply to the Greenpoint-Williamsburg exclusion areas. HPD, TASK FORCE, supra note 38, at 4.

82 IBO, FISCAL, supra note 44, at 3.

83 COMPTROLLER, OVERVIEW, supra note 4, at 3.

84 See HPD, TASK FORCE, supra note 38, at 6.

85 This $56,700 benchmark currently represents 80% AMI. N.Y. REAL PROP. TAX LAW § 421-a(2)(b) (McKinney 2005); HUD, NEW YORK, supra note 2, at 1.

86 See IBO, FISCAL, supra note 44, at 3. Yearly rent was limited to $17,010 in those affordable units because the yearly rent could not exceed 30% of the low-income threshold of $56,700. Id.


88 See HPD, TASK FORCE, supra note 38, at 4.
Affordable housing developers outside of the exclusion zone used the proceeds of the certificate sales to generate construction capital for their own projects. The number of certificates a market-rate developer could obtain from an affordable housing developer was dictated by the particular AMI ceiling for the particular affordable housing project. In return for helping to fund affordable housing projects outside the exclusion zone, each purchased certificate allowed a market-rate developer to receive the benefits of the tax incentives provided by the 421-a program on one new, market-rate apartment within the exclusion zone, without being impeded by rent regulations. Over the life of the tax abatement, the certificate was “worth, on average, over $100,000 in . . . tax benefits to [the developer for] each market-rate unit in the exclusion zone.” In this way, developers derived benefits not only from abated property taxes, but also from higher-fetched rental prices because they did not have to set aside on-site affordable units.

Given the lucrative market inside the exclusion zone, many market-rate real estate developers decried this innovation in particular because they saw it as encroaching on their assumed as-

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89 Id.
90 See PRATT, SUBSIDIZE, supra note 39, at 4; IBO, FISCAL, supra note 44, at 2–3.
91 Non-exclusion area units rented to families earning 60% AMI ($42,540) yielded five certificates for market-rate developers, whereas units rented to families earning between 60% and 100% AMI yielded only four certificates. HPD, OVERVIEW, supra note 87.
92 HPD, TASK FORCE, supra note 38, at 8. Essentially, each certificate bought by the market-rate developer permitted him to develop one market-rate unit within the exclusion zone while still receiving the tax benefits under 421-a. Market-rate developers had the opportunity to purchase varying amounts of certificates depending on the type of affordable housing that was being indirectly financed. Id.
93 Id. “The certificate program thus leverages only between 15% and 20% of the value of the tax benefit for affordable housing.” Id. at 8.
of-right ability to develop. Before the 1985 amendments were enacted, the President of the Real Estate Board of New York fretted, “Almost no rental buildings would be constructed [under the plan because it will] stop what little rental housing is being produced . . . . Almost all the rental housing being produced is within the [proposed exclusion zone].”

Nevertheless, the exclusion zone provision was approved. Because the vast majority of all 421-a subsidies were provided to high-end developments below 96th Street, “the city need[ed] to focus its attention on how to encourage [low-income unit] construction . . . . There [were] huge areas in the other boroughs that need[ed] housing” and an exclusion zone was able to help meet that need. Indeed, the exclusionary zone gained favor as it continued, enough so that almost twenty years later, it was further expanded to include other quickly gentrifying areas such as the Greenpoint-Williamsburg waterfront in Brooklyn and Hudson Yards.

b. Duration of Tax Incentives Correlated to Geographic Area

In addition to the creation of the exclusion zone, the post-1985 amendments also extended the duration of the tax incentive period, but the length of the additional period would depend on the section of the City in which construction occurred. These provisions

95 The developers’ basic contention was that the exclusion zone under 421-a would necessarily “dampen development if they reduce developer return expectations below certain thresholds so that developers choose to abstain from building or are unable to obtain financing to permit development.” JERRY J. SALAMA, MICHAEL H. SCHILL & JONATHAN SPRINGER, FURMAN CTR. FOR REAL ESTATE & URBAN POL’Y, REDUCING THE COST OF NEW HOUSING CONSTRUCTION IN NEW YORK CITY: 2005 UPDATE, at 100 (2005), available at http://furmancenter.nyu.edu/CREUP_Papers/cost_study_2005/CostStudy_intro.html.


97 Id. (quoting Ruth Messinger, City Council Member).

98 HPD, TASK FORCE, supra note 38, at 4.

99 See, e.g., N.Y. REAL PROP. TAX LAW §§ 421-a(1)(a)(ii)(C); 421-a(1)(a)(iii)(C) (McKinney 1985) (providing for various exemption periods
effectively encouraged developers to develop more general housing in the outer boroughs in exchange for longer extended tax-exempt periods in order to recoup more of their initial development money.\footnote{Id.}

Specifically, inside the exclusion zone, developers building 20% affordable housing units on-site would receive a twenty-year abatement.\footnote{N.Y. REAL PROP. TAX LAW § 421-a(2)(a)(iv) (McKinney 2005); PRATT, SUBSIDIZE, supra note 39, at 4. This created an all-or-nothing incentive for developers in that they could only take advantage of the 421-a tax exemption by building 20% affordable housing.} Those developers who chose instead to build market-rate units within the exclusion zone and purchase off-site negotiable certificates would receive a shorter, ten-year abatement.\footnote{N.Y. REAL PROP. TAX LAW § 421-a(2)(a)(i) (McKinney 2005); PRATT, SUBSIDIZE, supra note 39, at 2.} However, those builders outside of the exclusion zone would reap even more benefits. In most of the rest of the City, including areas north of 110th Street in Manhattan, the Bronx, Brooklyn, Queens or Staten Island, developers would receive a fifteen-year as-of-right tax abatement for any housing construction.\footnote{N.Y. REAL PROP. TAX LAW § 421-a(2)(a)(ii) (McKinney 2005). With the exception of the Greenpoint-Williamsburg waterfront. PRATT, SUBSIDIZE, supra note 39, at 4.} Further, if developers included 20% affordable housing units north of 110th Street or in the outer boroughs, they were eligible for an extended twenty-five year tax abatement.\footnote{N.Y. REAL PROP. TAX LAW § 421-a(2)(a)(iii) (McKinney 2005); PRATT, SUBSIDIZE, supra note 39, at 4. The loopholes inherent in the negotiable certificate system, see infra notes 125–36 and accompanying text, created a situation where developers were able to take advantage of tax benefits without significantly increasing the stock of affordable housing. Although the system likely could have been revised to be made effective, it was nevertheless cut from the 421-a program in 2007. See infra notes 190–200 and accompanying text.}
c. Rent Stabilization

While the goal of the post-1985 amendments was to increase affordable housing in the City, the amendments did nothing to regulate the pricing of permanent housing.\(^\text{106}\) Rentals, however, were stringently regulated: all initial rents for rental units built within the exemption period, whether affordable or not, were based on area market-value.\(^\text{107}\) To ensure that eligible families could afford monthly rent, affordable units within the exclusion zone were further regulated so that rents could not exceed 30% of 80% AMI.\(^\text{108}\) For example, if rent for a market-rate apartment in the exclusion zone was $3,000 per month, or $36,000 per year, then rent for a 421-a affordable unit in the same zone could not exceed 30% of the low-income threshold ($56,700, representing 80% AMI), or $1,417 per month.

After the end of the tax abatement period, developers had more freedom to increase rent for market-rate units than for the affordable units.\(^\text{109}\) As tax abatements were slowly being phased out, developers were allowed to increase rent on market-rate units by 2.2% each year.\(^\text{110}\) Once any given developer lost his tax incentive, however, and had to begin paying increased taxes, rent was no longer stabilized by the government, and could immediately rise to actual market rate.\(^\text{111}\)

While affordable units were more protected even after a developer exhausted their tax incentive period, they were not wholly insulated from increased rent.\(^\text{112}\) Developers were free to incrementally increase the rent of affordable units to market rate.

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\(^{106}\) Id. Specifically, there were no limits on the price for those purchasing apartments in newly built condominiums or co-ops. Id.

\(^{107}\) CHPC, ENHANCE, supra note 43, at 10.

\(^{108}\) Id.

\(^{109}\) IBO, FISCAL, supra note 44, at 2 (“As exemptions expire, rents may rise to market rates.”).

\(^{110}\) CHPC, ENHANCE, supra note 43, at 10.

\(^{111}\) Id.

\(^{112}\) See IBO, FISCAL, supra note 44, at 2 (“[U]nits designated as affordable remain rent stabilized for at least 20 years, [but] rents may only be increased to market rates upon vacancy.”).
only after the given tax exemption ran its course—and the length of the rent stabilization was dependent on the occupants of such apartments. If the unit was built after Fiscal Year 1985 had started, rent stabilization “continue[d] until the end of the last lease signed while the benefit period was in effect.” If the unit was built before Fiscal Year 1985, though, rent stabilization “continue[d] until the first vacancy occurs after the expiration of the tax benefits, even if the vacancy occurs long after the tax benefits have expired.”


While the goals of the revised 421-a plan were ambitious, the lack of any systematic data regarding the outcomes of the 421-a program makes it difficult to evaluate its effects from 1985 to 2006. Based on the available information, however, it appears that while the program certainly encouraged new housing production in general, it was not as successful in accomplishing its second, more crucial goal of providing additional affordable housing.

a. Overall New Housing Production

Between 1985 and 2006, approximately 260,500 housing units were developed throughout the City. Of these new units, approximately 92,000, or 35%, were built under the various 421-a

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113 See New York City Rent Guidelines Board, http://www.housingnyc.com/html/resources/zip.html (last visited Apr. 14, 2008). For example, if an affordable unit was built in 1988 in an area with a 20-year tax abatement period, rent was frozen until 2008 plus any additional time that was created by a lease signed within that abatement period. As soon as the lease ended, though, the developer was permitted to incrementally increase the rent to 2008 market-rate prices. As a result, the families living in such apartments at the end of a tax abatement period would experience rising rent. See id.

114 Id.

115 Id.

116 See PRATT, INCLUSIONARY, supra note 25, at 39.

117 See 2007 HSR, supra note 53, at 14. This figure represents a sizeable increase in the housing stock of the City. Id.
programs; the other 65% were built without utilizing the program. Developers choose not to build under 421-a for various reasons. Oftentimes, they were ineligible under the program because of where, or what, they were building. Others simply chose not to build under 421-a for economic reasons. While it is impossible to determine how many developers would have built in the absence of the program, the program’s maximum effectiveness in terms of sheer unit creation reached its peak in 1988. Subsequent effectiveness fell substantially in the late-1980s and 1990s, largely in part to a declining real estate market in the City. Although this trend reversed and there was considerable rejuvenation in both the housing market in general and in 421-a development specifically in the late 1990s and early 2000s, the program was once again on the decline by 2005.

b. Affordable Housing Creation

Of the 92,000 units created under 421-a, only a small fraction of these were found to be affordable. One study found that between 1985 and 2002, “only 8% (4,905) of the . . . units

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118 See id. at 16.
119 PRATT, SUBSIDIZE, supra note 39, at 7. For example, if a developer was only building market-rate units in the exclusion zone and was not interested in the negotiable certificate program, or if a developer was building a parking lot, they each would not be eligible for incentives under the 421-a program. Id.
120 Id. For example, a developer could determine that he could make more money simply from charging market-rate rents than from receiving tax benefits for setting aside affordable units or purchasing negotiable certificates.
124 Id. at 16.
125 See 2007 HSR, supra note 53, at 14; PRATT, SUBSIDIZE, supra note 39, at 6.
subsidized through the 10-, 15- or 20-year 421-a programs... were affordable to low-or moderate-income families.”

Even those “affordable units” created under the program were still out of reach for many financially limited families given the program’s definitions and calculations of affordability.

Moreover, the difficulty of ensuring affordable unit creation may be explained by the availability and prevalence of negotiable certificates, as well as loopholes in the program that worked to the advantage of developers.

Within the exclusion zone, developers were much more likely to purchase negotiable certificates than to designate 20% of their on-site units affordable. Choosing otherwise would have in effect limited the rent in those units, and thus driven down profit. The certificates allowed developers to maximize profits by charging market-rate rents in all units while still benefiting from a 10-year tax exemption on some of their units. As sound as these business decisions may have been, however, they hardly increased the City’s affordable housing stock in a substantive way. While some 28,000 market rate units built within the exclusion zone benefited from a 10-year 421-a exemption from 1985 to 2006, only approximately 5,500 affordable housing units were created outside the exclusion zone with the revenue generated from purchased negotiable certificates.

Moreover, there was simply more business incentive for market-rate developers. The benefits that market-rate developers gained, as opposed to those for off-site affordable-housing...

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126 PRATT, SUBSIDIZE, supra note 39, at 6. “Insufficient data is available on the 25-year exemption to determine affordability.” Id.

127 See supra notes 60–74 and accompanying text.

128 See HPD, TASK FORCE, supra note 38, at 8 (“[Negotiable certificates narrowed] participation in the affordable housing market and [led to a less] efficient allocation of limited resources.”).

129 Indeed, in 2005, the 80/20 program created 2,100 affordable housing units in the exclusion zone, while almost 7,700 units were created outside the exclusion zone with negotiable certificates. COMPTROLLER, OVERVIEW, supra note 4, at 3–4.

130 See PRATT, SUBSIDIZE, supra note 39, at 5.

131 HPD, TASK FORCE, supra note 38, at 8.
developers, were highly skewed. Market-rate developers stood to realize five to ten times more benefits for simply purchasing negotiable certificates than any off-site affordable-housing developers could gain in terms of raising capital; prices for the certificates ranged from $11,000 to $20,000, yet in practice, one certificate was “worth, on average, over $100,000 in... tax benefits to [the developer for] each market-rate unit in” the exclusion zone.” As a result, the certificate program in fact only generated approximately one-fifth of the total value of the tax benefit to affordable housing projects.

While the majority of developers within the exclusionary zone therefore preferred to take advantage of the certification option, some developers chose instead to receive 20-year tax incentives by designating 20% of on-site units as affordable: from 1992 to 2003, 6,782 units were created in the exclusion zone under this plan. Nevertheless, the choice between on-site units or off-site financing often came down to simple economics: since “market rents [often] exceed[ed] the allowable rent for affordable units, even including the property tax exemption” for the entire project, it usually made more business sense to opt for financing off-site affordable housing.

c. 421-a Unit and Subsidy Concentration

Further issues with 421-a are illustrated by the concentration of units in Manhattan built under the program. This concentration of units also resulted in a concentration of benefits to one borough. While a concentration of units is not necessarily harmful, it was decidedly not beneficial to those living in the outer boroughs.

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132 Id.
133 Id.
134 Id.
135 See IBO, FISCAL, supra note 44, at 3–4.
136 Id. at 4.
137 The disproportionate distribution of benefits was arguably detrimental to the outer boroughs because the 421-a program did not provide a comparable amount of units or value of tax benefits to those living in the outer boroughs. See COMPTROLLER, OVERVIEW, supra note 4, at 3.
From 1985 to 2002, projects in Manhattan accounted for 53% (36,668) of the total number of all units, affordable and market-rate, built under 421-a, with the other 47% distributed throughout the other four boroughs.\footnote{Queens realized 20\% (13,909); Brooklyn realized 13\%; (9,018); Staten Island realized 7.8\% (5,405); and the Bronx realized only 5.5\% (3,906). \textit{IBO, FISCAL, supra} note 44, at 4.} By 2005, Manhattan developments had received “78\% of all 421-a benefits but accounted for only 48\% of units that received 421-a benefits.”\footnote{\textit{COMPTROLLER, OVERVIEW, supra} note 4, at 2.} Put simply, Manhattan developers were receiving the lion’s share of tax benefits under the program, even though their developments were disproportionately market-rate developments. Moreover, since developers could benefit from unlimited levels of 421-a tax incentives, 421-a developments in Manhattan also received the largest yearly 421-a subsidies, including some as high as $160,000 per unit.\footnote{\textit{Id.} at 3 ("[P]er unit savings [in Trump World Tower] ranged as high as $160,000" and that such “deeply-subsidized [luxury] units had a market value of $4.2 billion.").} This trend was not only due to higher land costs in Manhattan relative to the other boroughs, but more importantly because the tax incentives were being used to subsidize large luxury units.\footnote{\textit{Id.} at 2.} The outer boroughs, in contrast, saw only a fraction of subsidies as compared to Manhattan, and far fewer units were created in the outer boroughs as well.\footnote{\textit{Id.} at 2–3. For example, in 2005, Manhattan received 78\% ($2,069,495,023) of the total 421-a exemption benefits for that year—almost four times that of the other boroughs combined. In contrast, Brooklyn received the second-largest total 421-a exemption benefits—a mere 9\% ($238,216,222). Queens, the Bronx, and Staten Island combined only received 13\% of the benefits ($331,711,530). \textit{Id.}}

Outside of the exclusion zone, 421-a developments were mostly found to be concentrated in areas with rapidly growing populations, increasingly affluent socio-economic populations, or where there were “strong residential real estate markets”—or combinations of the above.\footnote{Such areas included: Flushing, Queens, Greenpoint-Willimsburg, Brooklyn and Brighton Beach, Brooklyn. \textit{Id.} at 3.} Thus, while certain select pockets in
the outer boroughs benefited, low-income neighborhoods and the outer boroughs on the whole saw little increase in affordable housing under the 421-a program. Indeed, at least one commentator mused that the program was “far from trailblazing” and was “merely gilding a well-traveled road.”

d. Average Base Rent Under 421-a

Yet another exposed flaw of the 421-a program was the fact that “affordable” apartments under 421-a were not always affordable to those the law intended to target. While there is scant data as to the extent of “affordability” of apartments built under 421-a, one study estimated the average rents for a one-bedroom 421-a apartment built over a three-year span, 1999 through 2001. In the year of the study, AMI for the City was $62,800; low-income (80% AMI) was $50,250. The study showed that in Manhattan (primarily in the exclusion zone), the average initial base monthly rent for a 421-a market-rate one-bedroom apartment built within that timeframe was $3,172. Assuming a household spends 30% of its annual income on rent, this translates in to a “necessary annual income” of $126,864—225% above the AMI. Indeed, since four out of five apartments built in the exclusion zone could be rented at market rate, these expensive apartments represented the vast majority of those receiving subsidies in the exclusion zone under 421-a. In essence, even though some affordable units were created within the exclusion zone or through

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144 Id.
145 PRATT, SUBSIDIZE, supra note 39, at 9. The contention was that the 421-a program was in fact benefiting and encouraging a continued increase in market-rate housing rather than promoting affordable housing. Id.
146 See IBO, FISCAL, supra note 44, at 5.
148 IBO, FISCAL, supra note 44, at 5.
149 Id.
150 Only 20%, or 1 out of 5, on-site units were required to be affordable in order to receive the 20-year exemption. See N.Y. REAL PROP. TAX LAW § 421-a(2)(a)(iv) (McKinney 2005) (amended 2007).
negotiable certificates, the program essentially ensured that developers could maximize their profits by seeking market-rate rents while simultaneously receiving tax benefits.151

Given the $50,250 low-income threshold at the time of the study, monthly rent in a 421-a low-income apartment in Manhattan was approximately $1,256.152 This monthly rent would translate to a necessary annual income of $50,240—99% AMI. In short, these apartments would only be affordable for a family earning AMI, not to those families earning 80% AMI, let alone less than that. Moreover, since at most only one out of five exclusion zone 421-a apartments had such reduced rents, exclusion zone units such as these were likely few and far between.153

Outside the exclusion zone under the 15- and 25-year exemptions, average rents for 421-a apartments were substantially lower.154 Even here, though, they were rarely affordable for families earning low income given that the initial rents were tied to the market rate for the area.155 As a result, the outer boroughs also generally showed that the program touted to create significant affordable housing was not living up to its potential. In Brooklyn,

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151 See Pratt, Understanding, supra note 34, at 4 (noting that the 421-a program has only created a small amount of subsidized housing while 421-a benefits have “covered the boom of market-rate, luxury buildings in lower Manhattan . . . downtown Brooklyn, and Long Island City with little or no affordable units”).

152 This approximate rent was found by making the following calculations: 30% of 80% AMI ($50,250) = $15,075; as divided over 12 months = $1,256.25. See IBO, Fiscal, supra note 44, at 5; HUD Income Limits 2002, supra note 147, at 1.

153 IBO, Fiscal, supra note 44, at 3. As data for 2002 shows, 10,879 units received tax exemptions within the exclusion zone in Manhattan under 421-a; 4,097 units received 10-year exemptions (i.e., through negotiable certificates); 6,782 received 20-year exemptions. Id. Assuming that none of the 10-year exempt units were renting at “affordable” rates, and developers only designated the statutory minimum of 20% of their 20-year exempt units as “affordable,” only 1,356 (12%) of these units were developed as affordable apartments. See id.


155 See IBO, Fiscal, supra note 44, at 5.
the average monthly rent for a 421-a subsidized unit ($2,077) translated into a necessary annual income of 147% AMI; the same apartment in Queens required a necessary annual income of 85% AMI. Since these units fall outside of the exclusion zone, there was no requirement that any be affordable to families earning low-income wages, even though developers nevertheless benefited from the tax abatements. Only in the Bronx did average 421-a apartment rent prices even come close to being affordable—the average monthly 421-a apartment rent was $477, or 34% of the necessary annual income. Since market rates still determined the rent for 421-a units, many apartments were out of range for precisely those that the program was purportedly designed to benefit.

e. Cost to Taxpayers of the 421-a Program (Tax Expenditure)

As noted above, the basic economic principle behind the 421-a program is that a developer receives a tax exemption for every unit or building created under the program. The other side of this coin, though, is that the City foregoes what yearly property taxes it otherwise would have collected for every unit built under 421-a. From 2001 through 2006, 421-a subsidies cost the City nearly $1.5 billion in tax expenditures. In 2006 alone, 421-a subsidies cost the City over $500 million in unrealized property taxes, resulting in the largest real estate tax expenditure program that year. Given the amount of benefits developers were receiving as

156 Id.
157 See N.Y. REAL PROP. TAX LAW § 421-a(2)(a)(ii) (McKinney 2005) (any project in the outer boroughs is eligible for an as-of-right 15-year exemption).
158 Id.
159 See supra notes 37–48 and accompanying text.
160 Id.
162 Approximately 75,800 apartments received tax subsidies under the program in 2006. THE CITY OF NEW YORK DEP’T OF FIN. OFFICE OF TAX
compared to the amount of affordable housing produced, questions gradually began to emerge as to whether the costs of the program were outweighing the benefits, and, if so, how to best revise the program in order to realign it with its goals.

II. AMENDING THE 421-A PROGRAM: ENACTED LEGISLATION IN 2007

In light of the City’s burgeoning population, strong housing market, and the need for more affordable housing for families earning low-income wages, it became apparent that the 421-a program had to change.\textsuperscript{163} Public funds were still being used inefficiently.\textsuperscript{164} Wealth was being created, though not necessarily for the intended recipients of the program.\textsuperscript{165} While more housing was indeed being created, the second policy goal of 421-a—providing affordable housing—was still out of reach, and accordingly, the need for an overhaul of the 421-a program became evident by 2006.\textsuperscript{166}

A. Proposals for Change—Four Perspectives

Recognizing this need, Mayor Bloomberg assembled a task force in early 2006 to explore potential options for reforming the program.\textsuperscript{167} Around the same time, several housing advocacy not-for-profit organizations simultaneously began to independently lobby for progressive proposals to the 421-a program in hopes of influencing the pending City legislation.

\textsuperscript{163} See HPD, TASK FORCE, supra note 38, at 1 (“[T]he environment for housing development has changed dramatically. Our robust housing market provides an historic opportunity to strengthen the connection between the 421-a program and the development of affordable housing.”).

\textsuperscript{164} See supra notes 132–45, 159–61 and accompanying text.

\textsuperscript{165} See supra notes 146–58 and accompanying text.

\textsuperscript{166} Byrne & Diamond, supra note 13, at 531.

\textsuperscript{167} HPD, TASK FORCE, supra note 38, at 1.
1. Citizens Housing and Planning Council of New York

One such organization was the Citizens Housing and Planning Council of New York (“CHPC”). For several years, CHPC\(^{168}\) had called for a variety of substantive changes to the 421-a program and to zoning laws in general in order to spur affordable housing creation.\(^{169}\) CHPC contended that requiring, at minimum, 20% of on-site apartments in the exclusion zone be affordable created an inflexible system that failed to persuade developers to provide anything more than 20% because developers stood to gain no extra benefit.\(^{170}\) Moreover, CHPC argued that a freeze on eligibility requirements for on-site exclusion zone affordable apartments at “no more than 80%” AMI prevented developers from “tap[ping] the huge market [of] households earning above 80% [AMI] but below what is necessary to rent new market-rate apartments.”\(^{171}\) Instead, CHPC recommended creating a more adaptable program by instituting a “sliding scale of set-aside percentages and tenant [income] eligibility limits.”\(^{172}\) In effect, this change would encourage developers to build more affordable housing units

\(^{168}\) Citizens Housing and Planning Council “is a non-profit policy research organization dedicated to improving housing and neighborhood conditions through cooperative efforts of the public and private sectors.” Citizens Housing and Planning Council, http://www.chpcny.org/ (last visited, Apr. 14, 2008).


\(^{170}\) CHPC, ENHANCE, supra note 43, at 8.

\(^{171}\) Id. While there is no specific data to show exactly how many families fall into this range, data shows that approximately 820,000 City families fall into the census income bands between $50,000 and $99,000. US Census Bureau, American Factfinder 2006 for New York City, http://factfinder.census.gov (type “New York City” in City/Town/Zip box, follow the “show more” hyperlink next to Economic Characteristics) (last visited Apr. 14, 2008).

\(^{172}\) CHPC, ENHANCE, supra note 43, at 8.
because it would reward developers with more tax incentives if they chose to build over the statutory floor of 20%.\textsuperscript{173}

2. \textit{Housing Here and Now}

In a similarly progressive vein, Housing Here and Now (“HHN”)\textsuperscript{174} called for the exclusion zone to be expanded to encompass the entire City, thus revoking any as-of-right tax incentives for developers and instead obligating developers to provide on-site affordable low- and moderate-income housing if they wanted tax incentives.\textsuperscript{175} Moreover, the coalition called for “at least 30% of the units [to] be affordable for families earning up to 50% of area median income.”\textsuperscript{176} Under this proposal, not only would more affordable units be created, but more of those units would effectively go to families who earned less money.\textsuperscript{177} Furthermore, HHN urged that any developers who declined to build any affordable housing would have their taxes directed to the

\textsuperscript{173} \textit{Id.} For example, the CHPC-proposed scale would allow developers electing to create 40% of their units as affordable units would be permitted to increase the maximum average household income of renters up from 100% to 120%. As a result, while more affordable units would be created, developers could recoup the cost by renting other units to those with higher incomes. \textit{Id.}

\textsuperscript{174} \textit{Housing Here and Now} is a “coalition of affordable housing groups, labor unions, AIDS activists, churches and community groups [who] have joined together to demand that our leaders guarantee housing for ALL New Yorkers.” \textit{Housing Here and Now}, http://www.housinghereandnow.org (last visited Apr. 14, 2008).

\textsuperscript{175} \textit{Housing Here and Now, Recommendations for Reform of the 421-a Program} (2006), available at http://www.housinghereandnow.org/policy_421a.html (click on link below “421-a Housing Here and Now Recommendations (July 26, 2006)”).

\textsuperscript{176} \textit{Id.}

\textsuperscript{177} This is because more units would be available for those families earning less than $35,450. \textit{See id.} HHN also advocated for incentives for developers who dedicated 100% of their units to affordable housing for families earning moderate-income. \textit{Id. A “moderate-income” family is generally defined as one that earns between 80% and 120% AMI, which currently equates to between $56,720 and $85,080.} \textit{See Community Planning Bd. 12, Affordable Housing Defined, Affordable Rent Calculations} (2006), available at http://cd12-plan.net/Documents/AffordableHousingDefined.pdf.
City’s Affordable Housing Fund, and that developers would be required to pay building service workers prevailing wages if they received tax incentives under the program.\textsuperscript{178}

3. \textit{Pratt Center For Community Development and Habitat For Humanity}

Other organizations that became involved in the advisory process for the revamping of 421-a included the Pratt Center for Community Development\textsuperscript{179} and Habitat For Humanity New York City (referred to jointly as “Pratt”), which partnered together to provide a recommendation report.\textsuperscript{180} While the two groups did not initially suggest their own proposed reforms, they nevertheless mapped out the overarching issues that the Mayor’s task force should consider.\textsuperscript{181} Pratt predicted that the Task Force would take on important questions like whether to set a maximum cap on benefits that developers could receive for any project, and whether it would be more effective to expand the exclusion zone or do away with it altogether by requiring all new building projects in the City to set aside a certain number of affordable units.\textsuperscript{182} Further, Pratt

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\textsuperscript{178} \textit{Id.} The Affordable Housing Fund, see infra notes 201–15 and accompanying text, is a fund solely dedicated to financing the construction of affordable housing stock. Prevailing wages, see infra notes 256–63 and accompanying text, refers to the wages that maintenance workers in 421-a buildings receive. The 421-a program as envisioned by CHPC, would not only ensure that developers opting out of the 421-a program were indirectly promoting affordable housing through their City property taxes, but also that families earning moderate income were not also priced out of the City. Additionally, CHPC’s proposal sought to spread the benefits of the 421-a program to those actually working in 421-a subsidized buildings. \textit{Id.}

\textsuperscript{179} Pratt Center for Community Development “works for a more just, equitable, and sustainable city for all New Yorkers, by empowering communities to plan for and realize their futures.” Pratt Center for Community Development, About Pratt Center, http://www.prattcenter.net/about.php (last visited Apr. 14, 2008). PCCD partnered with Habitat For Humanity on this recommendation paper.

\textsuperscript{180} PRATT, \textit{SUBSIDIZE}, supra note 39.

\textsuperscript{181} PRATT, \textit{SUBSIDIZE}, supra note 39, at 9–10.

\textsuperscript{182} \textit{Id.} Indeed, the Task Force duly took up these questions, determining that the exclusion zone should be expanded, not removed completely, and that
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focused on whether the off-site negotiable certificates program should be abolished, or if it would be better to keep and enhance the existing program by setting higher minimum prices for certificates and creating more oversight for these private transactions.  

**4. Mayor Bloomberg’s 421-a Task Force**

Reflected in the ultimate recommendations of Mayor Bloomberg’s 421-a Task Force were aspects of the Pratt, CHPC and HHN proposals outlined above.  

The Task Force determined that the best route was to institute several substantive changes to jumpstart the affordable housing prong of the program. The most significant of these recommendations included: 1) expanding the exclusion zone to include specific areas in Brooklyn and Queens that were exhibiting rapidly growing populations and increasingly affluent socio-economic areas; 2) limiting 421-a eligibility only to projects with at least six units; 3) eliminating the negotiable certificate program and replacing it with a dedicated affordable housing fund; and 4) capping the “total amount of tax benefits that any market rate unit” could receive in a development that did not contain on-site affordable housing (i.e., developments inside of the exclusion zone).

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there should be a maximum level for tax benefits a developer could receive. See infra notes 184–89 and accompanying text.

183 Id.

184 See infra notes 168–83 and accompanying text.

185 See HPD, TASK FORCE, supra note 38, at 2–3.

186 GEA Map, supra note 79.

187 HPD, TASK FORCE, supra note 38, at 2–3, 4, 6–8. Limiting tax incentives to buildings with more than 6 units effectively prevents developers from building small-scale developments and receiving 421-a tax benefits; this decision, however, all but forecloses the possibility for small developers to take advantage of the 421-a program.

188 Id. The Affordable Housing Fund is a fund solely dedicated to financing the construction of affordable housing stock. See infra notes 201–15 and accompanying text.

189 Id. In turn, developers in the exclusion zone could not obtain large numbers of negotiable certificates unlike previous developers such as Donald
B. City Council Compromises

Bloomberg’s recommendations were formally introduced to the City Council in early December 2006. However forward-looking the proposed reforms may have been, some City Council members nevertheless viewed them with criticism as not being sufficiently progressive. Eventually, three other competing proposals emerged as options for determining new contours for the program.

The first competing proposal was offered by City Council Speaker Christine Quinn, which similarly called for eliminating the negotiable certificate program and excluded three-unit projects from obtaining exemptions. Her proposal went further than Bloomberg’s, however, by allowing four- and five-unit projects to remain qualified for exemption, calling for a comparatively expanded exclusion zone and establishing a committee to regularly review the exclusion zone boundaries. Moreover, only those developers who devoted at least 20% on-site affordable housing to families earning no more than 80% AMI would be granted tax incentives.

The second competing proposal was offered by Council Members Annabel Palma and David Yassky, which advocated for substantially simplifying the program by eliminating the exclusion zone and significantly ramping up benefits to families earning low-income wages. Council Members Alan Gerson and Letitia James Trump who faced fewer obstacles before the task force’s recommendations were implemented. See supra note 123 and accompanying text.


191 Janny Scott, Challenging a Tax Break for Housing Developers, N.Y TIMES, Nov. 30, 2006, at B3 [hereinafter Scott, Challenging].


193 Id.

194 No more than 5% of these affordable units had to be available to families earning between 60% to 80% AMI as calculated from the previous calendar year. Id.

195 Id. Specifically, Palma and Yassky contended that both Bloomberg’s and Quinn’s proposals only “[s]lightly narrow[ed] the tax break” and that “pure market rate development should be completely eliminat[ed]”. Scott,
offered a final competing proposal. Most significantly, their bill would have required developers to set aside 35% of on-site affordable housing in a development at 60% AMI in order to qualify for 421-a benefits.

One of the major opponents to any changes in the 421-a program was, unsurprisingly, the President of the Real Estate Board of New York, Steven Spinola. Spinola asserted that any new bill would “‘result in less production of housing, as well as less production of affordable housing’ [and] that the changes would alter the economics of development in certain neighborhoods, limiting the incentive for developers to proceed with their projects there.” Spinola and others urged reform of the negotiable certificate program instead of abandoning it altogether.

Challenging, supra note 191. Palma’s proposal would “get rid of this loophole altogether” by completely eliminating the exclusion zone, thus compelling all developers within the City to build on-site affordable units. Id. The Palma/Yassky bill would not only have allowed projects with at least three units to qualify for incentives, but also would have compelled developers seeking 421-a tax incentives anywhere in the City to reserve at least 30% on-site units as affordable. Int. 490 (2006), available at http://webdocs.nyccouncil.info/attachments/75430.htm. This three-unit proposition would have allowed smaller developers to take advantage of the 421-a tax incentives. Moreover, these units could only be made available to families earning no more than 50% AMI ($35,450 for a family of four). Id. Lowering the eligibility level to 50% AMI would arguably have realigned the program to benefit those families who were most disadvantaged. Indeed, as compared to the previous proposals, the Palma/Yassky recommendations were arguably more akin to the most progressive proposals of the affordable housing advocates. See supra notes 133–36, 139–40 and accompanying text.

Id. Like the Palma/Yassky proposal, the Gerson/James proposal would have significantly raised the conditions for developers to meet before they could obtain tax benefits under the program by increasing the required amount of on-site affordable housing and lowering the income threshold.


Id.

Matthew Schuerman, Mayor Faces Pitched Battle Over Breaks for Developers, N.Y. OBSERVER, Sept. 24, 2006, http://www.observer.com/node/52713. REBNY only took a lobbying role in negotiations over the City
C. City Council Legislation—Local Law 58

Ultimately, the City Council overwhelmingly approved the bulk of Quinn’s proposal in Local Law 58 in December 2006.201 The Law included an expanded exclusion zone, mandated on-site affordable housing units, and elimination of certain “of right” tax incentives. First, the exclusion zone was expanded into certain gentrifying areas in Brooklyn and Queens,202 and a boundary review commission was created in order to assess the zone map every other year.203 Moreover, within the zone, at least 20% of units were mandated to be “on site” affordable units; i.e., “situated within the building or buildings for which benefits . . . are being granted.”204 As before, such units were eligible only for families earning no more than 80% AMI.205 Outside of the exclusion zone, 25-year as-of-right tax incentives were eliminated unless the projects provided on-site affordable units or were built under certain other government affordable housing programs.206

In addition to the on-site mandate and the elimination of the 25-year as-of-right exemptions, several other elements of the 421-a program were altered. Most importantly, certain projects were precluded from receiving tax benefits, an Affordable Housing Fund was established, and market-rate rentals had tax benefit caps.207 Specifically, the City Council determined that only buildings with four or more units would receive tax incentives, thus precluding two- or three-unit projects from getting such benefits and ensuring that developments benefiting from the tax incentives would

Council bill.

201 Scott, Overhaul, supra note 198. The measure for Local Law 58 passed by a vote of 44 to 5. Mayor Bloomberg endorsed Quinn’s proposal as well. Id.
204 NEW YORK CITY, CODE § 11-245(b-1) (2007).
205 NEW YORK CITY, CODE § 11-245(b-2) (2007).
207 See NEW YORK CITY, CODE §§ 11-245(b); 11-245.1-a (2007); NEW YORK CITY, CHARTER § 1805 (2007).
advantage more low-income families.\textsuperscript{208}

The Affordable Housing Fund that Mayor Bloomberg had proposed\textsuperscript{209} in effect replaced the negotiable certificate system, creating a different alternate means for financing affordable housing development. The major goals of the Fund is to 1) direct affordable housing funds to specific neighborhoods with the highest percentage of “poor” households; 2) finance projects that would create affordable housing; and 3) finance projects where developers agree to preserve levels of affordability past the duration of tax abatement.\textsuperscript{210} Additionally, in order to combat the deep subsidization of luxury developments, the local law set a ceiling on the maximum tax incentives that any market-rate unit could receive at $65,000 per unit.\textsuperscript{211}

Upon passing Local Law 58, Speaker Quinn pledged that “[t]he bill will create even more affordable housing, encourage development in communities where it is still needed and protect taxpayer dollars from over-subsidizing new luxury development.”\textsuperscript{212} Even those who had introduced competing bills voted for Quinn’s plan.\textsuperscript{213} Councilmember Palma recognized its significance, musing, “We need to look at this piece of legislation[] and look at the significant improvements [from the previous program].”\textsuperscript{214} Yassky similarly observed that the law “[would] result in more affordable housing and [would] eliminat[e] some of the most egregious disparities in the property tax.”\textsuperscript{215}

\textsuperscript{208} \textit{New York City, Code} § 11-245.1-b(c) (2007).
\textsuperscript{209} \textit{New York City, Charter} § 1805 (2007).
\textsuperscript{210} \textit{New York City, Charter} § 1805(4)(a–c) (2007).
\textsuperscript{211} HPD, FAQ, \textit{supra} note 206, at 2. Indeed, prior versions of the 421-a program allowed for unlimited tax incentives, which allowed for high-end luxury developers to cash in. The exemption cap will certainly help to curb this phenomenon. \textit{See supra} notes 138–42 and accompanying text.
\textsuperscript{212} Scott, \textit{Overhaul, supra} note 198.
\textsuperscript{213} \textit{Id}.
\textsuperscript{215} \textit{Id}.

The 421-a program amendments by the City Council had to clear one more hurdle to become law. In New York state, a local law related to a “state concern” such as housing may not be unilaterally adopted unless “authorized specifically [by the State Legislature] . . . or unless the State Legislature has specifically granted such power to the City.” Thus, while the State Legislature had the authority to simply rubber stamp Local Law 58, it also had the ability to modify it prior to enactment. The task of shepherding the bill through the State Legislature and reauthorizing the tax incentives fell primarily to the Chairman of the Housing and Buildings Committee and representative for the 53rd Assembly District in Brooklyn, Assemblyman Vito Lopez.

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216 DOS, REVISING, supra note 38, at 3.
217 Id.
218 See id.
219 The 53rd Assembly District encompasses sections of Williamsburg and Bushwick and is currently a lesson in socio-economic contradictions. The NYU Furman Center for Real Estate and Urban Policy describes Williamsburg’s housing market as having “consistently high numbers of new certificates of occupancy . . . . [P]rices continue to rise rapidly and the district now has the 3rd highest rate of price appreciation in the City for 2–4 unit buildings.” FURMAN, HOUSING, supra note 8, at 58. Breaking with trends, Williamsburg “has seen rates of subprime refinance lending decline steadily in recent years [and] median household incomes increased significantly in the district since 2002.” Id.

220 As an Assemblyman for the State Legislature, Lopez was not involved in the process at the City Council level. See Matthew Schuerman, Grinding Sausage Late at Night: Albany Reforms 421a Program, N.Y. OBSERVER, June 26, 2007, available at http://www.observer.com/2007/grinding-sausage-late-night-albany-reforms-421a-program (“[T]he program, scheduled to expire at the end of this year, needed state reauthorization before the City Council’s changes took effect. That’s where Mr. Lopez came in.”).
1. Opening Moves in the State Legislature

Initially, it appeared that Lopez was poised to tighten the program’s requirements even more by restricting income eligibility levels to 60% AMI (down from the City Council’s 80% AMI level), mandating that at least 30% of on-site units be affordable (up from 20%), and expanding the exclusion zone across the entire City. Indeed, these modifications would not only have shifted the demographic the program was aiming to serve, but also would have made developers create more affordable housing in order to receive the tax incentives.

Lopez also questioned the method of pegging 421-a affordability levels to the regional AMI calculation. While the HUD-defined AMI for the entire City is currently $70,900, the true AMI in Queens is closer to $49,000, and the AMI in Brooklyn is only $37,000. As Lopez succinctly observed, “AMI in Bushwick is [only] $22,000. Regional AMI is a joke.” To Lopez, the “need [for moderate-income housing was] great but it shouldn’t be at the expense of people in Bushwick or Williamsburg.”

In response to Lopez’s lofty ambitions of further restricting the program, pro-development critics, including the Real Estate Board of New York, argued that including middle-income families

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222 Shane Miller, City Reformed It, But State Must Approve It, QUEENS LEDGER, Mar 22, 2007, available at http://www.queensledger.com/StoryDisplay.asp?PID=1&NewsStoryID=5470 (“Lopez, as well as affordable housing advocates, have been critical of the city’s proposal, arguing that the city shouldn’t subsidize market-rate housing, and that the entire city should be an exclusion zone.”).
223 See supra note 195 and accompanying text regarding Int. 490.
224 Atlantic Yards Report, supra note 221. “The big dilemma we have, with federal government getting out of public housing and Section 8 [housing vouchers], it puts a real burden on the underclass, people who earn $15,000, $18,000 a year. Affordable—it’s a relative thing” because AMI is calculated on a region-wide level. Id.
225 Id.
226 Atlantic Yards Report, supra note 221.
in the affordable housing calculation was necessary, and that any further restrictions beyond Local Law 58’s program modifications would stifle all development in the City.\textsuperscript{227} In light of Lopez’s proposed changes, even the Real Estate Board of New York turned to back the City Council bill, as did parties from the other side—including some affordable housing advocates who feared that Lopez’s proposals would encumber smaller developers too much.\textsuperscript{228}

2. The Outcome of Negotiations—A Revised 421-a Program

In the end, the New York State Legislature endorsed many sections of Local Law 58, including eliminating the negotiable certificate program and 25-year as-of-right benefits, creating the Affordable Housing Fund, and capping the maximum amount of incentives a project was eligible to receive.\textsuperscript{229} Notwithstanding the strong indications from Lopez that the Legislature wanted significantly stronger 421-a reforms, what eventually emerged was legislation that melded the City Council’s law with parts of Lopez’s vision, a compromise to ensure passage of the bills.\textsuperscript{230}

\textsuperscript{227} As the Commissioner for the City’s Department of Housing Preservation and Development asserted, “We agree we need low-income housing, but we need more middle-income housing. . . .” Id. Critics who claimed that revisions to 421-a would stifle development essentially used the same threat that they had in 1985—that any additional limitations on development in the City would scare off any further development. See supra, note 96 and accompanying text.

\textsuperscript{228} See id.

\textsuperscript{229} See generally, N.Y. REAL PROP. TAX LAW § 421-a (McKinney 2007).

a. Exclusion Zone Expansion

Although the Legislature declined to adopt a City-wide expansion of the exclusion zone, it did greatly extend the zone to more neighborhoods than were proposed by the City Council, more than doubling the areas in the City where the 421-a laws affirmatively apply. In these areas, developers are now obligated to create at least 20% on-site affordable housing if they wish to build there and can no longer opt for negotiable certificates instead. Outside of the zone, however, there is still no mandate to create affordable units, and market-rate units rent level is still determined by the prevailing rates in the area. As explained by Lopez,

What we’ve done is expanded those 421-a zones to fifteen more communities, eight more than the City Council excluded. [Many] people strongly objected to the [broader] City-wide [proposal] because they didn’t want to use the concept of tax benefits as a way of mandating affordability. [In turn, the zone, once only in Manhattan, was expanded such that now] every borough has a program. [Community


232 N.Y. REAL PROP. TAX LAW § 421-a(7)(f) (McKinney 2007).

233 See NEW YORK CITY LOCAL LAW No. 58 §§ 1-2 (2006); N.Y. REAL PROP. TAX LAW § 421-a(11) (McKinney 2007), which legislate the exclusion zones. Outside of these areas, though, there is no mandated affordability restriction.
Boards] picked areas that were prime for gentrification [in order] to slow it down [and to] be inclusive of working class people.\textsuperscript{234}

\textit{b. New Income Eligibility Restrictions}

In line with the City Council’s law and Lopez’s goals, the eligibility level for the 20\% on-site affordable housing units built within the expanded exclusion zone was modified; now, income levels are dependent on whether other government subsidies are involved in the project.\textsuperscript{235} Developers within the zone seeking 421-a benefits who build a project without any government assistance are obligated to reserve at least 20\% of their units as affordable for families earning 60\% AMI. However if those developers build a project with at least twenty-five units and receive “substantial assistance of grants, loans or subsidies from any federal, state or local agency,” they are allowed to raise the income eligibility level of the affordable units to an average of 90\% AMI.\textsuperscript{236} Developers with substantial government assistance who build a project with less than twenty-five units can set income eligibility for the 20\% affordable units at no more than 120\% AMI.\textsuperscript{237}

Under the non-government assistance option, the target demographic has shifted downward, thereby allowing more families earning lower incomes to qualify for affordable units under the program.\textsuperscript{238} Whereas under prior versions of the law, only families

\textsuperscript{234} Interview with Vito Lopez, Assemblyman for the 53rd Assembly District, in Brooklyn, N.Y. (Oct. 25, 2007).

\textsuperscript{235} N.Y. REAL PROP. TAX LAW § 421-a(7)(c) (McKinney 2007), amended by S. 6446 § 1, 2008 Leg., 230th Sess. (N.Y. 2008).

\textsuperscript{236} N.Y. REAL PROP. TAX LAW § 421-a(7)(c) (McKinney 2007), amended by S. 6446 § 1, 2008 Leg., 230th Sess. (N.Y. 2008).

\textsuperscript{237} N.Y. REAL PROP. TAX LAW § 421-a(7)(c) (McKinney 2007), amended by S. 6446 § 1, 2008 Leg., 230th Sess. (N.Y. 2008).

\textsuperscript{238} Compare N.Y. REAL PROP. TAX LAW § 421-a(7)(c)(i) (McKinney 2007) (“[Rent in affordable units must be affordable to] families whose incomes at the time of initial occupancy do not exceed sixty percent [AMI] . . .”), with N.Y. REAL PROP. TAX LAW §§ 421-a(2)(a)(ii)(C), 421-a(2)(a)(iii)(D), 421-a(2)(a)(iv)(A) (McKinney 2005) (“[Rent in affordable units must] be affordable to families of low . . . income [as set by the local housing agency].”).
making up to $56,700 would qualify for an on-site affordable housing unit in a new building within the exclusion zone, that same family would no longer be eligible—income is currently capped at $42,540 for non-government assisted developments.\textsuperscript{239}

The government assistance option, though, effectively increases the average income eligibility level with respect to the affordable units, from $56,700 (80% AMI) to an average of $63,810 (90% AMI).\textsuperscript{240} This provision permits developers increased flexibility to determine income eligibility levels for affordable units.\textsuperscript{241} For instance, a developer of an 80-unit project within the exclusion zone that finances a project with substantial government assistance could obtain 421-a tax benefits by setting aside ten units for families earning $42,540 (60% AMI) and ten units for families earning $85,080 (120% AMI). As a result, families earning less are more likely to be shut out of affordable apartments under this option simply because developers are permitted to seek renters with higher incomes.\textsuperscript{242}


\textsuperscript{241} Compare N.Y. REAL PROP. TAX LAW § 421-a(7)(c)(i) (McKinney 2007), amended by S. 6446 § 1, 2008 Leg., 230th Sess. (N.Y. 2008) (“[T]wenty percent of the units [must be affordable to] families whose incomes . . . do not exceed [60% AMI].”), with N.Y. REAL PROP. TAX LAW § 421-a(7)(c)(ii)(A) (McKinney 2007), amended by S. 6446 § 1, 2008 Leg., 230th Sess. (N.Y. 2008) (“[If construction] is carried out with substantial assistance of grants, loans or subsidies from any federal, state or local agency . . . twenty percent of the units [must be affordable to] families whose incomes . . . do not exceed [120% AMI] and, where the multiple dwelling contains more than twenty-five units, do not exceed an average of [90% AMI] . . . .”).

\textsuperscript{242} Id. Regrettably, a developer building with government assistance can entirely circumvent families earning incomes in the lower ranges and still meet the requirement to obtain tax benefits. For example, a developer building a 20-unit project could set aside four units at $85,080 (120% AMI) and satisfy the provision. N.Y. REAL PROP. TAX LAW § 421-a(7)(c)(i) (McKinney 2007), amended by S. 6446 § 1, 2008 Leg., 230th Sess. (N.Y. 2008). Similarly, a developer building a 100-unit project could meet the provision simply by setting aside twenty units at $63,810, which equates to an average of 90% AMI. N.Y. REAL PROP. TAX LAW § 421-a(7)(c)(ii)(A) (McKinney 2007), amended by
Contrary to initial indications, the HUD-defined AMI was wholly preserved in the new version of the 421-a program.\textsuperscript{243} It was argued that the State Legislature lacked authority to narrow the scope to the desired neighborhood or even City level because the regional AMI calculations are a “federal standard that’s used across the country [and the] federal government picks those areas and... applies them.”\textsuperscript{244} Without the apparent authority to restructure AMI itself, proponents of setting the level at 60% AMI asserted that the move would effectively create the same outcome by expanding affordable housing to families earning incomes lower than prior versions of the program.\textsuperscript{245} As a result, the AMI level was effectively modified in an attempt to achieve the same outcome as shifting to a more localized AMI calculation—targeting families earning incomes at the lowest levels. That said, the substantial government assistance option only seems to partially target such families because developers can spread income levels for affordable units across a wider, and wealthier, spectrum.\textsuperscript{246}

c. \textit{Extended Rent Stabilization Period}

The new 421-a amendments also stabilize the rents for affordable units for thirty-five years\textsuperscript{247} even though the tax incentives for developers expire at least ten years before that time.\textsuperscript{248} This provision significantly lengthens the period of rent

\begin{footnotesize}
\begin{enumerate}
\item S. 6446 § 1, 2008 Leg., 230th Sess. (N.Y. 2008).
\item See generally, N.Y. REAL PROP. TAX LAW § 421-a (McKinney 2007) ("area median income" cited throughout).
\item Public Hearing, supra note 49, at 54–55 (statement of Shaun Donnovan, HPD Commissioner).
\item Public Hearing, supra note 49, at 59 (statement of Hakeem Jeffries, Assemblyman for the 57th Assembly District).
\item N.Y. REAL PROP. TAX LAW §421-a(7)(c)(ii)(A) (McKinney 2007), amended by S. 6446 § 1, 2008 Leg., 230th Sess. (N.Y. 2008). This provision allows for affordable units to be, on average, 90% AMI for buildings with 25 units or more. Id.
\item N.Y. REAL PROP. TAX LAW §§ 421-a(2)(a)(ii), 421-a(2)(a)(iv)
\end{enumerate}
\end{footnotesize}
stabilization; in the past, rent stabilization simply ended when the tax incentive period ended. 249 “Prior to this,” Lopez observed, “only the Mitchell-Lama [affordable housing] program had a longer [rent stabilization] period of twenty-five years.” 250 As a result, developers receiving 421-a tax benefits may not increase the rent for almost double the amount of time that they could before. 251 This will create additional wealth for families earning low-income wages in the form of reduced rent burdens over time. 252

d. Community Preference Provision

Also included in the finalized amendments is a provision demonstrating strong preference for those currently living in neighborhoods with new 421-a construction to have preferential treatment for housing instead of simply being priced out of the area. 253 Now, within the expanded exclusion zone, “residents of the local community shall have priority for the purchase or rental of fifty percent of the affordable units.” 254 As Lopez has explained, “if you build 100 units in Bushwick, twenty of the units [must be designated] affordable. Half [of those, or ten units] must come from community. You sort of become a stakeholder if you live in the community,” 255 and this provision works to retain some of those stakeholders in the neighborhood by ensuring some units are set aside for pre-existing community members.

(McKinney 2007).

249 See N.Y. REAL PROP. TAX LAW § 421-a(2)(f) (McKinney 2005).
250 Interview with Vito Lopez, supra note 234.
252 See supra note 13 and accompanying text.
254 N.Y. REAL PROP. TAX LAW § 421-a(6)(d) (McKinney 2007). It is important to note that there is no oversight mechanism created by the new legislation. It is unclear how exactly the City will monitor and enforce this community preference ideal.
255 Interview with Vito Lopez, supra note 234.
e. Prevailing Wage Preservation

An important and novel addition to the 421-a program was in the area of wages for building service employees working in buildings receiving 421-a tax incentives.\textsuperscript{256} Aside from of the program’s focus on affordable housing, an associated concern was that “while 80[\%] of building service workers across the City earn a prevailing wage, only 50[\%] of such workers at buildings receiving 421-a benefits do.”\textsuperscript{257} As City Comptroller William Thompson described this divergence, “I think it is wrong for taxpayers to assist projects like these where workers earn wages that are barely livable.”\textsuperscript{258}

Section 8(b) of the new 421-a provides that in buildings with fifty or more units, “all building service employees employed at the building . . . shall receive the applicable prevailing wage for the duration of the building’s tax exemption.”\textsuperscript{259} Under this provision, all “building service employees” working in 421-a buildings must be paid the prevailing wage for that specific type of work.\textsuperscript{260} As a previous study determined, a “prevailing wage requirement [will] boost the annual wages with benefits included for a building service

\textsuperscript{256} See N.Y. REAL PROP. TAX LAW § 421-a(8)(b) (McKinney 2007).
\textsuperscript{258} Id.
\textsuperscript{259} N.Y. REAL PROP. TAX LAW § 421-a(8)(b) (McKinney 2007). The prevailing wage provisions do not apply in buildings with less than 50 units, or in buildings where at initial occupancy at least 50\% of the units are deemed affordable to families earning less than 125\% AMI ($88,625). N.Y. REAL PROP. TAX LAW § 421-a(8)(c) (McKinney 2007).
\textsuperscript{260} “Building service employees” are defined broadly as “any person who is regularly employed at a building who performs work in connection with the care or maintenance of such building.” N.Y. REAL PROP. TAX LAW § 421-a(8)(a)(i) (McKinney 2007). This may include “watchman, guard, doorman, building cleaner, porter, handyman, janitor, gardener, groundskeeper, elevator operator and starter, and window cleaner.” § 421-a(8)(a)(i). “Prevailing wages” refers to the going in-state wage rate for building service employees working in different capacities. See N.Y. REAL PROP. TAX LAW § 421-a(8)(a)(ii) (McKinney 2007).
worker from approximately $36,500 to over $47,400 [in order to] cover basic [family] needs such as food, housing and child care.”

As Lopez explained, “We [have] created a precedent for prevailing wages. We fought for fifty units; the City wanted 100 units.” Notably, the City’s 100-unit proposal, “would have [only] created 350 prevailing wage jobs . . . . [S]ince most of the [421-a] buildings [range from] 60–80 units, they all would have been exempt [from the] prevailing wage provision.” Instead, “[at the fifty unit level,] we will create 1,500 prevailing wage jobs . . . .”

f. Disparate Treatment for One Developer

Shortly before the amendments were ready to be voted upon, one extra provision was added to the new state legislation. The provision initially stated in part that:

[A] project that includes at least twenty-five hundred dwelling units . . . shall be eligible for benefits . . . notwithstanding paragraph (f) of subdivision seven of this section if in the aggregate twenty percent of the units . . . are affordable to . . . families [whose average] incomes do not exceed . . . seventy percent of the area median incomes.”

In effect, this section operated to create a significant loophole around the on-site and income eligibility provisions placed on exclusion zone developments elsewhere in the bill.

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262 Interview with Vito Lopez, supra note 234.

263 Id.


265 N.Y. REAL PROP. TAX LAW § 421-a(13) (McKinney 2007) (emphasis added).

266 N.Y. REAL PROP. TAX LAW § 421-a(2)(f) (McKinney 2007); N.Y. REAL PROP. TAX LAW § 421-a(7)(c)(1) (McKinney 2007).
Instead of on-site affordable housing, this section only required affordable housing “in the aggregate” over the project.\textsuperscript{267} By contrast to other developments that did not fit under this extra provision, the addition of these three words allowed a project falling under this provision to obtain tax incentives for the entire project, even if affordable units were only in some of the project’s buildings.\textsuperscript{268} This creates the potential for a sprawling, largely market-rate unit project, with a segregated section for affordable units, ultimately benefiting those with higher incomes (as well as the developer).\textsuperscript{269}

Further complicating matters, income eligibility levels for a project under this provision were loosened to 70% AMI, up from 60% AMI for all other similarly situated developments.\textsuperscript{270} In turn, rents could be 10% higher in an applicable development than in other 421-a developments.\textsuperscript{271} As a result, the tax exemptions could have been worth as much as $300 million in real estate tax exemptions and increased rent to a developer whose project fit the provision.\textsuperscript{272}

Interestingly, special interests appear to be involved in this dramatic new change to the 421-a amendments. Given the specific wording of the above section, this special exemption only applies to one large, high-profile development project already considered controversial by some due to its comparative size,\textsuperscript{273} public cost,\textsuperscript{274}

\textsuperscript{267} N.Y. REAL PROP. TAX LAW § 421-a(13) (McKinney 2007).
\textsuperscript{268} Id.
\textsuperscript{269} Id. This provision would also logically lead to socio-economic segregation within the project as well. \textit{See id.}
\textsuperscript{270} Compare N.Y. REAL PROP. TAX LAW § 421-a(7)(c) (McKinney 2007), with N.Y. REAL PROP. TAX LAW § 421-a(13) (McKinney 2007).
\textsuperscript{271} Compare N.Y. REAL PROP. TAX LAW § 421-a(7)(c) (McKinney 2007), with N.Y. REAL PROP. TAX LAW § 421-a(13) (McKinney 2007).
\textsuperscript{273} When completed, Atlantic Yards will be comprised of a “basketball arena and 16 towers containing 6,860 apartments on 22 acres in Prospect Heights . . . .” David Lombino, \textit{Pressure Mounts to Curb the Size of Atlantic Yards}, N.Y. SUN, Aug. 29, 2006, at 1. Renowned architect Frank Gehry is also planning the project. Cohen, \textit{Earlier, supra} note 264.
potential environmental impact, and its use of eminent domain to secure land for construction the Atlantic Yards Project under development in Prospect Heights, Brooklyn by Forest City Ratner Companies.

Surely, Lopez later downplayed charges of favoritism by claiming that the provision was not the real concern of critics. According to Lopez, Ratner “really wasn’t the issue, the real issue was income [levels to determine affordability] and [the expansion of] geographical areas, but the smokescreen was Ratner because it [was] a hot item.” Nevertheless, some former allies and supporters of the bill thought otherwise. The reaction to what was soon dubbed the “Ratner Carve Out” was swift and full of indignation. For instance, Assemblyman Hakeem Jeffries, a one-time supporter of the Atlantic Yards project, declared that a “tax break available only to the developer, was ‘offensive’ because it promoted ‘economic segregation.’” Mayor Bloomberg asserted

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278 In fact, Lopez received over $6,000 in campaign contributions in his latest re-election bid for his Assembly seat from Michael Ratner and Karen Ranucci, brother and sister-in law of Forest City Ratner Companies’ CEO Bruce Ratner. Cohen, Earlier, supra note 264. However, in light of the complexity and breadth of the law’s legislative history and full circumstances of its passage, it is hard to conclude that such a small sum directed to one candidate was the entire, or even primary, impetus for inserting the provision.

279 Id.

280 Assemblyman Jeffries went on to state, “enough subsidy has already been given to this developer. There’s absolutely no reason to treat this project
that the carve-out would “hurt the very people that everybody talks about helping and gives some tax breaks to a developer that doesn’t need them and which we didn’t have to do.”

In the face of this mounting pressure, the extent of the Ratner carve-out was revised. While the income level for affordable units within the Atlantic Yards project remained at the higher threshold of 70% AMI, two conditions now applied as a stop-gap compromise, with the promise of further revisions in a subsequent amendment: the project’s tax-exempt period was reduced, and affordable units were mandated to be built concurrently with market-rate units.

Thus, the 421-a amendments passed unanimously and the bill was signed into law. In his approval message, Governor Spitzer cautioned that while he “share[d] the Legislature’s desire to accelerate affordable housing production and slow . . . gentrification[,] he also share[d] New York City’s concerns about the impact of these three bills . . . on the level of subsidies for the Atlantic Yards project.” Spitzer continued, “Fortunately, the Legislature has agreed to further amend these

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281 Mayor Bloomberg added that he could “only hope that the Governor stands up and vetoes” the bill. Cohen, Bloomy, supra note 272. “Even Bertha Lewis of [the community reform organization] ACORN, a Ratner ally who is contractually barred from saying anything negative about the project, said that a state tax reform bill that exempted Ratner—and only Ratner—was ‘bad public policy.’” Editorial, The Ratner Clause, BROOKLYN PAPER, June 30, 2007, available at http://www.brooklynpaper.com/stories/30/26/30_26editorial.html.

282 See N.Y. REAL PROP. TAX LAW § 421-a(13) (McKinney 2007), amended by A. 9293 § 6, 2007 Leg., 230th Sess. (N.Y. 2007) (mandating that buildings with on-site affordable housing shall be eligible, provided that 20% of the units in any given building “are affordable to and occupied or available for occupancy by individuals or families the average of whose incomes at the time of initial occupancy do not exceed [70% AMI]”); Governor Spitzer, Approval Memorandum No. 40 Chapters 618, 619, 620, Memorandum filed with Assembly Bill Number 4408-A (2007), available at http://public.leginfo.state.ny.us/menugetf.cgi (type “A4408” in “Bill number” box, follow “Approval No. 40 of 2007” hyperlink).

three bills with swift passage of . . . A.9373/S.6446.\footnote{Governor Spitzer, Approval Memorandum No. 40 Chapters 618, 619, 620, Memorandum filed with Assembly Bill Number 4408-A (2007), available at http://public.leginfo.state.ny.us/menugetf.cgi (type A4408 in “Bill number” box, follow “Approval No. 40 of 2007” hyperlink).}

A.9373/S.6446 was ultimately passed in early 2008.\footnote{S. 6446 § 7, 2008 Leg., 230th Sess. (N.Y. 2008).} In many ways, the amendment directly responded to the concerns of those who had opposed the Ratner Carve Out: affordability levels within Atlantic Yards are now mandated to be exactly the same as for other developers working with other sources of government funding, i.e., 20% of units affordable at an average of 90% AMI.\footnote{Compare N.Y. REAL PROP. TAX LAW § 421-a(13) (McKinney 2007) (“[Benefits granted] if in the aggregate twenty percent of the units in such development are affordable to . . . families whose incomes . . . do not exceed [60% AMI].”), with S. 6446 § 7, 2008 Leg., 230th Sess. (N.Y. 2008) (“[Benefits granted if affordable housing requirements are met] in the aggregate for each successive fifteen hundred units of the project rather than for each multiple dwelling containing such fifteen hundred units and in the aggregate for the entire project rather than for each multiple dwelling in the project.”).} Further, affordable units are required to be available in the same buildings as market-rate apartments, precluding the possibility that those units would be segregated to certain buildings within the larger development.\footnote{N.Y. REAL PROP. TAX LAW § 421-a(13)(a)(iv) (McKinney 2007), amended by S. 6446 § 7, 2008 Leg., 230th Sess. (N.Y. 2008) (“[Benefits only go to] units in which, in the aggregate for each successive fifteen hundred units of the project rather than for each multiple dwelling containing such fifteen hundred units and in the aggregate for the entire project rather than for each multiple dwelling in the project.”) (emphasis added).} Additionally, certain amounts of affordable units now must be built during each phase of construction, which ensures that affordable units will be built as construction progresses rather than just towards the conclusion of the project.\footnote{N.Y. REAL PROP. TAX LAW § 421-a(13) (McKinney 2007), amended by S. 6446 § 7, 2008 Leg., 230th Sess. (N.Y. 2008) (“The period of tax}

A closer reading of the new amendment, however, still evinces special interests at work. Those buildings within Atlantic Yards that contain 20% affordable units are eligible for twenty-five years of tax benefits.\footnote{Astoundingly, buildings within Atlantic Yards}
that do not meet this 20% affordability mandate are nevertheless eligible to receive tax benefits for fifteen years. As a result, while other developers are barred from receiving this fifteen-year tax benefit if they do not meet 421-a requirements, those portions of Atlantic Yards that do not comply with this provision are still entitled to receive tax such benefits. This extra period essentially translates into hundreds of millions of dollars for Ratner that other developers are simply not eligible for.

III. ANALYSIS OF THE 421-A PROGRAM AMENDMENTS

“The original bill [I proposed was] my overall goal,” reflected Assemblyman Lopez, “[but] the reality was I could have stopped [affordable] housing totally by having the bill vetoed and then there would be nothing . . . . There is a role for the tax breaks, but not at the expense of affordable housing.” Even with legislative compromises, there is little doubt that the amendments expand the commitment to affordable housing when compared to prior versions of the law. The new 421-a program decidedly points toward a greater equalization of the existing disparities between the program’s twin goals of housing development and affordable housing construction and among its three policy objectives of decent shelter, wealth creation, and efficient use of public funds. The exclusion zone has been expanded to encompass more neighborhoods, mandating on-site affordable units in more locations across the City and curbing runaway profits for market-rate

benefits awarded to such multiple dwelling shall be the same as the period of tax benefits awarded under clause (A) of subparagraph (iii) of paragraph (a) of subdivision two of this section,” but parts of the project that do not meet general requirements can still receive benefits that are “the same as the period of tax benefits awarded under clause (A) of subparagraph (ii) of paragraph (a) of subdivision two of this section.”

291 Id.
292 Interview with Vito Lopez, supra note 234.
293 CHPC, ENHANCE, supra note 43, at 5.
294 See Byrne & Diamond, supra note 13, at 531.
developers. In a similar vein, the negotiable certificate program has been eliminated in lieu of requiring on-site affordable units.

Further, the eligibility levels with respect to AMI have been somewhat reduced, thus ensuring that the program is more directly tailored to help New Yorkers with lower income levels. This target population now has a greater opportunity to retain more of their earnings as affordable housing will allow them to pay closer to 30% of their income toward housing, instead of the 40-50% or more that many did under the previous version of the program. As an additional wealth creation facet of the new 421-a program, the prevailing wage provision will arguably help to ensure that these employees earn comparable wages. The amended program will thus be useful in enabling the City to realize Mayor Bloomberg’s plan to “create and preserve 165,000 units of

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295 See N.Y. REAL PROP. TAX LAW §§ 421-a(11); 421-a (7)(f); 421-a (9)(c) (McKinney 2007).
296 See N.Y. REAL PROP. TAX LAW § 421-a(7)(f) (McKinney 2007).
298 Compare N.Y. REAL PROP. TAX LAW § 421-a(7)(c) (McKinney 2007), amended by S. 6446 § 1, 2008 Leg., 230th Sess. (N.Y. 2008) (providing tax benefits either if 20% of units are rented to families earning 60% AMI, or, if the developer finances the project with government assistance, if 20% of units are rented to families earning an average of 90% AMI), with N.Y. REAL PROP. TAX LAW § 421-a(2)(a)(ii) (McKinney 2005) (providing tax benefits if 20% of units are rented to families earning 80% AMI). The extra savings for these families comes from the fact that the base rent for affordable units is now, under the non-government assistance option, 30% of 60% AMI ($12,762), instead of 30% of 80% AMI ($17,016). No doubt, though, this change comes with a cost, as eligibility to those earning over the 60% limit is eliminated, thus precluding those families earning more than $42,540 from obtaining affordable housing under this particular program. See id. Further, the option for developers to finance projects through government assistance arguably leaves families earning low-income wages in a worse off position than they were under the old version of the program. N.Y. REAL PROP. TAX LAW § 421-a(7)(c) (McKinney 2007), amended by S. 6446 § 1, 2008 Leg., 230th Sess. (N.Y. 2008). Under this provision, developers are permitted to seek families earning on average $63,810 (90% AMI). See supra notes 235–42 and accompanying text.
299 See N.Y. REAL PROP. TAX LAW § 421-a(8) (McKinney 2007).
affordable housing” for 500,000 New Yorkers by 2013. Notwithstanding these improvements, the new legislation begs the same fundamental question as before in light of the dramatic changes in the City’s economic vitality over the past 35 years, the current landscape of the City’s real estate market, and the program’s lackluster track record relative to affordable housing: whether the program’s trade-off of uncollected tax revenues for increased affordable housing construction is now an optimal one. Touting the legislation’s comparative improvements skirts the issue; such assertions are hardly conclusive that the amendments actually ensure effective use of public funds in the best manner possible or even to a meaningful extent.

A. Decent Shelter

1. No Quantifiable Performance Targets

One way to examine 421-a’s impact is by focusing on the amount of affordable units created under the program for a given period of time. Such analysis in the past has taken three factors into account: 1) the number of affordable units built under the program; 2) the total number of units built under the program; and 3) the total number of units built City-wide. This method is a straightforward way of showing how much “decent shelter” the program provides.

One reason that previous attempts to measure the effectiveness of the 421-a program have been so complicated is that there were no specific performance metrics to serve as benchmarks for whether or not the program was effective. Unfortunately, the

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301 See supra notes 116–62 and accompanying text.
302 IBO, FISCAL, supra note 44, at 4.
303 Byrne & Diamond, supra note 13, at 532.
304 Compare N.Y. REAL PROP. TAX LAW § 421-a(10)(a) (McKinney 2007) (outlining monitoring procedures for the program, but no specific goals or
new legislation does not address this basic problem. When asked what successful results for the 421-a program would look like, Assemblyman Lopez replied, “You will find thousands of units that have 20% [on-site affordable housing units].”305 This response, coupled with legislative silence as to a quantitative goal,306 illustrates the lack of any specific, publicly defined benchmarks or methodologies for which to meaningfully weigh results. In a data-oriented era of accountability, a program that stands to cost the public so much money but lacks adequate tools to measure it is difficult to defend.

Absent quantifiable performance targets, it is, and will continue to be, virtually impossible to determine whether the 421-a program is efficient. As long as some indeterminate amount of affordable housing is built, supporters of the program will publicize the program’s success, and opponents will claim that the program is a failure. Such post hoc rationalization prevents politicians, and the public, from accurately measuring the program’s success; it only fosters unfocused and ultimately unsupported debate on whether the number of affordable units built exceeded, met, or fell short of expectations. Unless and until there are clear performance goals, it will also continue to remain unclear whether the program is meeting expectations in terms of efficiently using public funds.307

305 Interview with Vito Lopez, supra note 234.
306 See generally, N.Y. REAL PROP. TAX LAW §421-a (McKinney 2007); NEW YORK CITY, CODE § 11-245.1(d) (2007). No quantifiable goals exist in either the state or the local law.
307 See A REPORT TO FEDERAL EMPLOYEES supra note 304, at 1.
2. A Weak Yet Rigid Market/Affordable Mix Mandate

The modified 421-a program continues to promote a rigid policy that imposes a strict building-mix percentage of affordable-housing to market-rate-apartments with no flexibility. Significantly, maintaining the 80% market/20% affordable mix makes it impossible to maximize the potential to create decent and affordable shelter as compared to other proposals advanced by affordable housing advocates and some members of the City Council.308 Approximately 92,000 units were built under 421-a between 1985 and 2006; roughly 4,900 of these were deemed affordable.309 Given the on-site provision now in place, if another 92,000 units were hypothetically built under new program, 18,400 (20%) affordable units would be produced.310

By contrast, a more forceful program that mandated 30% affordable units within the exclusion zone would produce 27,600 affordable units. Alternatively, even a flexible tax incentive program that provided developers with increased incentives for developing over the minimum standard of 20% would have likely yielded more than 18,400 units.311 Instead, the new program eschews both more stringent and more flexible standards, opting instead for the identical, unyielding 80% to 20% mix of market- and affordable-rate units as before. In failing to reflect either of the alternative options, the legislation essentially precludes the possibility that developers might tailor their projects to include more affordable units.312

308 See supra notes 133–36, 139–40, 152–53, 155–56 and accompanying text.
310 See N.Y. REAL PROP. TAX LAW § 421-a(7)(f) (McKinney 2007) (mandating on-site units in order to receive 421-a tax benefits).
311 See CHPC, ENHANCE, supra note 43, at 8–9.
312 Id. For example, allowing developers the flexibility to increase the proportion of affordable units to 40% in exchange for increasing the maximum allowable household income of renters could result in higher levels of affordable housing while simultaneously allowing developers to maintain their profit margins.
3. An Unfunded Affordable Housing Fund?

On its face, the addition of an Affordable Housing Fund sounds like a fair replacement for a negotiable certificate program that benefitted market-rate developers far more than off-site affordable housing developers. According to Councilmember Yassky, though, the Fund is “nothing but smoke and mirrors” and is “utterly without substance.” Yassky pointed out, “and this [supposedly new] commitment only means that the City will spend at least this—[absolutely] not $400 million over and above what we already spend. Where is the additional $400 million?” Indeed, there is no additional funding; the Fund merely re-commits funds for affordable housing that were already earmarked for promoting affordable housing.

Moreover, not only has the money not yet been allocated according to the criteria outlined above, but also there is no statutory timeline in which the money in such a Fund would be spent or replenished. For instance, if money from the Fund is stretched out over many years, the amount of affordable units built from the Fund in a given year could be less than what could be built using negotiable certificates. Alternatively, if a large portion of the Fund is initially used on a limited group of affordable housing projects, there is nothing to assure that there will continue to be

313 Telephone Interview with David Yassky, New York City Council Member for the 33rd Council District, in Manhattan, N.Y. (Nov. 16, 2007).
314 Id. Such HPD-administered programs that promote affordable housing include the Section 8 Program; Mitchell-Lama Housing; Low Income Housing Tax Credits; and the Low Income Affordable Marketplace Program. See Department of Housing Preservation and Development Home Page, http://www.nyc.gov/html/hpd (last visited Apr. 14, 2008).
315 Telephone Interview with David Yassky, supra note 313.
316 NEW YORK CITY, CHARTER § 1805(1-2) (2006). (“[T]he commissioner shall be authorized to establish or cause to be established an affordable housing trust fund . . . such fund may be established through agreement with a public benefit corporation authorized pursuant to the private housing finance law to finance the development and rehabilitation of affordable housing.”).
317 Interview with Vito Lopez, supra note 234.
318 See NEW YORK CITY LOCAL LAW No. 58 § 9 (2006).
money in the Fund in the future.\textsuperscript{319}

The consequence of an unfunded Affordable Housing Fund is that the Fund will likely provide for little more than what was built through the negotiable certificate program.\textsuperscript{320} This suggests that in addition to the Fund being under-funded, the money, if allocated, runs a high risk of being even less cost-efficient than the older version of the certificate program. According to Yassky, it may be better to either revise the negotiable certificate program so that developers are required to purchase a certain amount of off-site certificates if they chose to develop within the exclusion zone, or regulate the certificate system and enforce a substantially higher price.\textsuperscript{321}

\textbf{B. Wealth Creation}

\textit{1. Setting Tax Incentives for Developers as the Default}

Despite the substantive policy alterations to the 421-a program since 1971,\textsuperscript{322} the underlying conceptual framework has not been significantly changed by any new legislation. The statute’s default position still holds that real estate developers have a right to tax exemptions when building in the City.\textsuperscript{323} This default position is

\textsuperscript{319} NEW YORK CITY LOCAL LAW No. 58 § 9. Absent from the law is any mechanism to replenish whatever money may be first established in the Fund, such as devoting property tax payments from developers who chose not to take advantage of 421-a to replenishing the Fund. NEW YORK CITY LOCAL LAW No. 58 § 9.

\textsuperscript{320} Telephone Interview with David Yassky, supra note 313.

\textsuperscript{321} Id. Indeed, Yassky’s counter to the removal of the negotiable certificate program has merit only if the City devises a way to administer the negotiable certificate program, instead of allowing a private market to govern the sale and purchase of certificates.

\textsuperscript{322} See supra notes 75–115 and accompanying text.

\textsuperscript{323} N.Y. REAL PROP. TAX LAW § 421-a(7)(a)(ii) (McKinney 2007) (outlining the various “geographic exclusion areas” within the City). The continued existence of these exclusion areas—essentially sections of the City where developers must meet certain affordable housing obligations in order to receive tax benefits—shows that the default scenario for purposes of the 421-a
perhaps best evidenced by the so-called “exclusion zone”—only within its boundaries are developers excluded from receiving the as-of-right tax benefits unless they meet certain criteria.\(^{324}\) Outside the zone, though, developers still receive benefits as-of-right.\(^{325}\)

This illustrates a built-in fear that if the default position is shifted, developers will simply not build because profits will not be high enough.\(^{326}\) However, the premise that tax incentives are necessary to entice developers to build in the City is flawed. Given the lack of housing in the City\(^{327}\) and the constant, rapid population growth,\(^{328}\) it appears equally likely, if not more so, that the market itself would generate development. As Assemblyman Lopez suggested, “because the growth in population is so high [and there is] limited land, [developers] will build no matter what.”\(^{329}\)

Indeed, the majority of buildings constructed between 1985 and 2006 were built outside of the 421-a program.\(^{330}\) Given a more restrictive current program, it is unlikely that developers will now decide to build within the program.\(^{331}\) Even if there were City-wide requirements for the use of 421-a, it is still quite likely that the potential profits to developers would be large enough that they would continue to build even without the tax incentive and with some provisions of affordability. In fact, some large cities, including Los Angeles and Seattle, demonstrate a more aggressive approach to affordable housing through their development policies.

\(^{324}\) Interview with David Yassky, New York City Council Member for the 33rd Council District, in Manhattan, N.Y. (Oct. 5, 2007).

\(^{325}\) See N.Y. REAL PROP. TAX LAW § 421-a(7)(a)(ii) (McKinney 2007). Since this section delineates areas where developers cannot receive tax benefits without providing affordable housing, the parts of the City not covered by this section are therefore still fair game for developers to receive benefits as-of-right, without meeting any affordable housing criteria, should they choose to develop there.

\(^{326}\) See supra note 96 and accompanying text.

\(^{327}\) See supra notes 8–9 and accompanying text.

\(^{328}\) See supra note 8.

\(^{329}\) Interview with Vito Lopez, supra note 234.

\(^{330}\) See 2007 HSR, supra note 53, at 16.

\(^{331}\) See supra notes 117–20 and accompanying text.
without hurting their housing markets.\textsuperscript{332}

For example, in Los Angeles, California, there is no as-of-right tax exemption for new development, and it only applies “for 100% affordable housing development owned by not-for-profits.”\textsuperscript{333} Similarly, Seattle, Washington, statutorily compels developers to build between 20% and 30% affordable units across the city.\textsuperscript{334} Neither of these cities has seen decreased development because of such aggressive approaches.\textsuperscript{335} Subsequently, if developers in these cities do not need additional inducements to build housing, it is hard to justify 421-a on the basis of either general development or affordable housing.

2. The Exclusion Zone’s “Halo” Effect

Along with leaving the 421-a program in the pro-developer default position, an additional concern implicit in the new amendments is the effect on neighborhoods that fall on the edge of the exclusion zone. Failing to enact a City-wide exclusion zone has another consequence with respect to wealth creation, albeit an unintended one. As a result of the exclusion boundaries, a “halo” on the outer edge of some areas\textsuperscript{336} adjacent to the exclusion zone has formed, where developers, in addition to current landlords, are not bound by 421-a’s mandates and so could ostensibly fetch increasingly higher market-rate rents due to gentrification.\textsuperscript{337} In

\textsuperscript{332} PRATT, UNDERSTANDING, supra note 34, at 6.
\textsuperscript{333} Id. As such, developers who develop market-rate units are simply not eligible for tax exemptions; the exemption is only available for not-for-profit developers who pledge that all of the units in a project will be affordable. Id.
\textsuperscript{334} Id.
\textsuperscript{335} Id.
\textsuperscript{336} See supra note 204 and accompanying text. Some of these areas experiencing this “halo” effect include sections of Williamsburg and Greenpoint in Brooklyn and Long Island City in Queens.
\textsuperscript{337} See N.Y. REAL PROP. TAX LAW § 421-a(7)(a)(ii) (McKinney 2007); See also Laura Wolf-Powers, Pratt Center for Community Development, Why Job-killing Rezonings Don’t Make Sense: A Response to the Manhattan Institute, June 2005, http://www.prattcenter.net/pol-response.php (“[In the context of the Greenpoint-Williamsburg rezoning process,] the spillover effects of new market-rate development in any particular such neighborhood are difficult to estimate,
TEACHING AN OLD POLICY NEW TRICKS

...long-time community residents in these areas face the prospect of being forced out of their neighborhoods even though the purpose of 421-a is to help families earning low-and moderate-incomes. To be sure, it is one thing to provide affordable housing, but quite another to mandate that developers should be precluded from increased housing for more new people in the City. That said, incentivizing such development by allowing developers to take advantage of tax benefits and high rents in these areas stands in direct contradiction to the goals of the 421-a program.

As Assemblyman Lopez explained, the Legislature “picked areas that were being gentrified [to be included in the zone], parts of Williamsburg [for example]. Right now, as-of-right, they get a tax break right next door” in an area adjacent to the exclusion zone due to the lack of affordability provisions for areas nearby the exclusion zone. “They rent [apartments for] $3000, $4000, $5000 a month all throughout Williamsburg. Over 25 years, [developers] are getting up to $100 million [in tax incentives], and I think that is outrageous. It is really maximizing profits versus coming back with a decent return.”

While the exclusion zones mandate affordability standards, the edges of the zones do just the opposite. Developments within the Williamsburg-Greenpoint exclusion zone, for instance, force drastic change on the out-of-zone waterfront, encouraging robust development which is not restricted by 421-a, and further stands to adversely affect the upland areas of Williamsburg and Greenpoint as well, which are quickly becoming more and more populated with new and wealthier residents. Martin Needelman, the Project Director of Brooklyn Legal Services Corporation A, observed, “As more market-rate housing becomes available on the waterfront, current upland landlords are looking to maximize their profits,”

but . . . the city’s Environmental Impact Statement projected that 2,510 people could be subject to secondary displacement, a figure that activists on the ground critiqued as far too low.

338 See supra note 30 and accompanying text.
339 Id.
340 Interview with Vito Lopez, supra note 234.
341 Id.
342 See supra notes 143–45 and accompanying text.
even if it means pressuring existing long-term low-income tenants to move out of their apartments at the conclusion of their leases, or using similar schemes to force them out before their lease is up.\textsuperscript{343} “This is a situation where supply is actually driving demand. Waves of émigrés from Manhattan” are willing and able to pay more than what residents of low- or moderate-income housing can afford, and developers and landlords are similarly willing and able to increase their profit margin by driving up rents on non-421-a buildings within the exclusion zone, as well as on buildings just outside of the zone.\textsuperscript{344} “These tactics,” said Needelman, “combined with the rise of new market rate housing in the area, threaten the availability of real affordable housing” and the viability of the diverse community that has lived there for years.\textsuperscript{345}

3. \textit{Ill-Fitted AMI Calculation As Reflected By Atlantic Yards}

As with the preservation of as-of-right tax benefits for developers and the economic externalities created by the exclusion zone, the special provisions for Atlantic Yards evince an intent of the 421-a program that is not squarely in line with the rhetoric of affordable housing. Special giveaways to individual developers only undercut the program’s benefits to working-class families because they reveal the program itself to be a tool designed to disproportionately advantage developers, however superficially modified.

While the amended Ratner Clause alone is problematic, it is also equally symptomatic of a larger problem—the use of HUD’s regional AMI calculation, which includes many wealthier sections of the metropolitan area and thus artificially boosts AMI for the entire City.\textsuperscript{346} It may be difficult to decouple the City’s program from HUD’s regional AMI calculation,\textsuperscript{347} but the federal

\textsuperscript{343} Telephone Interview with Martin Needelman, Project Director, Brooklyn Legal Services Corporation A, in Brooklyn, N.Y. (July 3, 2007).
\textsuperscript{344} \textit{Id.}
\textsuperscript{345} \textit{Id.}
\textsuperscript{346} See \textit{supra} notes 60–74 and accompanying text.
\textsuperscript{347} \textit{Public Hearing, supra} note 49, at 55 (statement of Shaun Donnovan, HPD Commissioner).
government does not require the 421-a program to follow any national guidelines because it is not financed by federal money.\textsuperscript{348} Narrowing the scope of the AMI to a City-wide level ($43,434)\textsuperscript{349} or even a neighborhood-by-neighborhood level seems entirely plausible.\textsuperscript{350} Without any change in the scope of the AMI calculation, though, the program remains poorly tailored to the actual City-wide AMI, not to mention AMI at a borough or neighborhood level.\textsuperscript{351}

Brooklyn residents are in fact some of the least-benefited by HUD’s regional AMI calculation, as illustrated by the Atlantic Yards project. Because Brooklyn’s AMI is currently at $37,000,\textsuperscript{352} “only 40\% (900) of the affordable units would be geared to average Brooklynites.”\textsuperscript{353} For those living in the shadow of the development, those numbers drop to a mere 24\%—approximately 562 of the affordable units and 12\% of the total rental units.\textsuperscript{354} The reality is that Atlantic Yards is already being given many subsidies above and beyond 421-a.\textsuperscript{355} It is questionable why Atlantic Yards

\textsuperscript{348} 421-a is a combination of state and local legislation, and no city or state funds are used because of the very nature of the program—the provision of tax benefits to developers, in the form of tax exemptions, who choose to work within the program’s criteria. See generally N.Y. REAL PROP. TAX LAW § 421-a (McKinney 2007).

\textsuperscript{349} See supra note 5 and accompanying text.

\textsuperscript{350} One reason why it might be difficult to decouple the 421-a program from the HUD-defined AMI calculation is that portions of the program itself still contemplate substantial government financing. See supra notes 235–42 and accompanying text. As a result of this provision, developers receiving substantial federal funds for their development would have to meet both the HUD-defined AMI income level for the given federal program the developer was receiving subsidies from, as well as the 421-a program’s standards. Id.; see also supra notes 60–74 and accompanying text. As an additional concern, it might also be difficult to determine the appropriate scope for the income-level calculation, i.e., whether to set affordability levels based on a City, borough, or neighborhood AMI.

\textsuperscript{351} See supra notes 67–70 and accompanying text.

\textsuperscript{352} Miller, supra note 222.


\textsuperscript{354} Id.

\textsuperscript{355} Atlantic Yards Report, http://atlanticyardsreport.blogspot.com (June 6,
should also get such additional, disproportionate and beneficial treatment under 421-a for so little in return.356

CONCLUSION

“The way the City is situated now, you don’t need the 421-a program. . . . It is not like it was [in the 1970’s when the City was] losing people. [Then, there were] tens of thousands of vacant lots and abandoned buildings. Now, the situation has changed—the
dynamic changed." As the bill’s prime sponsor in the Legislature, Lopez’s comment is particularly revealing and somewhat paradoxical. The market is unlikely to voluntarily provide affordable housing, and it may very well be that the new legislation is better than none at all. Nevertheless, the amendments are too little, too late. Tax abatements for constructing market-rate housing are no longer necessary in today’s City; developers will likely continue to build without extra incentives. As a result, will remain a relic of the past unless significant revisions are made.

The program continues to misallocate public funds by giving away too much in tax incentives for not enough public benefit in return. Further, it only has an indirect expectation that affordable housing will trickle-down to those who need it instead of directly addressing the problem.

Rhetoric and political compromise aside, the fact that affordable housing does not play a more robust role in is problematic. Indirect promotion of affordable housing through tax incentives to developers, as provided in the new provisions, necessarily demonstrates that the program’s goals lie elsewhere: in perpetuating a giveaway of public funds that would otherwise have been collected from developers. Despite the improvements in the revised program, it falls short in advancing affordable development because developers’ profits are only marginally curtailed at the expense of significant unrealized public benefits.

In contrast to the three overarching policy goals the law purportedly advances—decent shelter, wealth creation, and efficient use of public funds—the results reflects an anemic and unjustifiable program that continues to put developers ahead of families earning low- and moderate-incomes. As a result, public funds continue to be used inefficiently because “decent shelter” provisions are not as sufficiently robust as they could have been, and “wealth creation” for families earning low-income continues to be trumped by deference to developers’ profits.

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357 Interview with Vito Lopez, supra note 234.
358 Byrne & Diamond, supra note 13, at 530–31.
360 See supra notes 29–32 and accompanying text.
The City Council will have the first opportunity to reexamine elements of the 421-a program in December of 2008.\footnote{See \textit{New York City, Code} § 11-245.1(d) (2007) (establishing a boundary review commission to determine exclusion zone boundaries in even-numbered years). Other sections of the 421-a program will expire in 2010. \textit{See also New York City Local Law} No. 58 § 12 (2006).} Assemblyman Lopez, the bill’s prime sponsor, has indicated that he “would love to reevaluate in three years, to bring down the income [requirement for eligibility for affordable housing] and make it broader [more inclusive] than it is now. [His ultimate] objective is a City-wide 70/30 program, and to make the 30% affordability income level much lower.”\footnote{Interview with Vito Lopez, \textit{supra} note 234. This would ostensibly be accomplished by: 1) modifying the mandatory market-affordable mix within the exclusion zone to reflect 70% market-rate units and 30% affordable units; and 2) maintaining the HUD-defined AMI as the benchmark for the program, but lowering the AMI from the current 60% limit. \textit{Id.}} The courage must be found to revise the 421-a program so that it truly delivers on its overarching premise and on what Jacob Riis maintained more than a century ago was one of the principal responsibilities of government in this critical area:\footnote{See \textit{supra} note 1 and accompanying text.} well-defined, progressive legislation to ensure the continued existence of affordable housing for the City’s families earning low- and moderate-incomes.
INTRODUCTION

Every year, in the United States alone, more than nine billion animals\(^1\) are slaughtered for food.\(^2\) More than 100 million are subjected to painful procedures or toxic exposures in laboratories on college campuses and research facilities throughout the country for biomedical research and to test the safety of cosmetics, household cleaners and other consumer products.\(^3\) Hundreds of millions more are killed or exploited for hunting and entertainment and to manufacture fur and leather clothing.\(^4\) “More than 300

\(^*\) Brooklyn Law School Class of 2009; B.A., Binghamton University, 2005. Thanks to the members of the Journal of Law and Policy for their efforts and Will Potter for his comprehensive investigative journalism. Special thanks to Jenny Deffes and the Goodman family for their absolute love and support.

\(^1\) For the purposes of this Note, the term “animal” will refer to only birds and nonhuman mammals.


mammals and birds die each time your heart beats.”

The magnitude of this institutionalized exploitation leaves animal rights activists with what may seem to be an unattainable goal: societal recognition of the inherent value of the lives of animals. Activists who wish to provide immediate sanctuary to these animals have begun to employ nonviolent, but often illegal, tactics against animal enterprises. The goal of these tactics, which range from demonstrations at the offices and homes of company officials to property damage, is to inflict economic damage on those who profit from the exploitation of animals, ultimately making it unprofitable to continue with their practices.

Fearing the increasing intensity and effectiveness of the domestic animal rights movement, various private groups have urged Congress to broaden the reach and increase the penalties of existing federal legislation applicable exclusively to animal advocates. One result of this corporate campaign, led primarily by

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6 The definition of “violence” with regards to activism is currently up for debate. However, for the purposes of this Note, “violence” may be defined as “physical violence against animals, human or non-.” Posting of Justin Goodman to Connecticut for Animals, http://connecticutforanimals.blogspot.com/2007/09/on-non-violent-direct-action.html (Sept. 9, 2007, 01:09 EST) (citing GENE SHARP, THERE ARE REALISTIC ALTERNATIVES, 1 n.1 (2003)).

7 The term “animal enterprise” refers to: a commercial or academic enterprise that uses or sells animals or animal products for profit, food or fiber production, agriculture, education, research or testing; a zoo, aquarium, animal shelter, pet store, breeder, furrier, circus, or rodeo, or other lawful competitive animal event; or any fair or similar event intended to advance agricultural arts and sciences. Animal Enterprise Terrorism Act § 43(d)(1), 18 U.S.C. § 43 (2006).


9 The National Association for Biomedical Research (“NABR”) has been credited with ensuring the passage of animal enterprise protection legislation
representatives of the agricultural, biomedical research and pharmaceutical industries, has been the enactment of the federal crime of “animal enterprise terrorism.”

With this legislation, the government has branded and successfully prosecuted individuals who have engaged in nonviolent activism as “eco-terrorists.”

Industry groups have taken full advantage of that characterization to demonize those who associate with, ideologically support, or simply refuse to condemn the actions of “eco-terrorists.”

Part I of this Note will provide a brief overview of the history of animal rights theory and the current philosophies behind the belief that animals should be afforded certain moral and legal rights. It will also examine the operational methods of animal rights activists and illustrate their role in achieving this underlying goal. Part II of this Note will discuss the impropriety of characterizing activists as “terrorists” in order to promote a particular political agenda. Part III will outline the measures animal enterprises and industries involved in animal exploitation have taken to urge the federal government to put an end to the activist tactics that have successfully caused them to sustain economic loss. Specifically, it will examine “animal enterprise terrorism” legislation and how it


12 For example, the Center for Consumer Freedom has accused mainstream animal advocacy organizations such as the Humane Society of the United States and the Physicians Committee for Responsible Medicine of “consorting with terrorists” for allowing nonviolent direct action organization Hugs For Puppies to set up an informational table at an animal advocacy conference. Will Potter, Industry Group Says Mainstream Animal Advocates “Consorting With Terrorists,” http://www.greenisthenewred.com/blog/2007/08/15/tafa-terrorists/ (Aug. 15, 2007).

13 Specifically, Part III will analyze the Animal Enterprise Terrorism Act, 18 U.S.C. § 43(a)(1) (2006), passed on November 27, 2006, as well as its
has been used successfully to prosecute the nonviolent activism of Stop Huntingdon Animal Cruelty USA, Inc. (“SHAC USA”). Part III will also discuss the “terrorism enhancement” penalties applicable to nonviolent activism. Part IV will examine how the application of such ideology-specific legislation has encroached upon traditionally protected speech. Finally, Part V concludes that “animal enterprise terrorism” legislation should be a concern not only of animal rights activists, but of all advocates of social or political change because of a subsequent chilling effect on the exercise of free speech.

I. BACKGROUND

A. Animal Rights Theory

Animal advocacy can be traced as far back as the sixth century B.C. when Greek philosopher Pythagoras urged respect for animals because he believed in the transmigration of souls between human and non-human animals.\footnote{ANGUS TAYLOR, ANIMALS AND ETHICS 34 (2003) ("Pythagoras . . . rejected the claim that we have nothing significant in common with animals and therefore cannot be said to treat them unjustly. [He] . . . believed that animals may be former human beings, now reincarnated in non-human form.").} In the 18th century, English philosopher and legal theorist Jeremy Bentham rejected the position that because nonhuman animals allegedly lack rationality or the ability to communicate using language, humans may use them as a means to their own desired ends and owe them no moral obligations.\footnote{JEREMY BENThAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 283 n.b (J.H. Burns & H.L.A. Hart eds., Clarendon Press 1996) (1789).} Instead, Bentham suggested that the primary characteristic relevant to the attribution of moral consideration is sentience, i.e., the ability to experience sensation or feeling.\footnote{THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000). In suggesting that the mistreatment of nonhuman animals was akin to the evils of racial discrimination, Bentham stated:}
However, it was not until 1983 that a thorough argument in favor of animal rights was presented by American philosopher Tom Regan in his book, *The Case for Animal Rights*. The general theory of animal rights is based upon the premise that individuals—human and non-human animals—are due equal respect for their equal inherent value. To Regan, the fundamental attribute all humans share is that each of us is the “subject-of-a-life;” that is, a conscious creature with an individual welfare important to us, logically independent of our usefulness to anyone else. Humans have, inter alia, beliefs and desires, perception, memory, a sense of the future, feelings of pain and pleasure, preference- and welfare-interests, and the ability to act in furtherance of those goals. Regan argues that because the same is true of certain animals, such as mammals aged one year or more, they too are subjects-of-a-life.

The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may come one day to be recognized, that the number of the legs, [or] the villosity of the skin . . . are reasons equally insufficient for abandoning a sensitive being to the same fate? [A] full grown horse or dog, is beyond comparison a more rational, as well as a more conversible animal, than an infant of a day, or a week, or even a month, old. But suppose the case were otherwise, what would it avail? [T]he question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?

*BENTHAM*, supra note 15, at 283 n.b.


18 *See, e.g.*, The Abolitionist Approach, supra note 17 (“*[A]ll sentient beings should have at least one right—the right not to be treated as property. If we recognized this one right, we would be compelled to abolish institutionalized animal exploitation.”).

19 *REGAN, supra* note 17, at 243.

20 *Id.*
with their own inherent value. Finally, it follows that the basic moral right of all who possess inherent value is the right never to be harmed “on the grounds that all those affected by the outcome will thereby secure ‘the best’ aggregate balance of intrinsic values (e.g., pleasures) over intrinsic disvalues (e.g., pains).”

Similarly, law professor Gary Francione maintains that true recognition of animal rights requires the complete abolition of animal exploitation. However, contrary to Regan, Francione argues that a theory of abolition should not require that animals have any cognitive characteristic beyond sentience to be full members of the moral community, entitled to the basic moral right not to be the property of humans. Francione’s theory has three components: first, society regards it as a moral imperative to protect all humans from the suffering caused by being used exclusively as the resource of another; second, animals and humans are similar in that they are sentient beings; and third, if animal interests in not suffering are to be morally significant, then the principle of equal consideration demands that we extend the basic right not to be treated as things to animals. Simply, if animal interests are to be taken seriously, we must treat their similar interests in a similar fashion.

Thus, because the theory of animal rights rejects treating animals as property, it “rejects completely the institutionalized exploitation of animals, which is made possible only because animals have property status.” The theory ensures that relevant animal interests are completely protected and not sacrificed for

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21 Id. at 78. This concept is further illustrated by the inherent value ascribed to humans who are not capable of rational thought, such as the infants referred to by Bentham and the severely mentally impaired. See BENTHAM, supra note 15, at 283 n.b.

22 REGAN, supra note 17, at 286.


24 Id. at 121, 124–25.

25 YOUR CHILD OR THE DOG, supra note 4, at xxvi.

26 Id. at 99.

human benefit, no matter how “humane” the exploitation or how stringent the safeguards from “unnecessary suffering.”

To deny animals this one basic right would be speciesism—a prejudice which, like racism or sexism, is based upon a morally irrelevant physical characteristic. “It is a bias, arbitrary as any other.”

B. Direct Action and the Role of Animal Advocates

Just as nineteenth-century white abolitionists in the [United States] worked across racial lines to create new forms of solidarity, so the new freedom fighters reach across species lines to help our fellow beings in the animal world.

When conventional methods of achieving social and political change are believed to be slow and inadequate, activists often employ direct action tactics. “[D]irect action seeks to create such a crisis and foster such a tension that a community which has constantly refused to negotiate is forced to confront the issue.”

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28 Id.

29 Speciesism is defined as “Human intolerance or discrimination on the basis of species, especially as manifested by cruelty to or exploitation of animals.” The American Heritage Dictionary of the English Language (4th ed. 2000).

30 Wise, supra note 5, at 26.

31 Steven Best & Anthony J. Nocella II, Behind the Mask: Uncovering the Animal Liberation Front, in TERRORISTS OR FREEDOM FIGHTERS 9, 12 (Steven Best & Anthony J. Nocella II eds., 2004). Steven Best is Associate Professor of Humanities and Philosophy at the University of Texas, El Paso, and is co-founder and Chief Editor of the peer-reviewed online journal, Critical Animal Studies Journal. Dr. Steve Best, Biography, http://www.drstevebest.org/InPages/Personal.htm (last visited Mar. 1, 2008).

32 Examples of conventional, indirect methods of affecting change are collecting signatures on a petition, writing letters to representatives in office, or voting for those who assure the public that they will provide a remedy at some point in the future if elected.

These tactics are intended to have an immediate impact on a problem or its causes, and can include legal and illegal activities, such as demonstrations, boycotts, civil disobedience, vandalism and property damage.\(^{34}\)

In the animal rights context, activists often resort to illegal direct action because conventional advocacy alone is insufficient to rescue the countless animals facing present dangers.\(^{35}\) Activists have resorted to illegal actions because of the substantial cultural, political, economic, legal, and psychological impediments to their agenda of abolishing institutionalized animal oppression and obtaining moral rights for animals.\(^{36}\)

There are three specific fundamental obstacles that preclude successful advocacy through legal means.\(^{37}\) First, although there are laws in the United States aimed at regulating animal usage, they rarely go beyond prescribing minimal guidelines to ensure that animals are used efficiently.\(^{38}\) Because animals are considered private property, their interests are always secondary to those of their owners.\(^{39}\) Second, despite the weakness of animal protection laws, many activists attempt to use these laws to effect change.\(^{40}\) However, legal advocacy is rarely successful in obtaining protection for animals because activists typically lack legal standing to litigate the specific instances of cruelty that fall within the purview of the legislation.\(^{41}\) Finally, and perhaps most

\(^{34}\) See Patrice Jones, Mothers with Monkeywrenches: Feminist Imperatives and the ALF, in TERRORISTS OR FREEDOM FIGHTERS 137, 137–38 (Steven Best & Anthony J. Nocella II eds., 2004).


\(^{36}\) Id. at 796.

\(^{37}\) Id. at 781.

\(^{38}\) YOUR CHILD OR THE DOG, supra note 4, at 10.

\(^{39}\) See id. at 10.

\(^{40}\) Kniaz, supra note 35, at 794.

\(^{41}\) Standing is a party’s right to make a legal claim or seek judicial enforcement of a duty or right. BLACK’S LAW DICTIONARY (8th ed. 2004). For examples of cases where the lack of standing has been a procedural bar to bringing claims for violations of animal protection legislation, see, e.g., Cetacean Cmty. v. Bush, 386 F.3d 1169, 1179 (9th Cir. 2004) (In declining to grant the cetaceans standing to bring suit in their own name under the
importantly, “animal enterprises wield extraordinary cultural and political power in the United States.” Enormous transnational industries are involved in raising and killing billions of animals for food, clothing, product testing, biomedical research, and entertainment each year. Today, products that result from animal exploitation are so abundant that it is nearly impossible to live without supporting the abuse of animals in some fashion, whether directly or indirectly.

As a result of the limitations of legal activism for animals, illegal direct action is sometimes perceived as the most effective method of animal rights advocacy. The Animal Liberation Front (“ALF”), a decentralized conglomerate of small autonomous groups, is among the most notorious for employing illegal direct action as its primary method of abolishing the property status of animals. Any individual may regard him/herself as part of the ALF so long as he/she carries out his/her actions in accordance with ALF guidelines:

1. TO liberate animals from places of abuse, i.e. laboratories, factory farms, fur farms, etc, and place them in good homes where they may live out their natural lives, free

Endangered Species Act, the court stated that “[i]f Congress and the President intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly.” (quoting Citizens to End Animal Suffering and Exploitation v. The New England Aquarium, 836 F. Supp. 45, 49 (D. Mass. 1993)); Animal Legal Def. Fund v. Glickman, 204 F.3d 229, 236 (D.C. Cir. 2000) (animal welfare organization denied standing to bring action against the United States Department of Agriculture, challenging regulations promulgated under Animal Welfare Act); Animal Legal Def. Fund v. Quigg, 932 F.2d 920, 922 (Fed. Cir. 1991) (third parties do not have standing to challenge a rule indicating that genetically engineered animals are patentable subject matter).

42 Kniaz, supra note 35, at 781.
43 See supra notes 2–5 and accompanying text.
44 Wise, supra note 5, at 20.
from suffering.
2. TO inflict economic damage to those who profit from the misery and exploitation of animals.
3. TO reveal the horror and atrocities committed against animals behind locked doors, by performing non-violent direct actions and liberations.
4. TO take all necessary precautions against harming any animal, human and non-human.
5. TO analyze the ramifications of all proposed actions, and never apply generalizations when specific information is available.  

The ALF’s short-term goal is “to save as many animals as possible and directly disrupt the practice of animal abuse,” while their long term intention is to end all animal suffering by making it unprofitable for companies engaging in animal abuse to remain in business.  

ALF activists often force entry into animal enterprise facilities that confine animals in order to release or rescue them.  

They typically operate at night, wearing balaclavas and in small groups of people.  

After removing animals from these facilities, ALF activists seize or destroy equipment and other property that has been used to exploit animals, and they sometimes use arson to destroy buildings and laboratories.  

“They have cost the animal exploitation industries hundreds of millions of dollars. They willfully break the law, because the law wrongly consigns animals to cages and confinement, to loneliness and pain, to torture and death.”

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46 Animal Liberation Front, supra note 8.
47 Id.
48 Mink or coyotes are released from confinement and left to acclimate to the wild. Best & Nocella, supra note 31, at 11.
49 Cats, dogs, mice, and guinea pigs are not merely released, but rescued and taken with activists. Id.
50 Id.
51 Id.
52 Id.
II. ACTIVISTS AS “TERRORISTS”

[M]ost Americans would not consider the harassment of animal testing facilities to be “terrorism,” any more than they would consider anti-globalization protestors or anti-war protestors or women’s health activists to be terrorists.53

- Sen. Patrick Leahy (D-VT)

The Federal Bureau of Investigation (“FBI”) has branded direct action by animal and environmental activists “eco-terrorism.”54 It defines eco-terrorism as “the use or threatened use of violence of a criminal nature against innocent victims or property by an environmentally-oriented, subnational group for environmental-political reasons . . . .”55 This characterization of violence is troublesome because the government, motivated by politics and the ideological biases of lawmakers, has singled out property crimes committed by these activists.56 The fundamental disparity between standard criminal behavior and direct action on behalf of animals or the environment is that the latter is adverse to corporate interests


Almost all the top positions at the agencies that protect our environment and oversee our resources have been filled by former lobbyists for the biggest polluters in the very businesses that these ministries oversee. These men and women seem to have entered government service with the express purpose of subverting the agencies they now command.

Id.
and consequently threatens the political status quo. In 2005, the Senate Environment and Public Works Committee met to discuss the alleged threat posed by these “eco-terrorists,” as well as the measures the federal government is taking to “detect, disrupt, and dismantle the animal rights and environmental extremist movements.”

Addressing the committee, FBI Deputy Assistant Director of the Counterterrorism Division John E. Lewis declared that “[o]ne of today’s most serious domestic terrorism threats come from special interest extremist movements such as the Animal Liberation Front (ALF), the Earth Liberation Front (ELF), and Stop Huntingdon Animal Cruelty (SHAC) campaign.” In fact, Lewis has stated that “[t]he No. 1 domestic terrorism threat is the eco-terrorism, animal-rights movement.” Contrary to what these remarks may suggest, however, the ALF, which is generally cited as the archetype of eco-terrorism, explicitly denounces violence against both human and nonhuman animals.

In light of the FBI’s classification of animal rights activists as the nation’s top priority of domestic terrorism, “Americans should question whether the Justice Department is making America’s far-

57 Industry lobbying to Congress and federal agencies has undoubtedly played a significant part in the classification of direct action as “terrorism.” For example, the American Medical Association and the Pharmaceutical Research and Manufacturers of America—two representatives of the pharmaceutical industry and its unwavering commitment to animal experimentation—rank among the top five spenders in the country in governmental lobbying. Combined, they have spent almost $300,000,000 between 1998 and 2007. Opensecrets.org, Lobbying Spending Database, http://www.opensecrets.org/lobbyists/index.asp?txtindextype=s (last visited Feb. 21, 2008).


59 Id.

60 Schuster, supra note 54 (emphasis added). It is noteworthy that Lewis and other governmental agents consistently refer to these activist organizations as “eco-terrorists” and “violent,” while failing to mention that “not a single incident of so-called [eco-terrorism] has killed anyone.” Steven Best, Showtrials and Scarecrows: “Ecoterrorism” and the War on Dissent, IMPACT PRESS, Summer 2005, http://www.impactpress.com/articles/summer05/bestsummer05.html (quoting Sen. Frank Lautenberg (D-NJ)).

61 Animal Liberation Front, supra note 8.
right fanatics a serious priority.\textsuperscript{62} For example, on an internal list of threats to the nation’s security, the Department of Homeland Security does not list anti-government groups, white supremacists and other radical movements that have staged various terrorist attacks and have killed hundreds of Americans.\textsuperscript{63} Criticizing the politically charged use of terrorist discourse, the Southern Poverty Law Center has pointed out that “for all the property damage they have wreaked, eco-radicals have killed no one—something that cannot be said of the white supremacists and others who people the American radical right.”\textsuperscript{64} Between 1995 and 2005, white supremacist and other extremist groups produced 60 terrorist plots, including plans to bomb or burn government buildings, abortion clinics, places of worship, and bridges; assassinate police officers, judges, politicians, civil rights figures and abortion providers; and stockpile illegal machine guns, missiles, explosives, and biological and chemical weapons.\textsuperscript{65}

Given the demonstrated violent propensities of many of the country’s extremist groups and the government’s subsequent focus on animal and environmental rights activists, it is evident that the priorities of federal law enforcement have become misplaced. After 168 individuals were killed and over 800 injured in the Oklahoma City attack by anti-government militia sympathizers Timothy McVeigh and Terry Nichols, a Justice Department official stated,

\begin{footnotes}
\item[64] Southern Poverty Law Center, \textit{Decade of domestic terror documented by Center} (Sept. 2005), http://www.splcenter.org/center/splcreport/article.jsp?aid=164.
\end{footnotes}
“Unfortunately, keeping track of right-wing and neo-Nazi hate groups isn’t necessarily a path to career advancement in the Bureau.” Under pressure from the White House and conservative Republicans, national security organizations have made the troubling political decision to discount the life-threatening violence emanating from Americans on the far-right fringe, and instead focus on nonviolent activist groups.

III. “ECO-TERRORISM” LEGISLATION AND ITS APPLICATION

A. The Animal Enterprise Protection Act

As a response to the increase in effective direct action activism, Congress enacted the Animal Enterprise Protection Act of 1992 (“AEPA”). This legislation, shepherded by the National Association for Biomedical Research, created the crime of “animal enterprise terrorism.” In doing so, it amended federal criminal law to provide a fine, up to one year in prison, or both, for anyone who intentionally causes physical disruption to the functioning of an animal enterprise by intentionally stealing, damaging, or causing the loss of, any property (including animals or records) used by the animal enterprise, and thereby causes economic damage exceeding $10,000 to that enterprise, or conspires to do so.

The AEPA also provided for increased imprisonment penalties of

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66 Levitas, supra note 62 (internal quotation marks omitted).
67 Schuster, supra note 54.
up to ten years if a violation results in serious bodily injury to an individual and life in prison if a violation results in death.\textsuperscript{72}

The AEPA was not used until September 16, 1998, when a federal grand jury in Wisconsin indicted activists Peter Young and Justin Samuel for, inter alia, animal enterprise terrorism.\textsuperscript{73} The indictment alleged their connection to a raid of fur farms in the Midwest in October 1997, in which an estimated 8,000 to 12,000 mink were released from five mink farms over a two week period.\textsuperscript{74} In 2000, after Samuel was apprehended in Belgium and subsequently extradited to the United States, he entered a plea agreement with federal prosecutors to implicate Young in exchange for a lighter sentence.\textsuperscript{75} Samuel pled guilty to two misdemeanor offenses under the AEPA,\textsuperscript{76} and was sentenced to two years in prison and ordered to pay over $360,000 in fines.\textsuperscript{77}

On March 31, 2005, Young was arrested after seven years of FBI pursuit.\textsuperscript{78} After rejecting various plea deals in exchange for becoming an undercover agent in the animal rights movement or providing investigators with the names of other activists, the government dropped four of the felony counts and Young eventually pled guilty to the remaining animal enterprise terrorism

\textsuperscript{72} Id.


\textsuperscript{75} SupportPeter.com, Background Information, supra note 74.

\textsuperscript{76} Kevin Murphy, Washington State Man Admits Releasing Hundreds of Minks by Cutting Fences, MILWAUKEE J. SENTINEL, Aug. 31, 2000, at B2.


\textsuperscript{78} SupportPeter.com, Background Information, supra note 74.
charges under the AEPA. He received a sentence of two years in federal prison, 360 hours of community service at a charity to benefit “humans and no other species,” $254,000 restitution, and one year probation.

Despite these sentences, industry groups pushed for expansions of “animal enterprise terrorism” legislation, alleging that the AEPA was an ineffective prosecutorial tool due to the limited penalties available for violations and its sparing application. In response to the heavy lobbying from animal-testing firms and pharmaceutical companies, Congress amended various provisions of the AEPA in 2002.

While opponents of animal enterprise terrorism legislation take little issue with Congress’ decision to increase the maximum prison sentence for causing serious bodily injury, the expansion of the scope of the statute and the increased penalties for nonviolent actions are much more controversial. This 2002 revision eliminated the requirement that economic damage to an animal enterprise must exceed $10,000, thereby providing a federal cause of action for even minimal economic loss. The newly created remedy for “economic damage,” defined as damage “not exceeding $10,000 to an animal enterprise,” consisted of a fine, maximum imprisonment of six months, or both. Further, “major economic damage,” defined as “economic damage exceeding $10,000 to an animal enterprise,” could result in a fine and imprisonment of up to three years, tripling the maximum sentence previously permitted.

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79 Id.
80 Id. (internal quotation marks omitted).
81 See, e.g., Walsh, supra note 9 (“Penalties attached to crimes committed against businesses and laboratories are appropriate, by some minimal definition, and, simultaneously, they are glaringly ineffective. This paradox constitutes the most serious practical problem confronting the Act’s utility as either a deterrent to terrorism or a prosecutorial tool.”).
84 Id. § 43(b).
85 Id. § 43(b)(1).
86 Id.
under the Act.\textsuperscript{87} Lastly, this revision included a catch-all category for restitution, authorizing such an order “for any other economic damage resulting from the offense.”\textsuperscript{88} Thus, the legislation addressed the concerns of lobbyists, increasing scope of the Act and the penalties applicable to offenses that constitute “animal enterprise terrorism.”

\textbf{B. The Case of the SHAC 7}

Since 1999, animal rights activists have waged an aggressive direct action campaign and utilized high-pressure tactics to advocate the closure of Huntingdon Life Sciences (“HLS”). HLS is a contract research laboratory\textsuperscript{89} with facilities in New Jersey and England that purportedly kills 180,000 animals per year to test pharmaceutical products, pesticides, industrial and other chemicals.\textsuperscript{90} This international campaign, known as Stop Huntingdon Animal Cruelty (“SHAC”), has targeted HLS because five undercover investigations at the labs have revealed appalling

\textsuperscript{87} Id. § 43(b)(2). Prior to this amendment, the AEPA provided that an individual could be imprisoned for up to one year for economic damage exceeding $10,000. Animal Enterprise Protection Act of 1992, 18 U.S.C.A. § 43 (West 2008) (amended 1996, 2002 & 2006).

\textsuperscript{88} Pub. L. 107-188, sec. 336(c)(3), § 43(c) (2002). The previous text of the AEPA provided restitution only for: (1) “the reasonable cost of repeating any experimentation that was interrupted or invalidated as a result of the offense”; and (2) “the loss of food production or farm income reasonable attributable to the offense.” Animal Enterprise Protection Act of 1992, 18 U.S.C.A. § 43 (West 2008) (amended 1996, 2002 & 2006).

\textsuperscript{89} A “[c]ontract research organization . . . assumes, as an independent contractor with the sponsor, one or more of the obligations of a sponsor, e.g., design of a protocol, selection or monitoring of investigations, evaluation of reports, and preparation of materials to be submitted to the Food and Drug Administration.” 21 C.F.R. § 312.3(b) (2008). Companies often outsource various forms of testing to contract research laboratories for products such as “pharmaceuticals, food additives and a variety of crop protection and consumer chemicals.” Huntingdon Life Sciences, Company Overview, http://www.huntingdon.com/index.php?currentNumber=0&currentIsExpanded=0 (last visited Feb. 21, 2008).

acts of animal cruelty and countless violations of the Animal Welfare Act.\footnote{91} Video footage obtained during those investigations showed workers punching beagle puppies in the face, dissecting live monkeys and falsifying scientific data.\footnote{92}

SHAC activists campaigning against HLS in the United States developed methodological approaches to activism that were new to the animal rights movement, as well as to social justice movements in general.\footnote{93} They utilized direct action tactics, the internet, an understanding of the legal system, and a singular focus on eliminating HLS as a primary representative of the evils of the vivisection industry.\footnote{94} These strategies resulted in the creation of Stop Huntingdon Animal Cruelty USA (“SHAC USA”), an incorporated organization whose sole purpose was to provide information, distinct from the SHAC campaign in which activists participate in both legal and illegal forms of direct action.\footnote{95} Fundamentally, SHAC USA merely operated a website that provided information and ideological support for protest activity against HLS, and significantly, its business affiliates.\footnote{96} “By maintaining [this] vital distinction . . . SHAC . . . pushed the political envelope as a movement while technically remaining within its rights as an organization.”\footnote{97}

\footnote{91} For more information on HLS and a video that was filmed during one of the undercover investigations, see SHAC7.com, HLS & Vivisection, http://www.shac7.com/hls.htm (last visited Feb. 21, 2008).

\footnote{92} Id. A recent lawsuit filed by a former HLS employee alleges that he was fired without explanation in 2005 after refusing “to change his interpretation of research data to show a test resulted in a success instead of the actual failure” so the company would be able to continue billing its clients for further unnecessary testing. Ken Serrano, Suit Cites False-Data Desires, Racial Bias at Lab, HOME NEWS TRIB., Nov. 4, 2007, http://www.thnt.com/apps/pbcs.dll/article?AID=/20071104/NEWS/711040457/1001.


\footnote{94} Id.

\footnote{95} Id. at 18.


\footnote{97} Best & Kahn, supra note 93, at 18.
However, on May 26, 2004, disregarding the distinction between SHAC USA and the SHAC direct action campaign, federal agents descended upon six animal rights activists involved with SHAC USA with guns drawn and helicopters overhead. These activists, along with the SHAC USA organization, have come to be known as the SHAC 7.

The SHAC 7 were indicted by a New Jersey grand jury on federal charges alleging they had orchestrated an interstate campaign of terrorism and intimidation, amounting to a conspiracy to violate the AEPA. These charges were based solely on the existence of the SHAC USA website, which contained home addresses and other personal information about Huntingdon Life Sciences employees, associates, and their family members, as well as news and anonymous communiqués submitted by activists that did engage in direct action. However, the creators of the site and the organization did not advocate any particular direct action tactics or direct action in general. In fact, the bottom of each page on the website contained a disclaimer which read: “[SHAC USA does] not advocate any form of violent activity, and in fact . . . urge[s] people that when they write letters or they send emails, that they’re polite, they’re to the point, they’re not threatening in nature.” Instead, the website was meant to remind those who opposed the practices at HLS that the company’s employees and affiliates were supporting its existence, without which it could no longer operate.

98 See id., at 1; Chris Maag, America’s #1 Threat, MOTHER JONES, Jan. 1, 2006, at 18.
99 The SHAC 7 consists of: Kevin Kjonaas, Lauren Gazzola, Jacob Conroy, Darius Fullmer, Andrew Stepanian, and Joshua Harper. John McGee, a seventh activist, was also charged originally but was later dropped from the case. SHAC7.com, The Case, supra note 96.
100 Id.
101 Telephone Interview by Amy Goodman of Democracy Now! with Andrew Stepanian, member of the SHAC 7, and Andrew Erba, a lead attorney in the SHAC 7 case (Oct. 3, 2006) [hereinafter Democracy Now! Interview], available at http://www.democracynow.org/article.pl?id=06/10/03/142235.
102 Id.
103 Id.
104 Id.
The activists denied any involvement with the vandalism, threats, and other forms of direct action that were subsequently carried out against Huntingdon Life Sciences employees and insisted they were “simply trying to shame their targets into dissociating themselves from the company . . . .”\(^{105}\) In fact, federal prosecutors failed to introduce any evidence that the individual defendants or the organization directly participated in any direct action.\(^{106}\) Instead, the government argued to jurors that the information contained on the SHAC USA website enabled activists to target those affiliated with the company and incited illegal direct action.\(^{107}\)

The government attempted to attribute to the SHAC 7 the violence that did occur as part of the campaign to close HLS.\(^{108}\) Various government witnesses testified about the protest activity and criminal actions carried out against HLS, its employees, and its affiliates.\(^{109}\) However, the one significant commonality among the testimony of the government’s witnesses is that none were able to identify any of the defendants as activists who engaged in criminal acts against them.\(^{110}\)

Nonetheless, on March 2, 2006, after fourteen hours of deliberation, the jury returned a verdict of guilty on all counts.\(^{111}\) All six defendants were found guilty of “[c]onspiracy to violate the Animal Enterprise Protection Act”\(^{112}\) and became the first


\(^{106}\) *Id.*


\(^{109}\) *Id.* Among the witnesses was HLS director Brian Cass, who resides in the United Kingdom. *Id.* Cass testified about the campaign against the company in England, an attack on him in England in 2001, and the alleged benefits that result from the animal research conducted by the company. *Id.*

\(^{110}\) *Id.*

\(^{111}\) Kocieniewski, *supra* note 105.

\(^{112}\) U.S. Attorney Press Release, *supra* note 107. The six charges were as
individuals to be found guilty of animal enterprise terrorism. The activists were sentenced to between one and six years in federal prison, and the organization received five years probation and was ordered to pay a restitution of $1,000,001 to HLS, the responsibility of which belonged to the individual defendants.

C. The Animal Enterprise Terrorism Act

The SHAC campaign was largely effective due to its innovative strategy of demonstrating against “tertiary” targets, such as the investors, insurers, and suppliers that support HLS and enable it to operate profitably but which cannot themselves be considered “animal enterprises.” Seemingly disregarding that the AEPA had been successfully used to prosecute individuals involved in this campaign that did not personally engage in direct action, animal industry groups once again pushed for broader legislation and greater maximum sentences than those available in the recently amended legislation. These efforts are illustrative of the driving force behind the enactment of animal enterprise legislation; that is,

follows: count one, conspiracy to violate the AEPA; count two, conspiracy to commit interstate stalking; counts three, four and five, interstate stalking of specific victims; and count six, conspiracy to use a telecommunications device to abuse, threaten and harass persons. Id. Kjonaas, Gazzola, and Conroy were found guilty of all counts, Harper of counts one and six, and Stepanian and Fuller only of conspiracy to violate the AEPA. Id.

113 SHAC7.com, The Case, supra note 96. Until 2004, the AEPA had only been used to secure the guilty pleas of Peter Young and Justin Samuel, and no defendant charged with a violation had been to trial. See id.

114 See Laura Mansnerus, Animal Rights Advocates Given Prison Terms, N.Y. TIMES, Sept. 13, 2006, at B8 (Judge Anne E. Thompson sentenced Kjonaas to six years, Gazzola to four years and four months, and Conroy to four years in prison); Trenton: Activist Sentenced, N.Y. TIMES, Sept. 14, 2006, at B4 (Harper was sentenced to three years); Will Potter, Remaining SHAC 7 Defendants Sentenced, http://www.greenisthenewred.com/blog/2006/09/19/remaining-shac-7-defendants-sentenced/ (Sept. 19, 2006) (Stepanian was sentenced to three years and Fullmer to twelve months and one day).

115 Best & Kahn, supra note 93, at 17.

industry groups are not concerned with further criminalizing those acts that are already illegal for criminal justice purposes, but instead are urging the federal government to shield their corporate interests entirely from opposition.\textsuperscript{117}

On May 18, 2004, the Senate Committee on the Judiciary held a hearing on “Animal Rights: Activism vs. Criminality,” where government officials, corporate executives and animal experimenters met to discuss the perceived need for stronger legislation.\textsuperscript{118} The proposed amendments included a provision to prohibit causing economic loss, even in the absence of any physical destruction; expanding the act to include tertiary targets; expanding the definition of “animal enterprise” to include the use of animals “for education . . . [and] for the purpose of advancing biomedical sciences;” and increasing the maximum prison sentence to ten years for physical or economic disruption.\textsuperscript{119} John E. Lewis, the FBI Deputy Assistant Director of the Counterterrorism Division, argued to the committee that these measures were necessary because “[w]hile it is a relatively simple matter to prosecute activists who allegedly commit arson or use explosive devices under existing federal statutes, “it is often difficult if not impossible to address a campaign of low-level . . . criminal activity like that of SHAC in federal court.”\textsuperscript{120}

However, the indictment of the SHAC 7 just two days after this committee hearing, and their subsequent conviction,
demonstrates that the AEPA was sufficient to prosecute defendants. The legislation was interpreted so broadly as to encompass nonviolent actions that cannot be incorporated into any traditional framework of criminal activity. Therefore, the adoption of any amendments to expand the reach of and increase penalties under the AEPA was unnecessary, and the claim that existing federal legislation was insufficient to prosecute those who demonstrate against secondary targets was illogical.

During the first session of the 109th Congress in 2005, Senator James Inhofe (R-Okla.) and Representative Thomas Petri (R-WI) introduced early versions of the Animal Enterprise Terrorism Act (“AETA”) as an amendment to the AEPA. This legislation, drafted with assistance from the Department of Justice and the FBI, was meant to “enhance the effectiveness of the U.S. Department of Justice’s response to recent trends in the animal rights terrorist movement.” The bill addressed the concerns being voiced by industry groups, incorporating provisions to enhance the protection of corporate interests. No action was taken on the bill during that session other than referral to committee. Inhofe and Petri introduced the final version of the bill to Congress in 2006.

Throughout this process, animal advocacy and civil rights organizations expressed their opposition to the AETA to the

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121 See infra text accompanying notes 224–55 (concluding that the activities of the SHAC 7 were entitled to the protections of the First Amendment).
123 Id.
124 Incorporating the provisions recommended by industry groups expanded the scope and increased the penalties of animal enterprise terrorism legislation, providing greater protections to those encompassed by the Act. See infra text accompanying notes 141–51. “No other industrial sector in U.S. history has ever been given such legal protections against people’s exercising of their First Amendment free-speech rights.” PETA, Tell Congress That Exposing Animal Abuse Is Not Illegal!, http://www.peta.org/Automation/AlertItem.asp?id=2032 (last visited Feb. 21, 2008).
125 Berger, supra note 70, at 300.
126 Id. at 300–01.
House Judiciary Committee. These organizations cautioned that the AETA’s characterization of the loss of property could potentially infringe upon constitutionally protected forms of activism such as demonstrations, leafleting, undercover investigations, and boycotts. They argued that the bill contained vague and overbroad language, and furthermore was unnecessary because federal criminal laws already provided sufficient punishments for unlawful activities by activists targeting animal enterprises. Consequently, they argued, the legislation would have had a “chilling” effect on free speech, as animal advocates would not be aware of what traditionally protected activities would fall within the purview of the AETA.

After the AETA passed in the Senate, the American Civil Liberties Union (“ACLU”) changed its position on the legislation, stating in a letter to the House Judiciary Committee that it would not oppose the bill if minor but necessary changes were made to make it less likely to threaten free speech. Specifically, the ACLU stated that the bill should define “real or personal property” as “tangible” property to avoid penalizing legitimate and

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128 See discussion infra text accompanying notes 133, 141–44.

129 ACLU Open Letter, supra note 127; National Lawyers Guild, supra note 127; Humane Society, supra note 127.

130 ACLU Open Letter, supra note 127; National Lawyers Guild, supra note 127; Humane Society, supra note 127.

131 ACLU Open Letter, supra note 127; National Lawyers Guild, supra note 127; Humane Society, supra note 127.

otherwise legal activity that results in lost profits. It further advocated for clarification that a provision, which imposes a penalty for actions that caused no reasonable fear of bodily harm, no actual bodily injury or no economic damage, applied only to conspiracies or attempts to violate the Act. These recommended changes were not made, however, thereby keeping many forms of previously accepted forms of activism within the purview of the bill.

Without further addressing these expressed concerns, on November 13, 2006, House Judiciary Committee Chairman James Sensenbrenner moved to suspend the rules and pass the bill. The motion to suspend the rules was granted and the bill passed by voice vote. With little or no dissent throughout these proceedings, the AETA was signed into law by President Bush on November 27, 2006.

The final version of the AETA addresses the concerns of the

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133 Id. at 1–2 (The ACLU suggested that the bill specify that it “does not include damage or loss resulting from a boycott, protest, demonstration, investigation, whistleblowing, reporting of animal mistreatment, or any public, governmental, or business reaction to the disclosure of information concerning animal enterprises.”).

134 Id. at 2–3. The ACLU stated that

[s]ince reasonable fear of bodily harm, actual bodily injury or economic damages are all elements of crimes associated with more severe penalties under the bill, we assume the first penalty provision under the bill is meant to address conspiracies or attempts. However, this should be clarified [t]o avoid the chilling effect on those individuals considering actions that would cause no harm, either physical or economic, nor instill any fear of harm. . . .

Id.


137 Lib. Cong., supra note 136.

138 Id.
industry groups and lobbyists that pushed for its passage.\footnote{See, e.g., 2004 Hearing, supra note 53 (testimony of William Green, Senior V.P. and General Counsel, Chiron Corporation), available at http://judiciary.senate.gov/testimony.cfm?id=1196\&wit_id=3462.} It further expands the reach of federal animal enterprise legislation and increases its penalties beyond those imposed by the AEPA as amended in 2002.\footnote{See discussion infra text accompanying notes 141–51.} As a result, the legislation has become excessively broad and vague, creating a chilling effect on activists’ exercise of constitutionally-protected speech.

1. AETA: Offenses

Through a series of amendments, the AETA has significantly expanded the scope of “animal enterprise terrorism” beyond its applicability under the AEPA. First, while the AEPA required that an individual have the “purpose of causing physical disruption to the functioning of an animal enterprise” for conduct to constitute a violation, the AETA eliminates the previous limitation of physical disruption and proscribes all conduct engaged in “for the purpose of damaging or interfering with the operations of an animal enterprise.”\footnote{Animal Enterprise Terrorism Act, 18 U.S.C. § 43(a)(1) (2006) (emphasis added).} In addition, Congress has taken steps to increase the number of individuals and entities protected by the Act: the term “animal enterprise” has been broadly redefined to include essentially any industry or company that is involved in the exploitation of animals, either directly or indirectly,\footnote{Id. § 43(d)(1). The definition now encompasses: (1) commercial or academic enterprises that use or sell animals or animal products for profit, food or fiber production, agriculture, education, research, or testing; (2) zoos, aquariums, animal shelters, pet stores, breeders, furriers, circuses, or rodeos, or other lawful competitive animal events; and (3) any fair or similar event intended to advance agricultural arts and sciences. Id.} and “tertiary” targeting is included within its scope, expanding the protections of the legislation far beyond those that fall within the definition of an animal enterprise.\footnote{Tertiary targets are defined as any “person or entity hav[ing] a connection to, relationship with, or transactions with an animal enterprise.” Id.}
Finally, the AETA does not proscribe only physical or economic disruption, but further prohibits individuals from “intentionally plac[ing] a person in reasonable fear” of death or serious bodily injury to that person, a member of their immediate family, or their partner “by a course of conduct involving threats, acts of vandalism, property damage, criminal trespass, harassment, or intimidation.”144 In sum, the legislation now proscribes a broader range of conduct when directed at a larger class of persons.

2. AETA: Penalties and Restitution

The AETA further increases the maximum penalties of the AEPA.145 Most significantly, the punishment for a violation of the Act, or attempt or conspiracy to violate the Act, is a fine, imprisonment up to one year, or both if the offense does not instill in another the reasonable fear of serious bodily injury or death, results in no bodily injury, and causes no economic damage or economic damage not exceeding $10,000.146 In addition, a violation under the AETA will result in a fine or imprisonment for up to five years, or both, if no bodily injury occurs and the offense results in economic damage between the amounts of $10,000 and $100,000.147

§ 43(a)(2)(A).

144 Id. § 43(a)(2)(B) (emphasis added).
145 Id. § 43(b)(1).
146 Id. (“economic damage” is defined by § 43(d)(3) as “the replacement costs of lost or damaged property or records, the costs of repeating an interrupted or invalidated experiment, the loss of profits, or increased costs, including losses and increased costs resulting from threats, acts or [sic] vandalism, property damage, trespass, harassment, or intimidation taken against a person or entity on account of that person’s or entity’s connection to, relationship with, or transactions with the animal enterprise.”). The AEPA did not provide for any penalty in the absence of economic damage and created a maximum of six months imprisonment for causing damage not exceeding $10,000. Animal Enterprise Protection Act, 18 U.S.C.A. § 43(b)(1) (West 2008) (as amended in 2002).
Furthermore, like the AEPA, restitution under the AETA may include costs for repeating any experimentation that was interrupted or invalidated as a result of the offense, as well as for the loss of food production or farm income.\textsuperscript{148} However, the third catch-all category for “any other economic damage resulting from the offense”\textsuperscript{149} now expressly includes any losses or costs caused by economic disruption.\textsuperscript{150} Thus, while the revisions to these sections have increased the penalties and restitution for conduct that constituted “animal enterprise terrorism” under the AEPA, the amended sections primarily address Congress’ subsequent concern with economic loss.\textsuperscript{151}

\textbf{D. \textit{The Applicability of Terrorism Sentencing Enhancements to \textquotedblright\textit{Animal Enterprise Terrorism\textquotedblright}}

Another tool that the federal government has attempted to use to deter individuals from engaging in direct action is the “terrorism” sentencing enhancement in the United States Sentencing Guidelines (the “Guidelines”).\textsuperscript{152} Section 3A1.4(a) of the Guidelines provides for significantly increased sentences if an offense was “a felony that involved, or was intended to promote, a federal crime of terrorism.”\textsuperscript{153} If applied, the enhancement more than doubles the length of a sentence authorized by the initial sentencing guideline range.\textsuperscript{154}

\begin{itemize}
\item \textsuperscript{148} Animal Enterprise Terrorism Act, 18 U.S.C. § 43(c)(1)–(2) (2006).
\item \textsuperscript{150} Animal Enterprise Terrorism Act, 18 U.S.C. § 43(c)(3) (2006).
\item \textsuperscript{151} See discussion supra text accompanying notes 115–50.
\item \textsuperscript{152} U.S. SENTENCING GUIDELINES MANUAL § 3A1.4.
\item \textsuperscript{153} \textit{Id.} A “federal crime of terrorism” is defined as an offense that “is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct” and falls under one of the many categories enumerated by the statute. 18 U.S.C.A. § 2332b(g)(5).
In *United States v. Thurston*, an Oregon District Court ruled that terrorism enhancement penalties may apply to direct action by animal and environmental rights activists. However, while “the government retains the prosecutorial discretion to request the enhancement,” it will not be applied liberally. The court noted that because of the substantial increase that the enhancement may provide to a relatively short sentence, the government must meet a high burden of proof. That is, in order for the enhancement to apply, the government must prove by clear and convincing evidence that the offenses of conviction involved, or were intended to promote, a federal crime of terrorism. In addition, if “the government is overreaching due to political considerations, either the enhancement will not apply to defendants’ offenses or defendants will be eligible for a downward departure because their conduct is outside the ‘heartland’ of terrorism offenses.”

Perhaps the greatest protection that animal rights activists have from this enhancement being applied to instances of direct action is


155 *Id.* at *20.
156 *Id.* at *18.
157 See infra notes 157–62 and accompanying text.
159 *Id.* at *1.
160 *Id.* at *18. It is noteworthy that the *Thurston* court prefaced its decision by writing that it was not “appropriate for the court to speculate whether the government seeks to promote a particular political agenda or to punish a particular form of activism in requesting the terrorism enhancement.” *Id.* at *1. The court likely included this statement because the government appears to have sought these penalty enhancements not because of the defendants’ criminal conduct, but because of their political beliefs. While the FBI states that “[t]errorism is terrorism—no matter what the motive,” Robert S. Mueller, FBI Director, Remarks at the Operation Backfire Press Conference (Jan. 20, 2006), accessed at http://www.fbi.gov/pressrel/speeches/mueller012006.htm, it hasn’t sought “terrorism enhancement” for church arsons or the murders of abortion providers. Will Potter, Government Seeks “Terrorism Enhancement” for Environmental Activists, http://www.greenisthenewred.com/blog/2007/05/11/terrorism-enhancement-hearing/ (May 11, 2007). In fact, “the enhancement has not [even] been sought . . . in prosecutions of persons who possessed biological toxins.” *Thurston*, 2007 WL 1500176, at *18.
that the federal crime of terrorism requires that actions be calculated "‘to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.’ Thus, the government must establish that the defendants targeted government conduct rather than the conduct of private individuals or corporations.”\(^{161}\) Animal rights activists that use direct action tactics, such as the SHAC 7, target solely corporations and their affiliates that engage in the institutionalized exploitation of nonhuman animals in an attempt to make it unprofitable or inconvenient for the businesses to continue their practices; they do not target government entities or engage in home demonstrations of governmental employees.\(^{162}\) In fact, the term “direct action” refers to the fact that activists target the source of their concerns directly, rather than attempting to affect change indirectly through governmental means.\(^{163}\) Accordingly, although terrorism sentencing enhancements may be applicable to defendants convicted of “eco-terrorism” offenses,\(^{164}\) federal prosecutors face several obstacles in meeting their relatively high burden of proof.

\(^{161}\) *Thurston*, 2007 WL 1500176, at *15 (quoting 18 U.S.C. § 2332b(g)(5)(A)).

\(^{162}\) *See, e.g.*, Potter *supra* note 160 (Illegal direction action is not “meant to influence government, because the [activists have] lost all faith that government could be influenced.”).

\(^{163}\) *See supra* text accompanying notes 32–52.

\(^{164}\) *Thurston*, 2007 WL 1500176, at *1.
IV. FIRST AMENDMENT CONCERNS

It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.\textsuperscript{165}

- Hon. Byron Raymond White

A. Boundaries of the Protections of Free Speech

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”\textsuperscript{166} However, the protection afforded by the First Amendment is not absolute and may be regulated when speech is “of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.”\textsuperscript{167} Two such narrowly tailored exceptions that the Supreme Court has explicitly recognized are where speech constitutes a “true threat,”\textsuperscript{168} or where it is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”\textsuperscript{169} In addition, lower courts have, on occasion, determined that crime-facilitating speech is not protected by the First Amendment.\textsuperscript{170}

\textsuperscript{166} U.S. CONST. AMEND. I.
\textsuperscript{170} See, e.g., Rice v. Paladin Enterprises, 128 F.3d 233 (4th Cir. 1997) (\textit{Hit Man: A Technical Manual for Independent Contractors}, a 130 page book of detailed factual instructions on how to murder and to become a professional killer, was not entitled to protection under the First Amendment).
1. True Threats: The Requirement of Subjective Intent

The First Amendment does not exclude all potentially threatening speech from its protections. 171 Instead, in Virginia v. Black, 172 the Supreme Court held that only “true threats” may be banned under the First Amendment. 173 “‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” 174 The Court further noted that “[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” 175

While it is not required that the speaker subjectively intends to carry out the threatened action for the speech to be punishable, 176 the Court adopted a separate standard of subjective intent—it must be shown that the speaker intentionally threatened the individual or group of individuals. 177 This prohibition is not merely intended to

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171 See Watts, 394 U.S. at 706–07 (holding that defendant’s statement, “[i]f they ever make me carry a rifle the first man I want to get in my sights is [the president],” was not a true threat but was constitutionally protected speech). The First Amendment protects “vehement, caustic, and sometimes unpleasantly sharp attacks” as well as speech that is “vituperative, abusive, and inexact.” Id. at 708.
173 Id. at 359.
174 Id.
175 Id. at 360.
176 Id.
177 Id. at 359. “The [Black] Court’s insistence on intent to threaten as the sine qua non of a constitutionally punishable threat is especially clear from its ultimate holding that the [state] statute was unconstitutional precisely because the element of intent was effectively eliminated . . . .” United States v. Cassel, 408 F.3d 622, 631 (9th Cir. 2005). Several circuit courts have modified their analysis of true threats to require this specific intent to threaten. See, e.g., id. (“[Black] embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to threaten the victim.”); United States v. Magleby, 420 F.3d 1136, 1139 (10th Cir. 2005) (“Unprotected by the Constitution are threats that communicate the speaker’s intent to commit an act of unlawful violence against identifiable
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protect individuals from the possibility that the threatened violence will transpire, but also from the fear of violence and “disruption that fear engenders.”

Thus, society’s interest in protecting threatening speech is secondary to that of maintaining a system of order and civility.

2. Incitement: Advocacy of Unlawful Action and the Requirement of Imminence

In the absence of a “true threat,” determining whether advocacy of violence or lawless action falls outside the purview of the protections of the First Amendment becomes even more complex. Although the Supreme Court has held that advocacy is constitutionally protected if it is not directed or likely to incite imminent illegal acts, the Court has not offered significant guidance on the meaning of “imminent.” Recent cases, however, suggest that this standard is difficult to meet if illegal acts do not immediately follow the speech in question.

Supreme Court opinions of the early twentieth century held that a State may reasonably and constitutionally conclude that certain instances of advocacy create such a danger to the public peace and security that they should be penalized by the use of State police power. However, in many of those cases, Justices

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Note:

183 Whitney v. California, 274 U.S. 357, 371 (1927) (affirming the conviction of Anita Whitney, found guilty of violating the California Criminal Syndicalism Act for her role as an organizing member of the Communist Labor Party); see also Abrams v. United States, 250 U.S. 616, 627–28 (1919) (upholding the constitutionality of the Espionage Act, the Court upheld the
Holmes and Brandeis dissented from the reasoning of the majority,\(^\text{184}\) defending the freedom of speech, stressing the distinction between advocacy and incitement, and supporting a requirement of a showing of “clear and present danger.”\(^\text{185}\) Thus, they advocated that for speech to no longer be protected, “it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.”\(^\text{186}\)

In the middle of the twentieth century, the Warren Court rejected previous restrictions on the exercise of free speech, and gradually adopted the Holmes-Brandeis requirement of the expectation of immediate violence.\(^\text{187}\) In 1969, this rationale was adopted in *Brandenburg v. Ohio*,\(^\text{188}\) and the reasoning of prior cases was expressly overruled.\(^\text{189}\)

After accepting an invitation from Brandenberg, the leader of a Ku Klux Klan group, a reporter and cameraman from a local television station attended a Ku Klux Klan gathering and filmed the events.\(^\text{190}\) On the basis of this gathering, Brandenberg was

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\(\text{184}\) See *Whitney*, 274 U.S. at 372 (Brandeis, J. concurring); *Abrams*, 250 U.S. at 624 (1919) (Holmes, J. in dissent).

\(\text{185}\) *Whitney*, 274 U.S. at 376.

\(\text{186}\) Id. (emphasis added). Justice Brandeis further explained that “no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time [for discussion], the remedy to be applied is more speech, not enforced silence.” *Id.* at 377.

\(\text{187}\) See, e.g., *Dennis v. United States*, 341 U.S. 494, 507 n.5 (1951) (listing nine opinions that “have inclined toward the Holmes-Brandeis rationale”); *American Communications Ass’n v. Douds*, 339 U.S. 382, 412 (1950) (The First Amendment “requires that one be permitted to advocate what he will unless there is a clear and present danger that a substantial public evil will result.”).

\(\text{188}\) 395 U.S. 444, 447 (1969) (*per curiam*).

\(\text{189}\) *Id.* at 449.

\(\text{190}\) *Id.* at 445. The film revealed twelve hooded figures, some of whom were armed, gathered around a large wooden cross which they eventually burned. *Id.* Portions of the film were later shown both on local and national television networks. *Id.* While most of the dialogue in the scene was unintelligible in the
convicted of violating an Ohio statute prohibiting the advocacy of unlawful acts “as a means of accomplishing industrial or political reform.” The Supreme Court reversed the conviction, holding that the statute was unconstitutional under the First and Fourteenth Amendments because it failed to distinguish mere advocacy “from incitement to imminent lawless action.” Thus, even advocacy of the use of force or to violate the law are protected from State prohibition by the constitutional guarantees of free speech and press, so long as that advocacy is not directed or likely to incite or produce imminent illegal acts.

The Court has yet to expressly provide a clearly defined rule for determining when advocacy incites violence and thus may be prohibited by the First Amendment. However, two recent cases involving the incitement requirement have found that the harm threatened by the defendant’s speech was not sufficiently imminent for the speech to be to be proscribed. In the first case, Hess v. Indiana, approximately one hundred protestors moved onto a public street and blocked vehicle traffic during an anti-war demonstration. When police caused the demonstrators to

film, scattered phrases could be understood, such as “bury the niggers” and “we intend to do our part.” Id. at 446 n.1.

Brandenburg, 395 U.S. at 444–45. Brandenberg was charged with violating an Ohio Criminal Syndicalism statute, Ohio Rev. Code Ann. § 2923.13 (West 2008), for “advocating the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform” and for “voluntarily assembling with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.” Id. (internal citations omitted). Upon conviction, he was fined $1,000 and sentenced to one to ten years’ imprisonment. Brandenburg, 395 U.S. at 444–45.

Id. at 448–49.

Id. at 447.


414 U.S. 105.

Id. at 106.
disperse,\textsuperscript{198} Hess said loudly, “[w]e’ll take the fucking street later (or again).”\textsuperscript{199} The Supreme Court concluded that this statement was not intended to incite further lawless action on the part of the crowd in the vicinity of Hess, nor likely to produce such action.\textsuperscript{200} The opinion noted, “[a]t best . . . the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time.”\textsuperscript{201} Thus, the Court held that these actions were not sufficient to permit the State to punish Hess for his speech.\textsuperscript{202}

In the second case, \textit{NAACP v. Claiborne Hardware Co.},\textsuperscript{203} white business owners who had suffered lost earnings as result of civil rights boycotts brought actions against the participants and civil rights organizations.\textsuperscript{204} In a series of speeches, NAACP chapter leader Charles Evers stated that boycott violators “would be watched”\textsuperscript{205} and “disciplined” by their own people.\textsuperscript{206} Subsequently, those individuals were unlawfully disciplined.\textsuperscript{207} Conceding that “[i]n the passionate atmosphere in which the speeches were delivered, they might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence,” the Court held that “[t]he emotionally

\textsuperscript{198} \emph{Id.}
\textsuperscript{199} \emph{Id.}
\textsuperscript{200} \emph{Id.} at 109.
\textsuperscript{201} \emph{Id.} at 108.
\textsuperscript{202} HESS, 414 U.S. at 108.
\textsuperscript{203} \emph{458 U.S.} 886 (1982).
\textsuperscript{204} \emph{Id.} at 889–90.
\textsuperscript{205} \emph{Id.} at 900 n.28.
\textsuperscript{206} \emph{Id.} at 902. Evers further warned violators that the Sheriff could not sleep with them at night and that if any African-American was caught “in any of them racist stores, we’re gonna break your damn neck.” \emph{Id.} The names of those who violated the boycott were then read at meetings of the local chapter of the NAACP and were published in a paper entitled the “Black Times.” \emph{Id.} at 903–04.
\textsuperscript{207} Evidence adduced at trial illustrated that shots were fired at the homes of three violators, \textit{Claiborne}, 458 U.S. at 904–05, a brick was thrown through the windshield of a car, \emph{id.} at 904, a flower garden was intentionally damaged, \emph{id.} at 904, automobile tires were slashed, \emph{id.} at 906, and two individuals were physically attacked, \emph{id.} at 905.
charged rhetoric of Charles Evers’ speeches did not transcend the bounds of protected speech set forth in Brandenburg.208 Essential to this determination was that the violence allegedly caused by Evers’s rhetoric occurred weeks and months after his speeches were made.209

In light of Brandenburg and its progeny, the Court has interpreted the First Amendment broadly and set forth expansive protections of advocacy speech.210 The resulting standard of imminence is a narrow one: “speech intended to stir anger and even speech that creates a climate of violence is protected under the First Amendment.”211 Thus, statements which advocate illegal action at some indefinite point in the future are insufficient to permit State proscription of speech.212 This stringent standard for imminence is particularly significant given the widespread knowledge of contemporary technology and the increasing use of the internet as a tool to express dissatisfaction with societal norms and disseminate related information.213

208 Id. at 927–28.
209 Claiborne, 458 U.S. at 928.
210 See Vitiello, supra note 194, at 1216–17.

First, when speech values are at stake, a court has a heightened duty to review the record independently to determine whether the findings below are justified. Second, the Court will not lightly find that threatened harm is imminent, at least not absent a showing that the threatened harm has come shortly after the speech. Third, a state must prove the speaker’s intent to bring about the harm; the Court will read ambiguous evidence of the speaker’s intent in favor of the speaker. The Court requires intent, not mere knowledge, that the harm will occur.

213 See e.g., The Final Nail, http://www.finalnail.com/ (last visited Feb. 21, 2008) (providing address and contact information for laboratory animal suppliers, fur farms, slaughterhouses and companies that trap animals for fur); Close HLS, http://www.closehls.net/ (last visited Feb. 21, 2008) (posting reports of demonstrations and providing addresses and contact information for HLS customers, lab suppliers, and financial affiliates); SHAC, http://www.shac.net/HLS/index.html (last visited Feb. 21, 2008) (posting detailed
3. Crime-Facilitating Speech

“Crime-facilitating speech” is another area in which courts have been willing to restrict the exercise of free speech.\(^\text{214}\) This term refers to any communication that, intentionally or not, conveys information that makes it easier or safer for some listeners or readers to commit unlawful acts or to get away with committing them.\(^\text{215}\) The Supreme Court has yet to explicitly determine when such speech is constitutionally protected,\(^\text{216}\) and lower courts have not set forth any discernible rule in their unpredictable decisions.\(^\text{217}\)

Crime-facilitating speech is often a form of “dual-use” material that can be used both in harmful ways and in legitimate ones.\(^\text{218}\) Thus, when attempting to generate a rule to regulate such speech, it is important that only the harmful uses are proscribed.\(^\text{219}\)

Noting that “[m]uch crime-facilitating speech can educate readers, or give them practical information that they can use lawfully[,]” Professor

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\(^{214}\) Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005); see, e.g., Rice v. Paladin Enterprises, 128 F.3d 233 (4th Cir. 1997) (holding that a book of instructions on how to become a professional killer was not entitled to First Amendment protection); United States v. Barnett, 667 F.2d 835 (9th Cir. 1982) (the publication and wide distribution of instructions on how to make illegal drugs is not entitled to protection of the First Amendment).

\(^{215}\) Volokh, *supra* note 214, at 1103.

\(^{216}\) Stewart v. McCoy, 537 U.S. 993, 995 (2002) (Stevens, J., respecting the denial of certiorari) (“Our cases have not yet considered whether, and if so to what extent, the First Amendment protects such instructional speech.”).

\(^{217}\) Compare United States v. Raymond, 228 F.3d 804 (8th Cir. 2000) (a permanent injunction prohibiting the sale of a program that provided instructions for avoiding federal income taxation did not violate promoters’ First Amendment right to free speech), with McCoy v. Stewart, 282 F.3d 626, 631 (9th Cir. 2002) (advising street gang members with a “blueprint on how a successful gang should be run” is protected by the First Amendment), cert. denied Stewart v. McCoy, 537 U.S. 993 (2002).

\(^{218}\) Volokh, *supra* note 214, at 1126–27.

\(^{219}\) Id. at 1127.
Eugene Volokh, Professor of Law at UCLA Law School and the author of The First Amendment and Related Statutes, has set forth a balancing test, advocating that there should be an exception to First Amendment protections where at least one of the following three circumstances is present:

1. When the speech is said to a few people who the speaker knows are likely to use it to commit a crime or to escape punishment (classic aiding and abetting, criminal facilitation, or obstruction of justice): This speech, unlike speech that’s broadly published, is unlikely to have noncriminal value to its listeners. It’s thus harmful, [and] it lacks First Amendment value.

2. When the speech, even though broadly published, has virtually no noncriminal uses. This speech is likewise harmful and lacks First Amendment value.

3. When the speech facilitates extraordinarily serious harms, such as nuclear or biological attacks: This speech is so harmful that it ought to be restricted even though it may have First Amendment value.

These narrow exceptions balance the significant values of protecting the right of free speech and prohibiting “speech that substantially facilitates crime.”

B. Free Speech, the Internet, and the SHAC 7

The normal method of deterring unlawful conduct is to punish the person engaging in it. It would be remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.

- Hon. John Paul Stevens

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221 Volokh, supra note 214, at 1217.
222 Id. at 1111, 1217.
A law is “unconstitutionally broad [if] it authorizes the punishment of constitutionally protected conduct.”\textsuperscript{224} Accordingly, the most problematic aspect of the SHAC 7 convictions concerns the defendants’ rights to freedom of speech and association.\textsuperscript{225} It is difficult, if not impossible, to reconcile the convictions of the SHAC 7 with the protections of the First Amendment. United States Attorney Christopher Christie stated in an interview that the defendants were “exhorting and encouraging” actions not protected by free speech guarantees.\textsuperscript{226} However, upon application of the First Amendment jurisprudence standards set forth above to the content of the SHAC USA website, the defendants do not appear to have engaged in any conduct that falls outside the purview of First Amendment protections.

1. True Threat

The information posted on the SHAC USA website did not constitute a “true threat,” as it did not “communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”\textsuperscript{227} At trial, an HLS employee who visited the SHAC USA website as part of his employment with the company recited postings from the site reporting on nation-wide protests and illegal actions by unknown individuals against HLS and its affiliates.\textsuperscript{228} Significantly, the pages that reported these events also contained a disclaimer, stating that the group did not direct, control or participate in the protests.\textsuperscript{229}

\textsuperscript{224} Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).
\textsuperscript{225} Best & Kahn, \textit{supra} note 93, at 19.
\textsuperscript{228} Brief of Defendant-Appellant at 17, United States v. Kevin Kjonaas, No. 06-4339 (3d Cir. filed Oct. 22, 2006) [hereinafter Kjonaas Brief].
\textsuperscript{229} Id.; United States v. Carmichael, 326 F.Supp.2d 1267, 1281 (M.D. Ala. 2004) (in holding that the First Amendment rights of the defendant precluded the court from ordering him to take down a website containing the pictures and personal information of government agents and informants, the court noted that a disclaimer of intent is evidence that the website would not reasonably be threatening to those individuals).
The same employee testified that he viewed the posting of “Top 20 Terror Tactics.” However, this document was not written by anyone affiliated with SHAC USA; rather, it was re-posted from the website of an organization that compiled the list to garner support against the SHAC campaign. In fact, the heading of that page clearly stated that the list was taken from another source, and it contained a disclaimer “making it clear that SHAC did not organize or take part in any criminal activity.” Neither these postings nor the remainder of the information contained on the website communicated a subjective intent to commit violent acts against anyone affiliated with HLS.

230 Kjonaas Brief, supra note 228, at 16. To view SHAC USA’s posting of these nineteen tactics, visit: http://web.archive.org/web/20010502223703/http://www.shacusa.net/news/3-6-01.html. The government contended that this document implicitly encouraged the invading of offices, vandalizing property and stealing documents; physical assault, including spraying cleaning fluid into someone’s eyes; smashing windows of a target’s home or flooding the home while the individual was away; vandalizing or firebombing cars and bomb hoaxes; and threatening telephone calls or letters, including threats to kill or injure someone’s partner or children. Press Release, United States Attorney’s Office–District of New Jersey, Three Militant Animal Rights Activists Sentenced to Between Four and Six Years in Prison 4 (Sept. 12, 2006), http://www.usdoj.gov/usao/nj/press/files/pdffiles/shac0912rel.pdf.

231 Josh Harper, Seven HLS Campaign Volunteers Arrested by FBI, Charged with Terrorism, 24 NO COMPROMISE, http://nocompromise.org/issues/24shac7.html. The list of tactics was originally written by the Research Defence Society, “a British lobby group reportedly funded by the pharmaceutical industry and universities. Its main focus is to disseminate information about, and to defend the use of, animal testing in medicine.” Research Defence Society, http://en.wikipedia.org/wiki/Research_Defence_Society (last visited Nov. 29, 2007).

232 Kjonaas Brief, supra note 228, at 16–17. The top of the list read: “From the Research Defence Society of the U.K.” Id.

233 The SHAC USA website acted only as an information clearinghouse, and the defendants themselves never indicated that they were going to take part in any actions. In fact, the organization “never advocated for anyone to be hurt” and the bottom of every webpage contained “a disclaimer that said that [they] do not advocate any form of violent activity, and in fact, [they] urge people that when they write letters or they send emails, that they’re polite, they’re to the point, they’re not threatening in nature.” Democracy Now! Interview, supra note 101.
Furthermore, the actions of the defendants cannot be considered intimidation “in the constitutionally proscribable sense of the word,” as there is no indication that the defendants directed a threat to any individual with the intent of placing them in fear of bodily harm or death.\textsuperscript{234} As the SHAC 7 defendant(s) argued, at most, the evidence showed only that animal rights activists intended to make the lives of these individuals miserable by relentlessly demonstrating in front of their homes, causing them embarrassment and emotional distress and great inconvenience, with the knowledge that this disruption of their lives would continue so long as their associations with HLS continued.\textsuperscript{235} However, “[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.”\textsuperscript{236}

2. Incitement

Likewise, the maintenance of the SHAC USA website was not directed or likely to incite or produce imminent lawless action.\textsuperscript{237} A claim that certain statements are not protected by the Constitution because they incite unlawful action “would be increasingly difficult if made against communications via the Web . . . [as] the indirect communicative nature of the Internet provides a strong buffer between a speaker and a threatened target.”\textsuperscript{238} Nonetheless, the

\begin{itemize}
  \item \textsuperscript{234} Id. at 360; cf. United States v. Hart, 212 F.3d 1067 (8th Cir. 2000) (concluding that a known anti-abortion activist’s actions were a true threat where he parked two Ryder trucks at an abortion clinic, knowing that the clinicians were aware that a similar one had been used in the Oklahoma City bombing and would fear for their lives); Planned Parenthood of the Columbia/Williamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (concluding that in creating “Guilty” posters and a website where the personal information of abortion providers was disclosed, the actions of an anti-abortion organization constituted true “threats of force” because they intentionally replicated a pattern that preceded the past murders of three providers).
  \item \textsuperscript{235} Kjonaas Brief, supra note 228, at 99–100.
  \item \textsuperscript{236} NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982).
  \item \textsuperscript{237} See Brandenberg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).
  \item \textsuperscript{238} Schlosberg, supra note 211, at 78–79. “[I]n Planned Parenthood,
case against the SHAC 7 was based primarily on the theory that the maintenance of the SHAC USA website “encouraged and incited SHAC members and followers to direct their intimidation, harassment and violence against HLS and its targeted employees, as well as secondary targets . . . in an often successful attempt to get those companies to end their business relationships with HLS.”

The evidence presented by the government at trial consisted of the testimony of employees and former employees of HLS and its affiliates detailing instances of harassment, vandalism and property damage. The government also presented evidence obtained from the investigation of the defendants conducted by the FBI and other law enforcement officers. However, this evidence failed to demonstrate either that any of the defendants participated in or directed others to participate in criminal activity, or that the criminal activity that occurred was an imminent result of the defendants’ conduct. In fact, vandalism and property damage at homes and offices sometimes “occurred within days or weeks of SHAC USA’s postings . . . but on other occasions the Government’s evidence demonstrated no link at all between postings and the actions of anonymous third parties, either because

Judge Kozinski in dissent noted that there was so little chance of proving that the posters and website in that case met the imminency requirement in Brandenberg that the plaintiffs did not even raise the argument.” United States v. Carmichael, 326 F.Supp.2d 1267, 1287 (M.D. Ala. 2004) (citing Planned Parenthood, 290 F.3d at 1092 n.5 (Kozinski, J., dissenting)).


240 Kjonaas Brief, supra note 228, at 10. For example, the Chairman of the holding company for HLS testified that he received offensive phone calls and mail, pictures of him labeled “puppy killer” were posted at his daughter’s apartment building, his California home was vandalized, and there were protests outside of his New York apartment. Id. at 20. He further testified that he did not know who was responsible for these actions, some of which were lawful protest activity. Id.

241 Brief of Defendant-Appellant at 5–6, United States v. Andrew Stepanian, No. 06-4296 (3d Cir. filed Sept. 29, 2006) (this evidence included “surveillance of speaking events, protests, demonstrations, marches, electronic surveillance of the website as well as phone conversations”).

242 Kjonaas Brief, supra note 228, at 12.

243 Id. at 15.
the activity occurred before the postings, or months later.\textsuperscript{244} The link between the speech and the conduct was further weakened because the SHAC USA website was often not the exclusive source of the information it contained.\textsuperscript{245} Thus, the government failed to show the requisite temporal nexus for the proscription of speech under this exception to the First Amendment’s protections.\textsuperscript{246} At worst, the website amounted to nothing more than advocacy of illegal action at some indefinite future time, which the Supreme Court has held to be protected speech.\textsuperscript{247}

3. Crime-Facilitating Speech

Finally, there is no overarching policy rationale for proscribing the SHAC 7’s conduct as impermissible crime-facilitating speech.\textsuperscript{248} In fact, as a preliminary matter, it is unclear whether the maintenance of the SHAC USA website facilitated the \textit{commission} of any crime as is required to fall within the possible exception to First Amendment protected speech.\textsuperscript{249} While the website posted reports of what had occurred on prior occasions and provided the location for possible targets of protest, it did not provide specific instructions making it easier for its visitors to commit unlawful acts

\textsuperscript{244} Id.

\textsuperscript{245} Id. at 13 (“Even the Government’s witness admitted . . . that there were other animal activist websites which publicized protest information.”). In fact, prosecutors called an activist to the stand who had participated in electronic civil disobedience (“ECD”) against an affiliate of HLS. SHAC7.com, The Case, \textit{supra} note 96; see Wikipedia, Electronic Civil Disobedience, http://en.wikipedia.org/wiki/Electronic_civil_disobedience (last visited Nov. 25, 2007) (ECD refers to a form of protest in which the participants use computer technology to carry out their actions, such as flooding a computer server with external communications requests, rendering it unable to respond to legitimate traffic). The activist testified that SHAC USA had not at all encouraged him to take these actions, and that he read about these tactics of common knowledge on a number of websites. SHAC7.com, The Case, \textit{supra} note 96.

\textsuperscript{246} See Vitiello, \textit{supra} note 194 and accompanying text.

\textsuperscript{247} Hess v. Indiana, 414 U.S. 105, 108 (1973) (per curiam).

\textsuperscript{248} See generally Volokh, \textit{supra} note 214 (setting forth a test for crime-facilitating speech).

\textsuperscript{249} Id. at 1096.
or get away with committing them.250

However, even assuming that such information can be said to constitute crime-facilitating speech, the information contained on the SHAC USA website does not fall within any of the three proscribable circumstances posited by Professor Volokh.251 First, the website was not available only to a few people which the defendants knew were likely to use the information to commit unlawful acts.252 The very nature of the Internet is such that its content is available to billions of individuals, accessible at any given moment. Second, the information posted was relevant for noncriminal use.253 In fact, the personal information posted about individuals who are affiliated with HLS was used for lawful purposes in this case.254 Lastly, it is evident that the information provided could not facilitate extraordinarily serious harms, such as nuclear or biological attacks.255 Thus, due to the First Amendment value of the information contained on the SHAC USA website and its inability to result in serious harm, the conduct of the SHAC 7 was likely insufficient to constitute proscribable crime-facilitating speech.

In sum, the maintenance of the SHAC USA website did not fall within any of the exceptions necessary to proscribe the fundamental freedom of speech: the information it contained did not communicate the requisite intent to constitute a true threat; it was not directed or likely to incite or produce imminent lawless action; and it could not be proscribed as crime-facilitating speech. Accordingly, the convictions of the SHAC 7 for conspiracy to violate the AEPA were not in accordance with the First Amendment.

250 See id. at 1103.
251 Id. at 1217.
252 See id.
253 See id.
254 Although the witnesses at trial testified that they were “upset,” “scared,” felt “threatened,” or were “concerned” about the demonstrations that occurred outside their homes, Kjonaas Brief, supra note 228, at 23–26, a large portion of the protests complied with the law and adhered to any injunctions that were in place at the time. Id.
255 See Volokh, supra note 214, at 1217.
C. A “Chilling” Effect on the Right to Free Speech

“[A] statute which . . . forbids . . . the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”

Michael Ratner, a human rights lawyer and vice-president of the Center for Constitutional Rights, noted that the AETA and its precursors are unique forms of legislation, the vagueness of which “sweep within them basically every environmental and animal-rights organization in the country.” Even under the USA Patriot Act, which has come under attack by virtually all concerned with the preservation of civil liberties, the definition of domestic terrorism requires that an offense include “acts dangerous to human life,” a defining element entirely absent from “eco-terrorism” legislation.

The problematic vagueness of the AEPA became apparent in the aftermath of the SHAC 7 convictions. “[T]he terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . .” This Note argues that the AEPA lacked this requisite clarity. The Act provided that whoever, for the purpose of causing physical disruption to an animal enterprise, intentionally damaged or caused the loss of any property used by that enterprise or conspired to do so, was in

violation of the statute. This language indicates that only physical disruption of an animal enterprise itself, and not economic disruption caused by the targeting of affiliated individuals and businesses, was prohibited by the statute. Nevertheless, the SHAC 7 defendants were convicted of animal enterprise terrorism for allegedly conspiring with other activists to target the employees and affiliates of HLS.

Neither the exercise of the speech at issue, nor the conduct that allegedly resulted from the speech, was explicitly proscribed by the statute. In fact, a chief concern of those discontented with the AEPA’s protections, and one of the primary bases for the support of its amendment, was that it did not address secondary or tertiary targeting by activists. Accordingly, the AETA expanded the scope of the Act to explicitly include such conduct. Because Congress felt it was necessary to amend the Act in such a manner, it may be inferred that such conduct was not previously intended to be proscribed. However, even if the Act had been intended to address these issues, these lobbying efforts demonstrate that “men of common intelligence” necessarily guessed at its meaning and differed as to its application, thereby resulting in a violation of due process as applied.

The conscious and intentional inclusion of disclaimers throughout the SHAC USA website clearly illustrate that the SHAC 7 defendants outwardly engaged in conduct which they believed to be legal. Consequently, these convictions have caused uncertainty in the minds of animal advocates, some of whom will

265 See 2004 Hearing, supra note 53 (testimony of William Green, Senior V.P. and General Counsel, Chiron Corporation).
266 See Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1444 (D.C. Cir. 1988), cert. denied, 488 U.S. 1010 (1989) (“Where the words of a later statute differ from those of a previous one on the same or related subject, the Congress must have intended them to have a different meaning.”).
267 Connally, 269 U.S. at 391.
268 See Democracy Now! Interview, supra note 101.
inevitably be deterred from engaging in legal activism out of fear that they may end up in federal prison.\textsuperscript{269} As a result, even if animal enterprise terrorism legislation is not actively used for prosecution, “the very risk of being charged as a terrorist will almost certainly have a chilling effect on legitimate activism.”\textsuperscript{270}

With the introduction of the AETA, Congress was given the opportunity to clarify the scope of animal enterprise terrorism legislation. However, although the passage of the AETA resolved the incongruity with respect to secondary targeting, it has created additional issues that are unlikely to be resolved at least until its first application. First, while the AEPA required that an individual have the purpose of causing physical disruption to an animal enterprise, the AETA creates a violation for those who act “for the purpose of damaging or interfering with the operations of an animal enterprise.”\textsuperscript{271} The use of such vague language widens the scope of the Act greatly, potentially encompassing purely economic damage, civil disobedience and other forms of activism that are generally accepted.\textsuperscript{272} The penalties provision of the legislation further supports such an expansive interpretation, as it provides a punishment for an offense that does not instill in another the reasonable fear of serious bodily injury or death, results in no bodily injury, and results in no economic damage.\textsuperscript{273}

Significantly, the AETA also extends the crime of animal enterprise terrorism to situations in which an individual “intentionally places a person in reasonable fear of death or serious bodily injury” for the purpose of “damaging or interfering with the operations of an animal enterprise.”\textsuperscript{274} Though it is uncontroversial

\textsuperscript{269} See, e.g., Humane Society, supra note 127.

\textsuperscript{270} Id.


\textsuperscript{272} See ACLU Letter to House, supra note 132.

\textsuperscript{273} 18 U.S.C. § 43(b)(1) (2007) (emphasis added). “One explanation for this sentencing provision is that it could be intended to target acts of ’conspiracy.’” Will Potter, Analysis of Animal Enterprise Terrorism Act, http://www.greenisthenewred.com/blog/wp-content/Images/aeta-analysis-109th.pdf (July 2007). However, it may also be used to provide a fine and imprisonment up to one year for legitimate activity that results in lost profits.

that individuals should not be threatened with such harm, there may be a potential and significant problem with the intent requirement if not interpreted narrowly by the judiciary. Those who have supported the passage of the AETA have begun a “scare-mongering campaign” to create a fear of “eco-terrorists” in the public.\footnote{See Potter, supra note 273. For example, the children’s film \textit{Hoot}, based on the prize-winning novel by Carl Hiaasen, has been labeled “soft-core eco-terrorism,” as it tells the story of young teenagers who break the law to sabotage a construction site and protect the habitat of burrowing owls. Marc Morano, \textit{New Movie Called ‘Soft Core Eco-terrorism’ for Kids}, CNSNews, May 1, 2006, \url{http://www.cnsnews.com/ViewSpecialReports.asp?Page=/SpecialReports/archive/200605/SPE20060501a.html}. Further, after the New York Stock Exchange announced it would not list the public offering of HLS, an anonymous full-page ad was run in the New York Times depicting a man in a black ski mask with the headline “I Control Wall Street” and noting that “NYSE employees were reportedly threatened by animal rights activists,” a claim that remains entirely unsubstantiated. NYSE Hostage, \url{http://nysehostage.com/ads.asp} (last visited Nov. 25, 2007).

275 See Potter, supra note 273. For example, the children’s film \textit{Hoot}, based on the prize-winning novel by Carl Hiaasen, has been labeled “soft-core eco-terrorism,” as it tells the story of young teenagers who break the law to sabotage a construction site and protect the habitat of burrowing owls. Marc Morano, \textit{New Movie Called ‘Soft Core Eco-terrorism’ for Kids}, CNSNews, May 1, 2006, \url{http://www.cnsnews.com/ViewSpecialReports.asp?Page=/SpecialReports/archive/200605/SPE20060501a.html}. Further, after the New York Stock Exchange announced it would not list the public offering of HLS, an anonymous full-page ad was run in the New York Times depicting a man in a black ski mask with the headline “I Control Wall Street” and noting that “NYSE employees were reportedly threatened by animal rights activists,” a claim that remains entirely unsubstantiated. NYSE Hostage, \url{http://nysehostage.com/ads.asp} (last visited Nov. 25, 2007).

276 See discussion supra text accompanying notes 54–67.

277 Potter, supra note 273 (“Through scare-mongering, the unreasonable becomes reasonable.”).


279 \textit{Id.}
Finally, the illusory exemptions contained in the AETA are unsuccessful in alleviating these concerns regarding the scope of the legislation. The drafters included a section entitled “Rules of Construction,” stating:

Nothing in this section shall be construed—(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution; (2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, regardless of the point of view expressed, or to limit any existing legal remedies for such interference; or (3) to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this action, or to preempt State or local laws that may provide such penalties or remedies.280

However, these provisions do not serve the same purpose as the amendments recommended by the ACLU in its letter to the House Judiciary Committee to make the bill less likely to chill or threaten free speech.281 In fact, these provisions state nothing more than the elementary proposition that a statute may not override a Constitutional right.282 Despite the drafter’s alleged precautionary measures, the AETA should not survive a constitutional challenge.283

It is unlikely that the AETA will stop the underground, illegal direct action that it was allegedly designed to prevent.284 Property

281 ACLU Letter to House, supra note 132.
282 See Potter, supra note 273.
283 See id.
284 See Steven Mitchell, Analysis: Bill targets animal activists, UNITED PRESS INTERNATIONAL, Nov. 14, 2006, http://www.upi.com/Health_Business/Analysis/2006/11/14/analysis_bill_targets_animal_activists/5048/ (Dr. Jerry Vlasak, a trauma surgeon and spokesman for the North American Animal Liberation Press Office, noted that “[a]s far as the underground [animal] liberation movement, [the AETA] won’t have any impact at all because . . . [t]heir activities—sabotaging, liberating animals—are already illegal so just adding one more law won’t make much difference.”).
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damage, vandalism, harassment, intimidation, and any other acts that aggressive animal rights activists may commit in furtherance of their goals that are not entitled to protection under the First Amendment were plainly unlawful even prior to this ideology-specific legislation.\textsuperscript{285} The presence of penalties for these actions has never been a deterrent in the past,\textsuperscript{286} and their increase is not likely to significantly influence a decision to engage in illegal direct action.\textsuperscript{287}

Despite activists’ resilience in the past, these further sanctions are likely to deter aboveground activists who attend protests and publicly voice their dissent, resulting in one of two possible undesirable outcomes. First, these individuals may fear expressing their opinions and their desire for change, thereby inhibiting the crucial “uninhibited marketplace of ideas” rationale behind the First Amendment.\textsuperscript{288} In contrast, other individuals may be persuaded to resort to clandestine activities and simply hope that they will not be caught.\textsuperscript{289} An examination of ALF activities and those of the

\textsuperscript{285} See id.

\textsuperscript{286} Addressing the court at his sentencing on November 8th, 2005, Peter Young stated:

I am not without my regrets. I am here today to be sentenced for my participation in releasing mink from 6 fur farms. I regret it was only 6. I’m also here today to be sentenced for my participation in the freeing of 8,000 mink from those farms. I regret it was only 8,000. It is my understanding of those 6 farms, only 2 of them have since shut down. I regret it was only 2. More than anything, I regret my restraint, because whatever damage we did to those businesses, if those farms were left standing, and if one animal was left behind, then it wasn’t enough.


\textsuperscript{287} See Mitchell, supra note 284.

\textsuperscript{288} Red Lion Broadcasting Co. v. Fed. Commc’ns Comm’n, 395 U.S. 367, 390 (1969). Further fostering a fear of expressing dissent by strictly legal means, industry groups have accused even the most benign animal protection organizations, such as the Humane Society of the United States, of “consorting with terrorists.” See Potter, supra note 12.

\textsuperscript{289} Mitchell, supra note 284 (Camille Hankins of activist organization Win Animal Rights noted that by shepherding this legislation, the industry “could’ve taken a step that will create their worst nightmare,” because the increase in penalties may drive more people “underground because there will be
SHAC 7 reveals that it is perhaps a greater risk to post information on a website than to put on all black attire and a balaclava, travel to a fur farm or animal testing facility, and proceed to destroy thousands of dollars worth of equipment and release animals from captivity. The freedom to communicate one’s ideas without fear of prosecution is essential to diminish the belief that illegal direct action is the most effective means to prevent the death of nonhuman animals.

CONCLUSION

The convictions of the SHAC 7 should not be perceived as merely affecting the contemporary animal rights movement because the legal implications that arise from branding activists as “terrorists” concern all individuals who advocate political and social change. The SHAC campaign, as well as other animal rights organizations that engage in direct action, have developed effective strategies and methodological approaches to activism that are highly significant for all matters of social justice, advocacy and political struggle.

When Congress creates legislation to proscribe the actions of advocates for one side of a debate, it must cautiously avoid silencing the discussion and dissent so fundamental to the significance of the First Amendment. The AEPA, as first passed in 1992, appears to have been drafted to effectively balance the competing interests of activists and the federal government. The text of the legislation protected animal rights advocacy by proscribing a relatively narrow range of activities, while also recognizing the governmental interest of protecting corporate interests from theft, vandalism and physical disruption. However, application of and amendments to this legislation have

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290 Best & Kahn, supra note 93 at 3, 4.
291 Id. at 3.
292 ACLU Letter to House, supra note 132, at 3.
294 Id.
progressively tipped the scale in favor of corporate interests.\footnote{295} By appealing to the unrelenting lobbying efforts of industry groups, Congress has effectively disregarded the concern for protection of the legitimate activities of grassroots activists.\footnote{296} Accepting the industry’s unsupported claims that further measures were necessary to criminalize already illegal activities, Congress adopted the Animal Enterprise Terrorism Act, a statute that not only failed to address the problems inherent in the AEPA’s revisions, but expanded the protections of those profiting from animal exploitation in terms even more vague and overbroad.\footnote{297}

In light of the SHAC 7 convictions and the passage of the AETA, it is necessary for Congress to reexamine the purposes for which it serves. At the start of each new Congress, representatives must “solemnly swear that [they] will support and defend the Constitution of the United States.”\footnote{298} Accordingly, if it is encouraged that a proposed bill be passed to proscribe criminal conduct, Congress must make some concerted effort to verify that the bill would accomplish that end without infringing upon fundamental freedoms. In adopting legislation that impermissibly proscribes activities traditionally protected by the First Amendment, Congress abandons its duty to defend the Constitution.

\footnote{295}{See discussion supra text accompanying notes 89–151.}

\footnote{296}{See discussion supra text accompanying notes 165–289.}

\footnote{297}{See discussion supra text accompanying notes 256–89.}

\footnote{298}{U.S. Senate, Oath of Office, http://www.senate.gov/artandhistory/history/common/briefing/Oath_Office.htm (last visited Feb. 21, 2008).}
BARGAINING POWER ON BROADWAY: WHY CONGRESS SHOULD PASS THE PLAYWRIGHTS LICENSING ANTITRUST INITIATIVE ACT IN THE ERA OF HOLLYWOOD ON BROADWAY

Ashley Kelly∗

INTRODUCTION

The presence of “pic-to-legit musicals” on Broadway has been around for decades.1 In recent years, Broadway has seen its share of motion pictures turned into musical hits2 as well as

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2 ‘‘The Lion King’’ (1997), ‘‘The Producers’’ (2001) and ‘‘Hairspray’’ (2002) [were] among the winners at both the box office and at the Tonys.” Id. “The Lion King,” adapted from the 1994 animated Disney film, has won over thirty major theatre awards, including six Tony awards, and recently celebrated its tenth anniversary on Broadway. See Andrew Gans, Empire State Building and Sardi’s to Honor Disney’s Lion King, PLAYBILL, Nov. 8, 2007, available at http://www.playbill.com/news/article/112596.html. “The Producers,” adapted from the 1968 Academy Award-winning film, won twelve Tony awards, the most ever awarded to one show, and ran on Broadway for six years before
disappointments. The 2007–2008 Broadway season alone features four new musicals adapted from movies, including the Disney production of “The Little Mermaid” and the Mel Brooks adaptation of “Young Frankenstein.” In the coming seasons, hit films such as “Gladiator” and “Shrek” will also be turned into musical adaptations. For major motion picture studios, a musical based on a movie can be a windfall as it reduces the risk of investment. For critics, that same musical can provoke the fear that “cherished musical-theater traditions are being suborned to serve a disposable mass culture.” Outside of the studios and critics, however, a larger issue looms: Before a movie-musical ever hits a stage, there is a battle that audiences rarely think about—the closing in April, 2007. See Kenneth Jones, Broadway Record-Breaker The Producers Closes April 22, PLAYBILL, Apr. 22, 2007, available at http://www.playbill.com/news/article/107445.html. “Hairspray,” adapted from the 1988 film, won eight Tony awards and is still running on Broadway. See http://hairspraythemusical.com/.


See Rogers, supra note 5 (“The beauty of the movie-musical is that the branding is already in place.”).

Id. “Their fear is that Broadway is becoming an adjunct to Hollywood, where desperation to reach a mass audience raised on movies and television” forces a dilution of traditional theatre. Id.
battle for copyright control between the playwright and the studio.\(^9\)

At the core of this battle is the recognition that playwrights and screenwriters deal in two distinct legal realities.\(^10\) This distinction centers on the work made for hire doctrine of the Copyright Act of 1976, which carves out an exception to the rule that copyright ownership vests in the party who actually created a work.\(^11\) If a work is made for hire, the employer or hiring party is considered to be the author and owns the copyright “unless there is a written agreement to the contrary.”\(^12\) Independent contractors are not employees under agency law,\(^13\) and their works may be “specially ordered or commissioned” under limited conditions, in which case the second clause of the work for hire doctrine applies and the commissioning party controls the copyright.\(^14\) In order to actually be a work made for hire under the second clause, two conditions must be met: (1) the work has to fall within one of nine specified categories,\(^15\) and (2) there must be a written agreement between the parties that states the work is a work made for hire.\(^16\) Screenwriters clearly fall into the “part of a motion picture or other audiovisual

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\(^9\) See Weidman, supra note 6, at 645 (“The studio’s interest in maintaining control of the content of the stage version of [a movie] seems irreconcilable with the theatrical mandate which gives the playwright ultimate control of the work which he creates.”).

\(^10\) See id. at 641–42 (“A screenwriter is an employee. . . . From the beginning, he understands that everything he writes will immediately become the property of the studio which employs him . . . . The playwright is an independent contractor. He owns his own work and is free to dispose of it as he sees fit.”).


\(^12\) Id.

\(^13\) Id. at 751.


\(^15\) The nine categories are (1) a collective work; (2) as a part of a motion picture or other audiovisual work; (3) as a translation; (4) as a supplementary work; (5) as a compilation; (6) as an instructional text; (7) as a test; (8) as answer materials for a test; or (9) as an atlas. 17 U.S.C. § 101 (2007).

\(^16\) U.S. Copyright Office, supra note 14, at 2.
work” category, meaning any work they do for a studio is owned by that larger entity. In contrast, plays, and more broadly, dramatic works, are not one of the nine categories and the work of playwrights may not be specially ordered or commissioned like a motion picture screenplay.

This brings us back to the battle between studios and playwrights and the increasing presence of Hollywood on Broadway with movie-musicals. Movie studios are producing on Broadway in increasing numbers, but with the assumption that they are in control of playwrights’ works as works for hire. John Weidman, president of the Dramatists Guild, warns against the dangers of allowing studios acting as producers on Broadway to make their own rules—in essence, “build[ing] a wall around them and keep[ing] them quarantined.” Weidman argues that while individual playwrights have been resisting the pressures to work under a work for hire regime, he admits that “with the appearance of more and more studio-produced musicals like ‘Tarzan’ and

19 See Weidman, supra note 6, at 645 (“[T]he most aggressive of the movie studios [bring] with them . . . a desire to do business, not according to the theater model which put[s] the playwright in first position, but according to the Hollywood model, in which the producing studio own[s] the author’s copyright and writers [can] be hired and fired at will.”).
20 The Dramatists Guild is an advocacy organization composed of playwrights, composers, and lyricists “who write for the first class theater and who represent the common interests of playwrights.” Barr v. Dramatists Guild, 573 F. Supp. 555, 561 (S.D.N.Y. 1983); Weidman, supra note 6, at 639 (“The Dramatists Guild is the only national organization representing the interests of playwrights, composers, and lyricists writing for the living stage.”).
21 Weidman, supra note 6, at 645 (“[A]s a general rule, what one producer gets, all producers want.”).
‘Aida,’ [these] pressures [on playwrights to relinquish copyright] are only going to grow more intense.”22

In light of these mounting pressures, Congress must intervene. Unlike screenwriters, playwrights are forced to negotiate with studios without the collective bargaining power of an organization like the Writers Guild of America (“WGA”)23 because Congress has not granted the Dramatists Guild the right to collectively bargain on behalf of playwrights.24 For years, senators and house representatives have proposed bills allowing the Dramatists Guild the ability to collectively bargain.25 However, none of the bills have ever been put to a vote.26

This Note advocates that now is the time for Congress to act on behalf of playwrights by passing the Playwrights Licensing Antitrust Initiative Act,27 which would allow playwrights as a group to collectively bargain with the powerful Hollywood studios now producing on Broadway.28 Part I addresses the functional differences between playwrights and screenwriters and the varied impact that the work made for hire doctrine has on playwrights and screenwriters. Part II discusses bargaining power in the entertainment industry, focusing on the negotiating power of the Dramatists Guild and the WGA. Part III looks at the past and current state of the Playwrights Licensing Antitrust Initiative Act.

22 Id. at 644.
23 The WGA is a labor union and screenwriters’ collective bargaining representative in the motion picture and television industry. Wellman v. Writers Guild of Am., W., 146 F.3d 666, 668 (9th Cir. 1998).
24 See ROBERT M. JARVIS ET AL., THEATER LAW: CASES AND MATERIALS 80 (2004) (“Because producers typically have the upper hand in... negotiations, the [Dramatists] Guild has wanted to engage in collective bargaining but cannot do so—as a trade association rather than a labor union, its activities are not shielded from the federal anti-trust laws.”).
25 Zamora, supra note 18, at 395.
26 Id.
Part IV advocates for why, in light of past legislative arguments and the growing presence of Hollywood studios as producers, Congress should act now to bring a balance of bargaining power to Broadway by passing the Playwrights Licensing Antitrust Initiative Act.

I. AUTHORIAL CONTROL: WRITING FOR THE STAGE AND SCREEN

The Copyright Act of 1976 provides that copyright ownership “vests initially in the author or authors of the work.” The Supreme Court generally considers the author to be “the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection.” However, there is an exception to this rule, which is at the core of the legal division between screenwriters and playwrights: the work made for hire doctrine. Section 101 of the copyright law defines a “work made for hire” as:

(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer materials for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

If a work is created by an independent contractor, then the work may be “specially ordered or commissioned” and therefore

31 See Weidman, supra note 6, at 641–42; 17 U.S.C. § 201 (“In the case of a work-made-for-hire, the employer or other person for whom the work was prepared is considered the author . . . and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”).
falls under the second clause of the work for hire doctrine, so long as two conditions are met: that the work falls within one of nine specified categories listed within 17 U.S.C. § 101(2) and that there is a written agreement that states the work is a work made for hire. The fundamental difference between screenwriters and playwrights under the Copyright Act is that screenwriters write as “part of a motion picture or other audiovisual work,” thereby working for hire, whereas playwrights do not fall into any of the nine categories and subsequently maintain control of their copyright. John Weidman put it best when he said, “[t]he intermittent sense of suicidal desperation which playwrights and screenwriters sometimes share is about the only thing they share.”

A. Playwrights: Creators for the Great White Way

The Dramatists Guild defines a playwright as any bookwriter, composer, or lyricist who is involved in the initial stages of the theatrical collaborative process and whose contribution is an integral part of a play as presented in subsequent productions by other producers. The playwright solely controls structure, dialogue, theme, and plot. Additionally, as author of a play, the playwright owns the

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33 U.S. Copyright Office, supra note 14, at 2.
34 Id.
36 Zamora, supra note 18, at 421 (“[A] playwright is not an employee of the producer, but rather an independent contractor.”). See 17 U.S.C. § 101 (2007). See also Dramatists Guild’s Business Affairs FAQ, supra note 18 (“[Work made for hire] is not an acceptable condition for writing in the theater, where authors still are entitled to own and control their own work.”).
37 Weidman, supra note 6, at 641.
39 Charles Isherwood, Go East, Young Writers, For Theater! N.Y. TIMES, Nov. 13, 2007, at E1 (as opposed to the screenwriter whose work can be “parceled out among a dozen writers and script supervisors and subject to executive meddling”).
intellectual property. These rights include the copyright of the play or musical. Because the playwright owns her work and is free to dispose of it as she sees fit, the playwright can grant a producer a defined package of performance rights for a limited time while reserving all other rights to herself.

Specified in most playwright licensing contracts with producers is that all changes made to the script, title, stage business, or performance of the play or musical also belong to the playwright. Many licensing agreements between playwrights and producers also specify that the playwright shall receive a percentage of the gross box office receipts from the initial production of the work and retain ownership and control over all subsequent productions. Indeed, a playwright is the only creator in the theater industry who enjoys the exclusivity of retaining the right of copyright ownership. Playwrights are not typically hired to write exclusively for an individual producer or Broadway theater. Though occasionally a theater or producer will commission a play, most plays “are simply written—by someone, somewhere with an impulse and an idea.” More importantly, playwrights do not

41 Id.
42 Weidman, supra note 6, at 641–42.
43 Nevin, supra note 38, at 1540; see Garmise, supra note 40. Typically, a producer may make changes to the play with the playwright’s consent, but regardless of whether the producer or the author composed the emendations, the intellectual property belongs to the playwright. Id.
44 Typically between 5% and 7% of the gross weekly box office receipts. See Richard Garmise, The Art of the Deal, Part 1: Money, Money, Money, DRAMATIST, Nov. 1994, at 1.
45 See id. at 2. See also Nevin, supra note 38, at 1540.
46 Nevin, supra note 38, at 1540. See Weidman, supra note 6, at 642 (“[I]t is in the theater, and only in the theater, that [the playwright] . . . knows his own unique, idiosyncratic voice will be heard, unedited and uncompromised.”).
47 See Zamora, supra note 18, at 421 (explaining that the relationship between a producer and a playwright is limited to “the time it takes to produce . . . one play” and if the producer wants to continue to work with the playwright, “a new contract would have to be devised”).
48 Weidman, supra note 6, at 642.
write plays as works made for hire.\textsuperscript{49}  
A playwright is not an employee under the first clause of the work made for hire doctrine.\textsuperscript{50} In \textit{Community for Creative Non-Violence v. Reid}, the Supreme Court articulated a multi-factor test for determining under what circumstances a creator acts as an independent contractor and when she is an employee.\textsuperscript{51} The factors to consider are (1) the hiring party’s right to control the manner and means by which the product is accomplished; (2) the skill required; (3) the source of the instrumentalities and tools; (4) the location of the work; (5) the duration of the relationship between the parties; (6) whether the hiring parties have a right to assign additional projects to the hired party; (7) the extent of the hired parties’ discretion over when and how long to work; (8) the method of payment; (9) the hired party’s role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the provision of employee benefits; and (13) the tax treatment of the hired party.\textsuperscript{52}

Applying the Supreme Court’s test to the relationship between producers and playwrights, the factors demonstrate that playwrights are not employees of producers.\textsuperscript{53} Producers do not control the manner and means by which a play is written or developed, rather, producers only become involved after a play has been completed.\textsuperscript{54} The skill required is solely the playwright’s specialized writing ability and talent and the source of the instrumentality is her own imagination.\textsuperscript{55} The playwright uses her own workspace and the working relationship with the producer

\textsuperscript{49} See Dramatists Guild’s Business Affairs FAQ, supra note 18.

\textsuperscript{50} 17 U.S.C. §101 (2007). Under the first clause of the work made for hire doctrine, a work qualifies as a work made for hire if it was “prepared by an employee within the scope of his or her employment.” Weidman, supra note 6, at 641 (“The playwright is an independent contractor. He owns his work and is free to dispose of it as he sees fit.”).


\textsuperscript{52} Id.

\textsuperscript{53} Zamora, supra note 18, at 421.

\textsuperscript{54} Id.

\textsuperscript{55} Id.
encompasses only the time it takes to produce the play.\textsuperscript{56} The play is only licensed to the producer.\textsuperscript{57} Thus, the ability for a producer to assign additional projects to the playwright is irrelevant, as is the producer’s discretion over the timeline the playwright works, since the relationship does not commence until after a play is completed.\textsuperscript{58}

The method of payment to the playwright is governed by the licensing agreement.\textsuperscript{59} The playwright does not receive a salary, and the playwright hires her own dramaturges\textsuperscript{60} if she requires them.\textsuperscript{61} There are no employment benefits bestowed upon the playwright and producers do not take taxes out of the playwright’s share of the profits from the production.\textsuperscript{62} Rather than outright control by a producer, producers in the theater industry are rewarded for their investment through subsidiary rights.\textsuperscript{63} In exchange for the initial risk of developing a play’s first production, a producer is often entitled to a percentage of all subsequent licensing of the play and sometimes even a percentage of other rights such as film adaptations.\textsuperscript{64} A playwright also does not come under the second section of the work for hire doctrine because dramatic works do not fall into one of the nine specified categories.\textsuperscript{65}

\textsuperscript{56} Id.
\textsuperscript{57} See Dramatist’s Bill of Rights, http://www.dramatistsguild.com/about_rights.aspx (last visited Apr. 1, 2008) (”When a university, producer or theatre wants to mount a production of your play, you actually license (or lease) the public performance rights to your dramatic property to that entity for a finite period of time.”).
\textsuperscript{58} Zamora, supra note 18, at 421.
\textsuperscript{59} See Garmise, supra note 40, at 1.
\textsuperscript{60} See Thomson v. Larson, 147 F.3d 195, 197 n.5 (2d Cir. 1998) (“[T]he role of the dramaturg can include any number of the elements that go into the crafting of a play, such as actual plot elements, dramatic structure, character details, themes, and even specific language.”) (internal quotations omitted).
\textsuperscript{61} Zamora, supra note 18, at 421.
\textsuperscript{62} Id.
\textsuperscript{63} Nevin, supra note 38, at 1541.
\textsuperscript{64} Id.
\textsuperscript{65} A playwright’s play is not “a contribution to a collective work, . . . a part of a motion picture or other audiovisual work, . . . a translation, . . . a supplementary work, . . . a compilation, . . . an instructional text, . . . a
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However, a playwright’s ability to retain copyright is not absolute. A playwright may assign her copyright to a producer, and indeed some contracts with producers require such provisions. For example, a contract may contain language stating that if the work is not a work made for hire, the playwright nonetheless irrevocably transfers and assigns the producer all rights, title, and interest therein, including all copyrights. Unaware of the ramifications, playwrights often sign such contracts, without understanding that they are losing their rightfully entitled intellectual property for at least 35 years, at which point they may terminate the transfer of rights to the producer. In an industry riddled with egoism, paranoia, and severe financial hardship, playwrights are often blinded by “artistic euphoria and dreams of box office glory” and frequently fail to consider legal and business safeguards in their contracts.

Though playwrights enjoy the unique privilege of retaining copyright ownership, it is a right that must be safeguarded. Playwrights are considered at the bottom of the “financial totem pole” in the theater industry and accordingly have little bargaining leverage with producers, especially large motion picture studios acting as producers. Because standards in theater are low to begin


67 The playwright, through a written conveyance, may transfer in whole or in part “any of the exclusive rights comprised in a copyright.” See 17 U.S.C. § 201(d).


69 Nevin, supra note 38, at 1540. Though a playwright may write many plays throughout her career, a play’s production is expensive and complicated, but unless a play is produced, the playwright does not earn any money from her craft. Even if it is produced once, it is rare that it is optioned for additional productions. See Randolph N. Jonakait, Law in the Plays of Elmer Rice, 19 CARDOZO STUD. L. & LIT. 401, 403–04 (2007) (“A new play almost always has to be instantly successful to last more than a brief time, and if its initial production does not succeed, it is unlikely ever to be produced again.”).

70 Nevin, supra note 38, at 1540.

71 See Isherwood, supra note 39, at E1 (“[I]t is not easy to earn a good living strictly as a playwright.”). See also Jonakait, supra note 69, at 403–04.

72 See Weidman, supra note 6, at 644.
with, the average advance against royalties for a 99-seat production is only between $2,000 and $5,000, with a 5% to 7% share in gross box office receipts post-recoupment. If a playwright is successful enough to engage a Broadway production, the starting advance will be significantly higher but still not very lucrative, usually in the range of tens of thousands of dollars.

With such small returns and little safeguard against the bargaining strength of producers, playwrights are increasingly drawn to Hollywood to write for television and film, giving up their roles for those as screenwriters. While they are more likely to earn enough money to support their writing careers, they

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73 See Victor Knapp & Ralph Sevush, The Money Flow, DRAMATIST, July–Aug. 2001, at Newsletter 2–3. The advance that a small theater gives a playwright is non-refundable but recoupable from the royalties that the playwright earns from ticket sales of an entire production run. DONALD A. FARBER, PRODUCING THEATRE: A COMPREHENSIVE AND LEGAL BUSINESS GUIDE 196 (3d ed. 2006). The production contract usually will specify how many performances the play has been licensed for, but this typically does not alter the amount of the advance. Id. Recoupment occurs when all production costs incurred in presenting a play for a given production have been returned to the investors of the play. Id.

74 See, e.g., HAROLD L. FOGEL, ENTERTAINMENT INDUSTRY ECONOMICS 468 (7th ed. 2001) (“The fees for rights for a major performance of [a show like Rodgers and Hammerstein's musical “Oklahoma”] are customarily in the area of 8% of box-office gross, with an advance against royalties of $18,000 or more.”). Though more than the advance for a small theatre production or Off-Broadway, this is still lower than the multi-million dollar advances seen by Hollywood screenwriters. See Dana Kennedy, Screenwriters Adjust to Being Bit Players Again, N.Y. TIMES, Dec. 9, 2001, at B15 (“The newcomer, David Benioff, was paid $1.8 million upfront for ‘Stay.’

75 Nevin, supra note 38, at 1569 (“Despite intermittent moments of excellence, the American theatre has faced a considerable challenge during the last few decades. Exciting and vital artists are decamping for the hills of Hollywood, taking with them the innovative approaches that define each generation of the theatrical movement.”); see also The Playwrights Licensing Antitrust Initiative Act: Safeguarding the Future of American Live Theater: Hearing on S. 2349 Before the Subcomm. on the Judiciary, 108th Cong. (2004) [hereinafter Hearing] (statement of Marsha Norman, Vice President, Dramatists Guild).

76 See Isherwood, supra note 39, at E1 (“In theory a talented writer interested in making plays and making a living in other media should be able to
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ultimately sacrifice their intellectual property rights in Hollywood.

B. Screenwriters: All of the Money, None of the Control

In sharp contrast to playwrights, film and television screenwriters are almost always employees of a production, and their work product is normally characterized as work for hire.77 In essence, screenwriters are paid to write. This includes plots, characters, twists, turns, and whatever else the studio desires.78 Typically a screenwriter receives a large advance from her studio before she even begins writing and will receive additional sums of money as subsequent drafts are submitted.79 A standard option payment for a feature film can range from $10,000 to $25,000.80

From the 1920s until the late 1940s, movie studios had their own “stables of writers” composed of screenwriters tied exclusively to particular studios.81 These screenwriters were
do both. But in practice it doesn’t seem easy. A lot of writers who head west never look back . . . . Young writers who win some acclaim for a first or second play will probably continue to head west before they have had time to develop, which means the theater is potentially losing important voices before they mature.”).

77 Nevin, supra note 38, at 1542. See Matthew J. McDonough, Moral Rights and the Movies: The Threat and Challenge of the Digital Domain, 31 SUFFOLK U. L. REV. 455, 473 (1997) (“Because of a significant disparity in bargaining power, directors and screenwriters are almost always employed or otherwise contracted for work pursuant to the work for hire doctrine, with the motion picture studio alone as copyright owner.”).

78 Weidman, supra note 6, at 642.

79 Id.

80 STEPHEN BREIMER, THE SCREENWRITER’S LEGAL GUIDE 12 (3d ed. 2004). The option payment gives a producer exclusive control to use the screenwriter’s work. When the option period expires, it can be exercised and the work can be purchased, at which time the screenwriter receives a purchase payment, which can be hundreds of thousands of dollars additionally paid to the screenwriter. Id. at 11–13.

81 Id. at 1. During this time, Hollywood ran on a “studio system,” with major studios (e.g., MGM, Paramount, etc.) producing movies on their own lots with creative personnel (directors, actors, and screenwriters) under long-term contracts. See Mark Weinstein, Profit-Sharing Contracts in Hollywood: Evolution and Analysis, 27 J. LEGAL STUD. 67, 71 (1998).
employees within the meaning of the 1909 Copyright Act and work for hire doctrine. However, as the large movie studios’ empires began to crumble, so did the practice of retaining in-house screenwriters. Thus, when the Copyright Act came up for revision in the 1960s, movie studios were some of the most vocal lobbying forces in Congress. Because of their efforts (and likely their financial resources), the studios were successful in having motion pictures included among the nine exceptions of the second clause of the work for hire definition. Specifically, the works of screenwriters are characterized as “specially commissioned works” under 17 U.S.C. § 101(2), vesting all copyright ownership with the motion picture or television studio.

Under this scheme, the studio is considered the sole legal author of the script and may fully exploit a screenwriter’s creation.

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82 See 17 U.S.C. § 26 (1909). See also Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 748 (1989) (determining an employment relationship existed sufficient to give the hiring party copyright ownership whenever that party has the right to control or supervise the artist’s work).
83 Hollywood moved away from the studio system after the 1948 decision by the Supreme Court in United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948), which forced the major studios to dissolve their monopolies over vertically integrated exhibition, production, and distribution studio systems. See Weinstein, supra note 81, at 71.
84 As the studio systems dissolved, the amount of writers under contract by the studios dropped. See Weinstein, supra note 81, at 89.
85 See, e.g., Copyright Law Revision, Part 5: 1964 Revision Bill with Discussion and Comments Before H. Comm. on the Judiciary, 88th Cong. 298–309 (1965) (statement by the Motion Picture Association of America) [hereinafter MPAA Statement] (“We have indicated all along that provisions such as [the work for hire provisions] are the heart and soul of the operation of commercial and personnel relationships in our industry, without which there would be a very severe upset.”).
88 BREIMER, supra note 80, at 4 (“[O]ur own laws have helped to reinforce the philosophy that the employed writer can be forgotten.”); see Weidman, supra note 6, at 641 (“As legal author of the film, [the] studio can change the content of the screenwriter’s script at will. His pirate captain can become a teenage runaway, his teenage runaway a Cocker Spaniel, his original story, set
While playwrights do their own rewriting and have the last word on their scripts, Hollywood scripts do not remain in the hands of just one screenwriter and are almost always rewritten by another, if not many other screenwriters.\(^{89}\) Moreover, because the studios own the copyright in scripts, they have “free reign to decide whether to modify the content of a film to suit [their] . . . needs.”\(^{90}\) Though screenwriters have been known to balk at the creative control they forfeit to studios,\(^{91}\) Stephen Breimer—a well-known Hollywood entertainment attorney\(^{92}\)—advises screenwriters to “not bite the hand that feeds you. . . . [W]hine about [the system] and you will be labeled a whiner. . . . [T]he system is the system. It is unlikely to change.”\(^{93}\) Because a screenwriter relinquishes all creative control over her screenplay, her name becomes her sole professional asset.\(^{94}\) However, even the decision to credit a screenwriter by name is relinquished to the producer.\(^{95}\)

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\(^{89}\) Breimer, supra note 80, at 2.

\(^{90}\) “Absent a contractual agreement to the contrary, filmmakers remain powerless to prevent a studio from making significant changes to a motion picture.” McDonough, supra note 77, at 477. Modern digital technology makes it possible for a studio to alter, delete, or add scenes to a film to make it more palatable to certain audiences. Id. at 476.

\(^{91}\) See, e.g., Sean Mitchell, Written Out of the Script, L.A. Times, Nov. 11, 2007, at M1 (“Regardless of the head-turning sums they can make, screenwriters are often treated like second-class Hollywood citizens, routinely replaced by other writers and often not even invited to the set of a movie they’ve written.”).

\(^{92}\) Stephen Breimer is a partner of Bloom, Hergott, and Diemer, LLP, in Beverly Hills, California. Prior to his legal career in entertainment law, he produced for film and television. See Breimer, supra note 80, at xviii–xix.

\(^{93}\) Id. at 6.

\(^{94}\) Wellman v. Writers Guild of Am., W., 146 F.3d 666, 668 (9th Cir. 1998) (“The credit does not merely satisfy a writer’s longing to see his name in lights; it can propel him to other work—perhaps to the next blockbuster.”).

\(^{95}\) Id.
II. BARGAINING WITH STUDIO PRODUCERS: WRITERS AND GUILD POWER

For a Hollywood studio, obtaining copyright ownership for the works it creates is perceived as essential in order to fully exploit the works regardless of whether the works are major motion pictures or pic-to-legit musicals.\(^\text{96}\) Production and exploitation of a work often requires a studio to risk millions of dollars,\(^\text{97}\) and if the studio did not have all rights in the work, expenses would drastically increase. For example, industry essentials such as marketing could be subject to a multitude of termination rights that would be difficult to overcome.\(^\text{98}\) Not surprisingly, because the studio has a financial interest behind the work, it tries to ensure that it is holding the entire bundle of rights.\(^\text{99}\)

Generally, the work made for hire doctrine tips the negotiating scales in favor of the copyright holder.\(^\text{100}\) To help promote more balance in Hollywood, a strong collection of guilds has formed to support the creative employees negotiating with big studios.\(^\text{101}\)

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\(^{97}\) According to the Motion Picture Association of America, major motion picture studios pay an average of $106.6 million to produce and market a film. See Josh Friedman, *Movie Ticket Sales Hit Record; But a Report on the Industry’s Health May Understate the True Cost of Making Films*, L.A. TIMES, Mar. 6, 2008, at C1.

\(^{98}\) See Smith, supra note 96, at 31. Without sole ownership of all rights, the studio would be obligated to keep track of multiple licenses subject to termination, limiting not only their ability to exploit the work of the screenwriter but also the director and the many creative contributors to a film. For example, a producer may not be able to sell a film in a foreign market unless nationality vests in one author—the studio. *Id.*


\(^{100}\) *Id.*

\(^{101}\) Movie and television actors are represented by the Screen Actors Guild and the American Federation of Television and Radio Artists. *Melvin Simensky, Entertainment Law* 105 (3d ed. 2003). The writers are represented by the WGA. See *infra* Part II.A. The directors are represented by
instance, film and television writers are represented by the WGA, which has the ability to collectively bargain with the studios. Within the context of Hollywood productions on Broadway, it is increasingly common for the studios to collectively bargain with the Actors Equity Association, which represents live theater performers, and the Local One of the International Alliance of Theatrical Stage Employees (“IATSE”). Playwrights, however, cannot participate in these types of collective bargaining conversations because, while they may be members of the Dramatists Guild, the Dramatists Guild is not enabled to enter into collectively bargained agreements. Subsequently, while screenwriters gain a certain amount of bargaining power through their guild, playwrights are left without strong advocates.

the Directors Guild of America. SIMENSKY, supra note 101, at 105; see also infra note 136.

102 Wellman v. Writers Guild of Am., W., 146 F.3d 666, 668 (9th Cir. 1998). See also infra Part II.A.

103 Founded in 1913, Actor’s Equity Association is the labor union representing American actors and stage managers in the theatre. The organization collectively bargains on behalf of the actors and stage managers. See http://www.actorsequity.org/AboutEquity/aboutequityhome.asp (last visited Apr. 1, 2008).

104 Local One of the International Alliance of Theatrical Stage Employees is the labor union that represents Broadway stagehands. The organization has the power to collectively bargain with producers. See http://www.iatselocalone.org/about/aboutus.html (last visited Apr. 8, 2008).

105 The Dramatists Guild is a trade organization, as opposed to a labor union, and its activities are not shielded from federal anti-trust laws. See discussion infra Part II.B.

106 Id.
A. The Writers Guild of America: Formidable Opponent in Studio Negotiations

Screenwriters are represented by one of the more powerful guilds in the entertainment industry. When disputes between screenwriters and producers arise, the screenwriters turn to the Writers Guild of America, a labor union and the screenwriters’ collective bargaining representative in the motion picture and television industry. The WGA primarily represents screenwriters involved in work made for hire situations and performs writing functions for employers engaged in the production of motion pictures and television. While screenwriters pay yearly dues to the WGA, the studios contribute as well, paying a percentage of pension, health, and welfare benefits to the WGA with respect to each writing assignment for which the studio employs a WGA member.

Since 1954, the WGA has “negotiated and administered minimum basic agreements with major film producers and networks and stations, covering theatrical and television films, broadcast and cable television, documentary film and radio, public and commercial television.” In recent years, the WGA has expanded its coverage

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107 In 2007, for example, the WGA was able to gain the support of the Screen Actors Guild, which represents the entertainment industries acting celebrities, and, as a coalition, forced the canceling of the annual Golden Globe Awards. See Patrick Goldstein, *It’s a Writers Strike, But the Actors Play a Major Role*, L.A. TIMES, Jan. 10, 2008, at E1; see also, e.g., Damon Lindelof, *Mourning TV*, N.Y. TIMES, Nov. 11, 2007, at D13.

108 Wellman v. Writers Guild of Am., W., 146 F.3d 666, 668 (9th Cir. 1998).

109 Almost all agreements between studios and screenwriters are work made for hire situations. Nevin, *supra* note 38, at 1540.


111 BREIMER, *supra* note 80, at 215.


113 Id.
to staff members of radio and television stations, “the latter group mostly in the news and documentary areas, including news writers and others at ABC and CBS and a number of major individual stations.”\(^{114}\)

The agreements promulgated by the WGA dominate in the entertainment industry.\(^{115}\) Members of the WGA “enjoy the benefits, privileges and protections under the various national Minimum Basic Agreements in effect in the field of radio, television and motion pictures.”\(^{116}\) WGA protections are minimum protections and screenwriters are often able to negotiate better terms based on their previous work.\(^{117}\) Many major motion picture studios’ production agreements with screenwriters are governed by the WGA, and WGA writers write most television network programming.\(^{118}\) Studios’ use of WGA screenwriters is so pervasive and exclusive that the only opportunities for non-WGA screenwriters are in animation, low budget pictures, and some basic cable programming.\(^{119}\)

Although the WGA originally ceded screenwriters’ copyrights to the studios in 1942,\(^ {120}\) the WGA has progressively wielded its bargaining power over the years to try to regain more rights for screenwriters.\(^ {121}\) For example, in 1988, the WGA added a provision to its standard agreement, known as a reversion, that allows a screenwriter the limited right to regain control over his copyright under certain conditions.\(^ {122}\) If the screenwriter’s script is original

\(^{114}\) Id.

\(^{115}\) BREIMER, supra note 80, at 287.

\(^{116}\) Writers Guild History, supra note 112.

\(^{117}\) BREIMER, supra note 80, at 8.

\(^{118}\) Id. at 287.

\(^{119}\) Id. Some of the contested issues in the 2007 WGA strike were gaining guild jurisdiction over animation and basic cable programming. WGA Contract 2007 Proposals, http://www.wga.org/contract_07/proposalsfull2.pdf (last visited Apr. 1, 2008).

\(^{120}\) See Mitchell, supra note 91, at M1 (“The agreement reached with the newly founded Writers Guild in 1942 contained the defining clause that survives to this day: ‘The studio, hereinafter, referred to as the author . . .’ making it clear where the writer stood after the sale of his work—or service, as it were.”).

\(^{121}\) See BREIMER, supra note 80, at 42–43.

\(^{122}\) Id.
and not adapted from any pre-existing material, the screenwriter may reacquire copyright of the script five years after either (1) the studio’s purchase or license of the material or (2) the last draft is written so long as the material is not in active development and the studio still owns the first draft.\textsuperscript{123} Because it is incredibly rare to see a basic reversion term in a studio contract with a screenwriter, this WGA provision is the only way for a writer to have a chance at getting back his material.\textsuperscript{124}

Today, the WGA aggressively advocates on behalf of screenwriters and continues to bargain with studios to keep the terms of the WGA Minimum Agreement on pace with technological advancements in the entertainment industry.\textsuperscript{125} This past winter, the WGA engaged in a 100-day bargaining struggle with studios over the future of digital media residuals for writers.\textsuperscript{126} Every three years, the collectively bargained WGA Minimum Basic Agreement is renegotiated with the Alliance of Motion Picture and Television Producers ("AMPTP").\textsuperscript{127} After three months of contentious negotiations went sour and the expiration of the most

\begin{itemize}
\item \textsuperscript{123} See 2004 Writers Guild of America—Alliance of Motion Picture & Television Producers Theatrical and Television Basic Agreement, at § 16.A.8, available at http://wga.org/uploadedFiles/writers\_resources/contracts/MBA04.pdf [hereinafter WGA Basic Agreement]. See also BREIMER, supra note 80, at 42–43.
\item \textsuperscript{124} BREIMER, supra note 80, at 43 (“The best thing about the WGA provision is not just that it exists, which is a major accomplishment in itself, but that it covers commissioned works as well as material that is purchased.”).
\item \textsuperscript{126} See id.; see also Richard Verrier & Claudia Eller, Strike Report; And That’s a Wrap! Walkout to End; After 100 Days and Untold Losses, Writers Vote Overwhelmingly to Get Back to Work, L.A. TIMES, Feb. 13, 2008, at C1. Digital media residuals are derived from Internet downloads, straight-to-internet content, on-demand online distribution, and video on demand. See Verrier & Eller, supra note 125, at A1; see also Lindelof, supra note 107, at D13 (“[F]or more than 50 years, writers have been entitled to a small cut of the studios’ profits from the reuse of our shows or movies; whenever something we created ends up in syndication or is sold on DVD, we receive royalties. But the studios refuse to apply the same rules to the Internet.”).
\item \textsuperscript{127} See, e.g., WGA Basic Agreement, supra note 123.
\end{itemize}
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recent contract on October 31, 2007, the WGA membership authorized a screenwriters’ strike which went into effect on November 5, 2007. The contentious issues were DVD residuals, union jurisdiction over animation and reality television, and residuals for new media. More than 12,000 writers “traded their laptops for picket signs.”

In January, 2008, after eleven weeks of picketing and stalled negotiation, tensions between the WGA and AMPTP broke and talks resumed in the wake of an agreement made between the AMPTP and another industry guild, the Directors Guild of America. A month later, on February 12, 2008, the members of

131 In April of 2004, the New York Times reported that studios made $4.8 billion in DVD sales versus $1.78 billion at the box office. Sharon Waxman, Swelling Demand for Disks Alters Hollywood’s Arithmetic, N.Y. TIMES, Apr. 20, 2004, at E1. The WGA claims that DVD residuals are necessary to a writer’s income to cover periods in between employment, which is common in the industry. The WGA wants the residual rate to double from what amounts to 4 cents per DVD sold up to 8 cents per DVD sold. WGA Contract 2007 Proposals, supra note 119.
132 According to the WGA, 100% of animated screenplays in 2005 were written by at least one WGA member. However, the Minimum Basic Agreement currently does not include animation. See WGA Contract 2007 Proposals, supra note 119.
133 The WGA argues that the process of creating interesting scenarios and shaping raw material into a narrative with conflict and character arc should fall under WGA contract. They advocate for the creation of “Story Producer” and “Supervising Story Producer” as acceptable forms of credit. See id.
134 See Verrier & Eller, supra note 125, at A1. The WGA proposes that all television and theatrical content re-used on non-traditional media like the Internet or phones will earn a residual payment of 2.5% of the distributor’s gross. See WGA Contract 2007 Proposals, supra note 131.
136 See Richard Verrier & Claudia Eller, Strike Report: Writers, Studios to Revive Negotiations; the Directors Accord Opens the Door to Ending the
the WGA voted overwhelmingly to end the strike.\textsuperscript{137} The deal struck between the writers and the producers provides writers with residual payments for shows streamed over the internet and secures the WGA’s jurisdiction for programming created for the internet.\textsuperscript{138} The WGA strike proved that there are opportunities to exploit the vulnerability of studios in negotiations.\textsuperscript{139} Because playwrights are deprived of the opportunity to collectively bargain in the same way that their screenwriting peers can, playwrights are denied an invaluable opportunity to attempt to close the gap in bargaining leverage in negotiations with Hollywood studios producing on Broadway.

\textbf{B. The Dramatists Guild: The Toothless Voice of Playwrights}

While screenwriters have a strong labor union fighting for them, playwrights have no union to argue on their behalf. Instead, playwrights must rely on advocacy groups to collectively represent their interests. The most prominent of these groups is the Dramatists Guild—an advocacy organization representing the common interests of playwrights, composers, and lyricists involved in theater.\textsuperscript{140} The Dramatists Guild was started in 1919 under the umbrella of the Authors League of America.\textsuperscript{141}


\textsuperscript{137} See Verrier & Eller, \textit{supra} note 126, at C1.

\textsuperscript{138} See Verrier & Eller, \textit{supra} note 126, at C1.

\textsuperscript{139} At the start of the strike, it was predicted that without screenwriters, an entire season of television would be lost, and no pilots would be shot in the spring. See Lindelof, \textit{supra} note 107, at D13. When the strike ended in February 2008, it “proved to be far more economically damaging than the studios had expected, shutting down more than 60 TV shows, hampering ratings and depriving networks of tens of millions of advertising dollars.” Verrier & Eller, \textit{supra} note 126, at C1.


\textsuperscript{141} The Authors League of America includes the Authors Guild, which solely represents book authors and the Dramatists Guild. See History of the
purpose of the Dramatists Guild is to “protect and promote the professional interests of playwrights” by advocating “to improve the conditions under which their works are created and produced.”

The Dramatists Guild not only represents the interests involved in theatrical productions, but also “those broader concerns which affect directly or indirectly the role of the theatre in society.”

As an advocate for playwrights, the Dramatists Guild advocates for the enhancement of playwrights’ bargaining power by encouraging playwrights to negotiate for terms the Dramatists Guild pushes as minimum standards producers should meet, promulgating model agreements for use by members, and advising members on standard industry terms concerning advances, royalties, billing, and script changes. For first-class productions, such as a large-scale Broadway musical or play, playwrights that are members of the Dramatists Guild are encouraged to use a guild

Dramatists Guild of America, http://www.dramatistsguild.com/about_history.aspx (last visited Apr. 1, 2008) (“Matters of joint concern to authors and dramatists, such as copyright and freedom of expression, remain in the province of the [Authors] League, other matters, such as contract terms and subsidiary rights, are in the province of the [g]uilds.”).

Mission Statement of the Dramatists Guild, supra note 140 (the Dramatists Guild claims it carries out its mission by “[f]ormulating production contracts; [p]romoting and protecting playwrights through these contracts . . . ; [e]xpressing a public opinion . . . on issues which affect the role the [playwright] plays in the theatre and in society in general; [w]orking with other theatrical institutions to educate them to the primacy of the author in theatrical production; [and] [i]dentifying emerging trends in theatre, and responding affirmatively and actively on an institutional basis to such trends.”).

Jarvis, supra note 24, at 80 (“[T]hese agreements are] respectively known as the ‘Approved Production Contract for Plays’ and the ‘Approved Production Contract for Musicals.’”).

Members of the Dramatists Guild are encouraged to meet with the Director of Business Affairs when they are approached with production agreements to discuss the contracts before signing and to learn about how they can advocate for better terms. However, it is the playwright who must negotiate on her own with a producer, not the Dramatists Guild on her behalf. See Dramatists Guild Member Benefits, Business Advice, http://www.dramatistsguild.com/mem_benefits_business.aspx (last visited Apr. 1, 2008).
certified Approved Production Contract ("APC"). The APC is a licensing agreement which sets forth minimum terms relating to fees, advances against royalties, territorial restrictions, and subsidiary rights for stock and amateur performances as well as motion picture rights. Moreover, the APC grants the producer the right to produce the play as written by the playwright, but protects the playwright by preventing the producer from making any changes to the text, lyrics and/or music. The playwright additionally retains the right to approve the director, the cast, and all other creative elements of the play such as the scenic, costume and lighting designers. The APC is negotiated between the playwright’s agent and the producer, who is often supported by the League of American Theaters and Producers. The APC then goes through a certification process by the Dramatists Guild, to ensure that the negotiated contract conforms to the minimum standards of the Dramatists Guild. If an APC does not conform to these terms, the playwright is asked to leave the guild.

For all the goals that the Dramatists Guild strives for, however, it cannot really enforce the APC as a requirement of the theatre industry, leaving playwrights to ultimately negotiate their own

147 Id.
148 See ALEXANDER LINDSEY & MICHAEL LANDAU, Approved Production Contract for Plays, in 5 LINDSEY ON ENTERTAINMENT, PUBLISHING, & THE ARTS § 11:8 (3d ed. 2008) [hereinafter APC]. Article VIII, Section 8.02(b) requires that any changes that are made shall be the property of the playwright.
149 Id. at Art. 1, § 1.01(b).
150 See Hearing, supra note 146 (statement of Gerald Schoenfeld, Chairman of The League of American Theaters and Producers).
151 See APC, supra note 148, at Art. XVI.
152 Id. Playwrights are not required to use an APC as an industry requirement; rather, the Dramatists Guild requires use of an APC for membership. A playwright is free to leave the Dramatists Guild and negotiate on her own if she is willing to take less favorable terms than those promulgated under the APC.
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This is because the Dramatists Guild is a trade organization rather than a labor union, and therefore, its activities are not shielded from federal anti-trust laws. In fact, over the last sixty years, the Dramatists Guild has been involved in numerous disputes regarding the applicability of restrictions under the Sherman Act.

The first major dispute involving a standard contract certified by the Dramatists Guild was brought before the United States Second Circuit Court of Appeals in 1945. The plaintiff, a)

153 Jarvis, supra note 24, at 80. The playwright must ultimately decide to hold her ground and only accept APC terms, and thus stay within her membership requirements as set by the Dramatists Guild, or negotiate for less favorable terms and choose to lose the benefits of being a member of the Dramatists Guild. For many, the opportunity to be produced at all outweighs the harm of taking less than favorable terms. However, the more playwrights unable to acquire APC terms, the greater the dilution to the bargaining power of all playwrights.

154 “The term ‘antitrust laws’ has the meaning given it in section (a) of the first section of the Clayton Act, 15 U.S.C. § 12 (2007), except that such term includes section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (2007), to the extent that such section applies to unfair methods of competition.” See Playwrights Licensing Relief Act of 2002, S. 2082, 107th Cong. (2002). The purpose of the Sherman Act is to prevent economic harm caused by restraints of trade, such as price-fixing. 15 U.S.C. §§ 1–7 (2007) (“Every contract . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.”). Setting minimum standards in a contract, such as the APC, has been interpreted as a form of price-fixing. See Ring v. Spina (Ring I), 148 F.2d 647, 650 (2d Cir. 1945).

Anti-trust laws seek to ensure that competitors be treated fairly, promote equal opportunities, and to disperse economic and social power. See The Sedona Conference Working Group Series, Commentary on the Role of Economics in Antitrust Law 3 (2006), available at http://www.thesedonaconference.org/content/miscFiles/2_06WG3Report.pdf; see also Zamora, supra note 18, at 399 (“If associations are not deemed labor unions, the Sherman Act prohibits them from collectively negotiating the terms of licensing agreements . . . .”).


156 Ring I, 148 F.2d 647 (2d Cir. 1945).
producer, took over production of a play from another producer who had already signed the Dramatists Guild’s Minimum Basic Agreement (a pre-cursor to the APC) with the defendants, the authors of the play.\footnote{157} When the replacement producer attempted to make changes to the play without the authors’ consent, the authors brought a breach of contract claim for failure to obtain their consent.\footnote{158} The Second Circuit held that the new producer made a \textit{prima facie} showing of illegality, emphasizing that the producer was exactly the type of person whom the Sherman Act sought to protect.\footnote{159} Though the producer was not awarded any damages and the injunction which required the authors to offer the producer the chance to produce the play was later discontinued,\footnote{160} the decision strongly suggested that playwrights were not employees, and the Dramatists Guild, therefore, was not a labor union entitled to the labor exemption to the anti-trust law.\footnote{161}

Subsequent case law involving the theater further exacerbated the tenuous position of the Dramatists Guild.\footnote{162} In \textit{Bernstein v.}

\footnote{157} \textit{Id.} at 649. \\
\footnote{158} \textit{Id.} The authors requested arbitration pursuant to the agreement, but the producer sued, claiming that the authors and the Dramatists Guild had violated the Sherman Act by creating a monopolistic contract through collective bargaining among members of the Dramatists Guild. \textit{Id.} The Dramatists Guild argued it was a labor union and should come under the § 17 exemption of the Sherman Act. \textit{Id.} \\
\footnote{159} \textit{Id.} at 653. The court argued that the Sherman Act seeks to protect an individual from “combinations fashioned by others and offered to such individual as the only feasible method by which he may do business.” \textit{Id.} \\
\footnote{160} The issue of damages was remanded to the District Court, which held that since the allegations made on the motion for a preliminary injunction had been proven, the producer was entitled to injunctive relief. \textit{Ring v. Spina (Ring II)}, 84 F. Supp. 403, 408 (S.D.N.Y. 1949). Both the producer and the Dramatists Guild appealed. In a decision by Judge Learned Hand, the Second Circuit discontinued the injunction because of the absence of a “tangible probability that the wrong [would] be repeated.” \textit{Ring v. Spina (Ring III)}, 186 F.2d 637, 643 (2d Cir. 1951). \textit{See also Ring I}, 148 F.2d at 649; \textit{Ring II}, 186 F.3d at 643. \\
\footnote{161} \textit{See Ring II}, 84 F. Supp. at 408; \textit{Ring III}, 186 F.2d at 643. \\
\footnote{162} \textit{Hearing, supra} note 155 (statement of the Dramatists Guild of America).
Universal Pictures, the Second Circuit held that movie and television composers were independent contractors rather than employees, and thus violated the Sherman Act by collectively bargaining with producers. The same year, however, the court in Julien v. Society of Stage Directors and Choreographers, Inc., found that stage directors are employees and not independent contractors like playwrights or composers. The contrary decisions regarding other creatives’ statuses as either independent contractors or employees, using playwrights as a comparison, left the Dramatists Guild exposed to more antitrust litigation.

Almost forty years after Ring v. Spina, the League of New York Theaters and Producers (“the League”) again brought the Dramatists Guild’s Minimum Basic Production Contract (“MBPC”) under fire. Richard Barr, the president of the League, alleged a conspiracy among playwrights and the Dramatists Guild “to restrain trade and commerce in the sale of authors’ works for

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163 517 F.2d 976 (2d Cir. 1975) (antitrust dispute between Composers and Lyricists Guild of America (“CLGA”) and a group of television and motion picture producers asking whether composers are employees or independent contractors). The CLGA and the Dramatists Guild are similar in status and purpose. Both organizations are advocacy groups composed of creators that are independent contractors but whom wish to negotiate collectively with producers. See id.

164 Id. at 980. (“[Antitrust jurisdiction cannot be declined simply because independent contractors masquerade as a union.”). The Bernstein decision, by ruling against another group of creators who are not protected by a labor union, strengthened producers’ ability to assert antitrust claims against the Dramatists Guild. See, e.g., Barr v. Dramatists Guild, 573 F. Supp. 555 (S.D.N.Y. 1983).


166 Id., at *3. The court argued that a producer has a significant amount of control over the stage director, unlike the limited amount of control the producer has over the playwright. Because the producer has final control over every aspect of the director’s job, the court held that stage directors are employees. Id.

167 See Bernstein, 517 F.2d at 976; Julien, 1975 WL 957, at *3.

168 Julien, 1975 WL 957, at *3.

169 Barr, 573 F. Supp. at 555.
legitimate theatrical attractions by agreeing not to license plays to producers except upon the minimum terms in the MBPC. The Dramatists Guild counterclaimed against the producers, alleging that it was the League that violated the Sherman Act by setting non-competitive maximum levels of compensation for playwrights. The court only decided the producers’ motion to dismiss or stay the contingent counterclaim, holding that the Dramatists Guild could bring a counterclaim. The competing antitrust claims produced a deadlock that eventually resulted in an amicable settlement and a renegotiated APC satisfactory to both sides. However, the threat of antitrust litigation remained and the APC has not been revised since that settlement in 1983.

Even though the above cases date back several decades, the same problems remain as the Dramatists Guild continues to be prevented from renegotiating the APC by collective bargaining. The APC no longer reflects the best terms for either playwrights or producers, yet the Dramatists Guild is powerless to improve the situation. Legislation must be passed to allow the Dramatists

170 Id. at 557.
171 Id.
172 Specifically, the Dramatists Guild alleged that the Shubert Organization and the Nederland Organization, which at the time controlled about 70% of the first-class theaters in New York, were in violation of the Sherman Act. Barr, 573 F. Supp. at 558. See also infra note 231.
173 Barr, 573 F. Supp. at 558. The claim concluded that if and to the extent that the MBPC was an antitrust violation, it was one in which the theater owners and producers had used their monopoly power to force the Dramatists Guild to agree to what became maximum, not minimum, terms set at artificially low prices by the dominant party. JOHN G. KOELTL & JOHN KIERNAN, THE LITIGATION MANUAL: PRETRIAL 55 (1999).
174 Barr, 573 F. Supp. at 563.
175 KOELTL & KIERNAN, supra note 173, at 55.
176 Hearing, supra note 155 (statement of the Dramatists Guild of America).
177 Id.
178 Like any industry, economic realities of the theatre industry have evolved since the APC was last revised.
179 Hearing, supra note 155 (statement of the Dramatists Guild of America).
Guild and other peer groups of playwrights to collectively bargain with groups of producers. The ability for playwrights to negotiate with the support of the Dramatists Guild in the same way that screenwriters negotiate with the support of the WGA is especially important now as more Hollywood studios migrate to Broadway to do business with playwrights.\footnote{180}

III. THE PLAYWRIGHTS LICENSING ANTITRUST INITIATIVE ACT

The power to negotiate as a group is not limited to screenwriters and other employees of Hollywood studios.\footnote{181} Along with the recent screenwriters strike, in November 2007, stagehands represented by the Local One of IATSE\footnote{182} went on strike after negotiations broke down with the League of American Theaters and Producers.\footnote{183} The strike caused the shutdown of 27 shows on Broadway and a loss in revenue of approximately $17 million per day.\footnote{184} The strike lasted for 19 days and was the longest union-supported strike in the theater industry since a musicians’ strike in 1975.\footnote{185}

In both the WGA and IATSE strikes this past year, issues arose regarding the negotiation of current and future contracts.\footnote{186} It should logically follow that playwrights should have the same right to strike in negotiations, yet, this is not the case.\footnote{187}

\footnote{182} Id. at B1 (describing the Local One of IATSE as “the most powerful of Broadway unions”).
\footnote{183} Id.
\footnote{186} See Verrier & Eller, supra note 126; see also Robertson, supra note 185.
\footnote{187} See Hearing, supra note 155 (statement of the Dramatists Guild of America).
antitrust laws prevent playwrights from collectively negotiating a standard form contract for the production of their works. This puts playwrights at a distinct disadvantage in bargaining with producers. With this disadvantage in mind, Congress has attempted to amend antitrust laws and enable playwrights to bargain collectively under the Playwright Licensing Antitrust Initiative Act, which, although sponsored numerous times in the House and Senate, has yet to be put to a vote.

A. Precursors to the Playwrights Licensing Antitrust Initiative Act

On December 19, 2001, Congressmen Henry Hyde and Barney Frank introduced the Fair Play for Playwrights Act of 2001 to the House of Representatives. The bill’s purpose was to “modify the application of the antitrust laws to authorize collective negotiations among playwrights and producers regarding the development, licensing, and production of plays.” The bill would modify antitrust laws to allow associations of playwrights to establish and enforce “minimum terms and conditions on which the works of such playwrights could be developed, licensed, or produced,” and allowed playwrights and producers to have

188 See supra text accompanying note 154; see also Hearing, supra note 155 (statement of the Dramatists Guild of America).
189 Hearing, supra note 28 (statement of Senator Orin Hatch) (“As a result, playwrights—who are frequently at a substantial bargaining disadvantage—are forced to accept contracts on a take it or leave it basis.”).
190 Id. Though playwrights in theory maintain control over their intellectual property, they must defend against producers taking control of their works contractually. With the swell of powerful movie studios flooding Broadway as producers, it is getting harder for playwrights to fight to keep their intellectual property in solo negotiations. See Weidman, supra note 6, at 644 (“[T]he pressures are intense, and with the appearance of more and more studio-produced musicals . . . those pressures are only going to grow more intense.”).
193 H.R. 3543.
194 E.g., the Dramatists Guild.
discussions “for the purpose of negotiating, implementing, or enforcing a standard form contract or other collective agreement governing the terms and conditions on which playwrights’ works will be developed, licensed, or produced.”

Although the bill was referred to the House Committee on the Judiciary, it never reached the voting stage.

In another attempt to push similar legislation, Senators Orrin Hatch and Chuck Schumer introduced the Playwrights Licensing Relief Act of 2002 to the Senate. This bill proposed that antitrust laws should not apply to “any joint discussion, consideration, review, action, or agreement for the express purpose of, and limited to, the development of a standard form contract containing minimum terms of artistic protection and levels of compensation for playwrights.” This second attempt made clear that the collective negotiation powers would be limited to the creation of a modern APC. Unfortunately, the bill met a similar
fate as the one sponsored in the House—it was read twice and once again was referred to the Committee on the Judiciary where it died.200

Continuing to fight for playwrights, Senator Hatch, along with Senator Edward Kennedy, again introduced the bill to the Senate, using the same language but with a new title—the Playwrights Licensing Antitrust Initiative Act of 2004 (“PLAI”).201 The new bill gathered more momentum than its predecessor and hearings were held before the Senate Judiciary Committee on April 28, 2004.202 The committee heard testimony from famous playwrights Wendy Wasserstein,203 Stephen Sondheim,204 and Arthur Miller,205 representatives of the Dramatists Guild,206 and representatives from the League of American Theaters and Producers,207 as well as opening remarks from Senator Hatch.208

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200 See S. 2082.


206 See Hearing, supra note 75 (statement of Marsha Norman, Vice President, Dramatists Guild).


208 See Hearing, supra note 28 (statement of Senator Orin Hatch).
1. Testimony in Support of PLAI

First, Senator Hatch noted that the PLAI would enable playwrights, through the Dramatists Guild and any other peer organizations, to collectively deal with “other industry groups that operate both under and behind the bright lights of the American stage.”\footnote{209} He emphasized that the bill only covered collective adoption and implementation, as opposed to collective enforcement, of an updated APC.\footnote{210} Such a distinction is important because the functional purpose of the PLAI is to allow for the emendation and modernization of the APC, which individual playwrights can then use as a template in individual negotiations.\footnote{211} Such collective deal making was important because, as playwright Wendy Wasserstein testified, the voice of the playwright “has become much more challenged as the ownership of the theaters and the production of plays has become increasingly dominated by corporate interests.”\footnote{212}

Ms. Wasserstein emphasized that every other creative contributor to the theater had union representation and is able to bargain collectively, leaving playwrights at a distinct disadvantage.\footnote{213} Importantly, she stated that the purpose of the PLAI was not to “force a producer to produce a play,” but rather, to develop a standard form contract so that the playwright’s copyright would be “respected throughout the production of [a play].”\footnote{214}

\footnote{209}Id.
\footnote{210}Id. ("My hope is that the basic ability to update the standard form contract as well as provisions ensuring that certain artists’ rights are respected in the production of their plays will encourage young, struggling playwrights to continue working in the field.").
\footnote{212}Id.
\footnote{213}Id.
\footnote{214}Id. Wasserman echoes the concerns of Dramatists Guild president John Weidman, who foresees the fight for control between the playwright and major
Similarly stressing the need for improved future relations, Stephen Sondheim, former president of the Dramatists Guild and current member of its Council, emphasized that the bill was not necessarily for the benefit of established playwrights like himself, but rather it was for the younger generation of playwrights struggling to negotiate with ever-powerful producers. To illustrate the extent of a playwright’s struggle, he told the Committee an anecdote about his play “Merrily We Role Along,” written to go backwards in time, starting at the end and proceeding to the beginning. At one time, a producer demanded that Mr. Sondheim reverse the order of events—completely contrary to his artistic invention. Mr. Sondheim pointed out that while he was able to maintain the integrity of his intellectual property because of his status in the theater industry, many young unknown playwrights do not have the same leverage when negotiating with producers.

Some of the testimony before the Committee focused more on the detrimental after-effects that would likely come from continued strained relations between playwrights and producers. In his motion picture studios acting as producers (Wasserman’s “copprporate interests”) as a “slippery slope down which the playwright’s copyright [control] runs the risk of sliding into oblivion.” Weidman, supra note 6, at 645.


The Board of Directors of the Dramatists Guild is called the Council. The general management, direction, and control of the Dramatists Guild vests with the Council and the Council would have the authority to negotiate a new APC if the PLAI were passed. See Constitution of the Dramatists Guild of America, Inc., Art. V, Sec. 1, available at http://www.dramatistsguild.com/about_constitution.aspx (last visited Apr. 1, 2008).

Hearing, supra note 215 (statement of Stephen Sondheim, playwright).
testimony, playwright Arthur Miller argued that “American theater risks losing the next generation of playwrights to other media and opportunities as the pressures on playwrights increase and their power to protect their economic and artistic interests diminish.”

Mr. Miller emphasized that with the growing pressures of corporate interests in the theater, “only one entity does not have a seat at the bargaining table: the playwrights.” He explained that the PLAI would allow the APC to be updated to “take account of today’s market realities and intellectual property protection climate.”

Vice president of the Dramatists Guild, Marsha Norman, agreed with Mr. Miller that young playwrights were being lost “to television and other unionized venues which pay them in advance and don’t quibble over the price.” She noted that half of her students in the Julliard playwriting program in 2004 left for California to talk to television-show runners and producers and argued that once writers leave the theater, they rarely return.

Ms. Norman contended that without a standard contract for young and mid-career playwrights to rely upon, they would continue to leave the theater and lose the creative rights afforded to them as playwrights in exchange for being guaranteed a paycheck in Hollywood.

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222 Id.

223 Id. Miller notes that the APC has not been updated since 1982. Since that time, intellectual property has increasingly come under the control of corporate interests like major motion picture studios, and Miller advocates that the PLAI should be passed so that the APC can meet and counter the demands of these powerful corporate interests. Id.

224 Hearing, supra note 75 (statement of Marsha Norman, Vice President, Dramatists Guild).

225 Id. (“[W]e try to warn the writers about the dangers of work for hire, but at the moment, the Broadway arena is offering them little reason to stay.”).

226 Id. Unlike the guaranteed paycheck in Hollywood, few playwrights’ works are ever produced, so while they maintain their intellectual property, it has no real value for the struggling playwrights. See Weidman, supra note 6, at 642; see also Jonakait, supra note 69, at 403–04.
In addition to the testimony given before Congress by these prominent playwrights, the Dramatists Guild of America submitted its own statement for the hearing record. The official statement addressed the string of decisions involving the Dramatists Guild and its resulting inability to collectively bargain. The Dramatists Guild argued that the cases attempted to reconcile labor and anti-trust issues, but face “a daunting challenge in the unique environment of the Broadway Theater.” Moreover, it pointed out that the PLAI was not an attempt to reconcile larger issues of anti-trust and labor law, but rather a simple solution to the small but important arena of American theater—the ability to renegotiate and modernize the APC without breaking the law.

2. Testimony in Opposition to PLAI

Not all parties at the Committee hearing, however, were supportive of the proposed legislation. Representing the opposition to the PLAI were the producers, backed by the Broadway League. Gerald Schoenfeld, Chairman of both the Shubert Organization and of the Broadway League, testified in

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227 Hearing, supra note 155 (statement of the Dramatists Guild of America).
229 Hearing, supra note 155 (statement of the Dramatists Guild of America). The Guild argues that because the Broadway theater industry is unique in the way that it conducts business, it is difficult to categorize dramatists as common law employees or independent contractors in the same way those labels are used in more traditional labor scenarios. Id. Because of this difficulty in categorization, the Dramatists Guild argues the PLAI is necessary as an appropriate remedy. Id.
230 Id.
231 See Hearing, supra note 146 (statement of Gerald Schoenfeld, Chairman of The League of American Theaters and Producers); Hearing, supra note 207 (statement of Roger Berlind, Producer).
232 The Shubert Organization is the oldest and largest theater owner on Broadway, owning and operating seventeen Broadway theaters and one Off-Broadway theater. The Shubert Organization not only owns the theaters, it also
opposition to the bill.\textsuperscript{234} Above all, Mr. Schoenfeld expressed his concern that because producers had to worry about the evolving demands of theatre, they needed the flexibility to respond to situations, as they arose, through individual negotiations.\textsuperscript{235} Specifically, he explained that under the APC, it had been necessary for producers to draft addendums to each individual agreement since 1985 in order to meet the demands of modern theater, e.g., the creation of royalty pools.\textsuperscript{236} However, Schoenfeld argued that the negotiating power of producers would be hindered if producers were required to negotiate using the terms of the APC and comply with Dramatists Guild certification.\textsuperscript{237}

produces plays and controls almost all Broadway ticket sales through its subsidiary Telecharge. See Shubert Organization homepage, http://www.shubertorganization.com (last visited Apr. 1, 2008). The Dramatists Guild contends that the Shubert Organization has kept a harsh grip over the theater industry for years, not only controlling 70% of the first-class theaters but also dominating the Broadway League by dictating the terms on which they will produce playwrights’ plays. See Barr v. Dramatists Guild, 573 F. Supp. 555, 558 (S.D.N.Y. 1983).

\textsuperscript{233} The Broadway League, formerly the League of American Theaters and Producers, is the national trade association for theater owners, producers, and general theater managers. See Broadway League homepage, http://www.broadwayleague.com/ (last visited Apr. 1, 2008).

\textsuperscript{234} Hearing, supra note 146 (statement of Gerald Schoenfeld, Chairman of The League of American Theaters and Producers) (“If there are any restraints upon the production of plays and musicals they are imposed by the [Dramatists] Guild and its members and not the producers or the venue operators.”).

\textsuperscript{235} Id.

\textsuperscript{236} Because the form APC was last negotiated in 1985, it is necessary to add terms that were not common practice 25 years ago, such as forms of press, approval of venues, and royalty pools. \textit{Id.} A royalty pool provides for a certain percentage of the weekly net profits to be allocated to the royalty participants (producers, playwright, director, among others) by creating an equation where the total of all of the royalty percentages is the denominator and the numerator is the percentage paid to each royalty participant. \textit{Id.} As Schoenfeld explains, if the royalty pool participants receive 35% of the weekly operating profits, the total royalties are 15%, and the playwright’s negotiated royalty is 6%, then the playwright in the pool receives 6/15 of 35% of the weekly net profits. \textit{Id.}

\textsuperscript{237} \textit{Id.} Schoenfeld reargues the stance of the Broadway League in Barr v. Dramatists Guild, 573 F. Supp. 555 (S.D.N.Y. 1983), that the APC restrains trade by imposing minimum terms. \textit{Id.} However, Schoenfeld fails to consider
Similarly, Broadway producer Roger Berlind testified that freeing playwrights from the restraints of antitrust laws would be detrimental for both competition and playwrights. Because there are so many variables in producing a play, producers needed flexibility in the terms they set. He stressed that if the PLAI were passed, it would destroy the free market of theater producing and instead place the Dramatists Guild as the “gatekeeper” to pre-agreed terms.

Ultimately, while the PLAI of 2004 made it to the hearing stage, the Senate never put it to a vote and the bill died yet again. A strong handful of supporters for the proposed legislation remained, however. A few months after the bill died in the Senate, the identical bill, again entitled the PLAI of 2004, was introduced in the House on June 18, 2004, sponsored by Representatives Howard Coble, John Conyers, Jr., Barney Frank, and Henry Hyde. The bill once again failed to be taken to a vote. Not to be dissuaded, less than a year later, Representatives Coble, Conyers, Frank, and Hyde again attempted to introduce the PLAI of 2005 in the House. Predictably, with the language of the bill that the PLAI allows for the renegotiation and revision of the APC and therefore does not force acceptance of the contested terms.

Hearing, supra note 207 (statement of Roger Berlind, Producer).

Berlind argues that all producers do not agree on having the same structure, price, or terms so it is a misstep to assume that all playwrights agree on the same standards either. Id.

Berlind comes from a Wall Street investment banking background and draws parallels between producing theater and taking investment risks. Id. He argues that he has a fiduciary obligation to investors and that allowing the playwrights to set minimum terms would infringe upon his ability to make a profit. Id.


See H.R. 4615.

unchanged, it again died on the floor without a vote.245 Though the proposed bills up until this point have been unsuccessful in making it to the voting stage, advocates have not yet given up and continue to lobby for the PLAI. Over the past year, the Dramatists Guild has been lobbying in both the House and the Senate for an exception from labor laws, as embodied in the PLAI bill, so that they may collectively bargain without violating antitrust laws.246 Meanwhile, the Broadway League has been successfully spending their time and money lobbying Congress to stall on the Dramatists Guild’s legislative proposals.247

IV. Why Congress Should Act Now

Given the competing agendas and continued struggle between playwrights and producers, the PLAI represents a worthwhile attempt to address and correct the disparate bargaining power between the parties.248 It is undeniable that producers on Broadway are very financially strong,249 and the Broadway League, controlled by the Shubert Foundation, has at times resembled a monopoly.250 Nevertheless, with the ever-growing influx of Hollywood studios producing on Broadway251 and the subsequent mounting pressure to do business according to a Hollywood model, as with screenwriters,252 the gulf in bargaining strength between playwrights and powerful studios as producers has grown even wider.253

245 See H.R. 532.
246 E-mail from David Faux, Director of Business Affairs, Dramatists Guild, to Ashley Kelly (Oct. 17, 2007, 14:25:17 EST) (on file with author).
247 Id.
248 See Zamora, supra note 18, at 428.
249 For example, the Shubert Organization gives out millions of dollars worth of grants to attract shows to its theaters. See N.R. Kleinfield, I.R.S. Ruling Wrote Script for the Shubert Tax Break, N.Y. TIMES, July 11, 1994, at A1.
251 See, e.g., Kuchwara, supra note 4.
252 Weidman, supra note 6, at 644.
253 Id.
A. Battling the Giants: Hollywood Studios on Broadway

The influx of Hollywood producers to Broadway was, in a way, entirely foreseeable. For large motion picture studios with a hit film, a move to adapt a pic-to-legit musical for Broadway has an added advantage over other straight Broadway productions. As opposed to an original musical like “Avenue Q” that must build a reputation by word of mouth, people already have an interest in “Spider-Man the Musical” or “The Little Mermaid” because they saw, and likely enjoyed, the films. Because the branding for a pic-to-legit musical is already in place, Broadway has become yet another arena for movie studios to expand their successful franchises. Inevitably, this is why almost every major studio is making its mark on Broadway, including Fox Theatricals producing “Legally Blonde The Musical,” Dreamworks

254 See Rogers, supra note 5.
255 “Avenue Q,” the surprise winner of the 2004 Tony award for Best Musical, started out in a small Off-Broadway theater before transferring to Broadway after a year. See Jesse McKinley, “Avenue Q” Tony Coup is Buzz of Broadway, N.Y. TIMES, June 8, 2004, at E1.
256 See Rogers, supra note 5.
259 See Rogers, supra note 5.
260 Id.
261 See, e.g., Kuchwara, supra note 4. The Shrek franchise is an apt example, with the forthcoming musical joining the revenue streams from toys, t-shirts, and more film sequels. See Weidman, supra note 6, at 644. In the recent review of “The Little Mermaid” musical, Ben Brantley remarked that the show felt like a cynical reversal of art and commerce: “It used to be that the show came first, followed by merchandising tie-ins. Thoroughly plastic and trinketlike, this show seems less like an interpretation of a movie musical than of the figurines and toys it inspired.” Brantley, supra note 257, at E1.
262 See Cox, supra note 1, at 39.
BARGAINING POWER ON BROADWAY

Animation producing “Shrek The Musical,”263 Sony Pictures Entertainment producing “Spider-Man The Musical,”264 and of course Disney, which hopes to mimic past Broadway successes “Beauty and the Beast” and “The Lion King” with new productions of “Mary Poppins” and “The Little Mermaid.”265

Successful branding and automatic audiences, however, are not the only things that Hollywood producers attempt to bring with them to Broadway. Studios also come prepared to do business with playwrights in the same manner they do business with screenwriters266—intending to contract with playwrights in such a way as to maintain control of their valuable franchises, including copyright control.267 In the same way that the studios argue that their financial interests behind a film entitle them to control over authorship, they are attempting to secure intellectual property rights from playwrights as well.268

The clearest example of this growing disparity in bargaining power is illustrated by the studios’ attempts to apply the work for hire doctrine to playwrights, and the playwrights’ inability to effectively fight back against the studios.269 While a playwright may challenge a work for hire clause as playwrights are neither employees of the theatre or the Hollywood studio,270 nor among the nine categories of works that can be specially ordered or commissioned,271 most playwrights do not have the financial

264 See Kit, supra note 180, at 2.
265 See Weidman, supra note 6, at 645. See also Kuchwara, supra note 4.
266 See Weidman, supra note 6, at 645.
267 See id.
268 See Gulick, supra note 99, at 66.
269 See Weidman, supra note 6, at 644 (“[T]he most aggressive of the movie studios [bring] with them . . . a desire to do business, not according to the theater model which puts the playwright in first position, but according to the Hollywood model, in which the producing studio own[s] the author’s copyright and writers [can] be hired and fired at will.”).
270 See Weidman, supra note 6, at 641–42.
resources to raise such a challenge in court.\textsuperscript{272} Even assuming the work for hire clause could be contracted around, studios are still frequently able to exercise their superior bargaining power in obtaining assignments from playwrights,\textsuperscript{273} effectually taking away the playwrights’ creative property rights anyway.

A hypothetical will further illustrate the impact of a work-for-hire clause, as well as the unequal bargaining between the parties. Consider the following: A writer with both a playwrighting and screenwriting background receives a Writers Agreement from a large motion picture studio to adapt a non-fiction book. The contract combines screenwriting services with an additional clause called “Playwright Services,” granting the writer the first opportunity to write the musical based on the screenplay he was hired to write. The clause could include the language “these services shall be rendered on a ‘work-for-hire basis’ for copyright purposes,” meaning that the writer signs over both his copyright of the screenplay, as well as the copyright in stage rights. More specifically, the contract may grant the studio rights that are very broad: “for all time, exclusively and throughout the world, all rights to use the Property as the basis of or in connection with stage plays (straight plays or musicals) and other live theatrical productions, and all ancillary and subsidiary rights related thereto.”

Under this language, the studio, before the screenplay has even been written, takes control of the stage rights, using the language “work for hire” to do so. Further, the contractual language may also include a tagline such as, “and if this is not a work-for-hire, then it is an assignment.” While the writer may attempt to negotiate with the studio to license his stage rights, he unfortunately must handle the negotiation because, unlike the WGA, the Dramatists Guild is not able to negotiate minimum terms without violating antitrust laws. Likely, the writer will be told by the studio that altering the stage rights is a deal-breaker. Desperate to not lose the deal, the writer will often sign away all of his rights.

\textsuperscript{272} Additionally, the Dramatists Guild as a trade organization is not in a position to give legal aid to individual members.

\textsuperscript{273} Smith, supra note 96, at 30. Contracts will often state that if the work is not a work made for hire then it is an assignment, acting as a catch-all for the studio in securing all necessary rights. \textit{Id.}
As the presence of motion picture studios on Broadway grows stronger, agreements like the hypothetical are becoming more common. Playwrights need the power and protection of the Dramatists Guild now more than ever to balance the current inequities in bargaining power and the growing threat of exploitation. Indeed, “playwrights may often be so desperate to get their play produced and seen by audiences, that they will accept terms that are detrimental to their own interests.” If Congress passed the PLAI, the Dramatists Guild could start to regain ground in bargaining power and playwrights could begin to feel secure in their choice to stay in the world of theater rather than migrating to the world of screenwriting.

Certainly the above demonstrates the extent to which major studios may strip playwrights, and screenwriters, of their ultimate rights. As noted, unlike screenwriters, playwrights do not have the backing of an organized guild that may bargain collectively on their behalf. The recent strikes of both the WGA and IATSE on behalf of Broadway stagehands illustrates that guilds can effectively assert bargaining power over powerful producers. Fairness requires that Congress level the playing field for playwrights as they are the last remaining group of creative professionals that must bargain alone without the support of a guild with collective bargaining authority. It is because of the strength that the screenwriters have through the power of the WGA and the stagehands through the power of IATSE that they were able to successfully stand up against studios and producers in 2007 and 2008 and continue to negotiate effectively today. Congress should no longer favor the power of studios, producers

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274 Zamora, supra note 18, at 428.
275 See Verrier & Eller, supra note 126, at C1. The WGA secured coveted residuals for new media.
276 See Robertson, supra note 185, at B1.
277 See Verrier & Eller, supra note 126, at C1; Robertson, supra note 185, at B1.
278 See supra Part II.B.
279 Id.
280 See Verrier & Eller, supra note 126, at C1; Robertson, supra note 185, at B1.
and their money, but rather, embrace a policy that stimulates creativity by ensuring protection of young playwrights.

B. Following Legislative Precedence

Congress can protect young playwrights by passing the PLAI. Congress has repeatedly demonstrated its concern for motion picture studios, which argue that the work for hire doctrine protects their financial well-being.\textsuperscript{281} Throughout the revision process of the Copyright Act of 1978, Congress argued that work for hire was appropriate in light of the power of the WGA\textsuperscript{282} and operated under the assumption that the Dramatists Guild’s playwrights “take care of themselves.”\textsuperscript{283} Today, however, these two assumptions are in tension with one another given the influx of motion picture studios into the realm of Broadway. The power of the studios, which can be managed with the power of a collectively bargaining guild, is not a legally viable option for playwrights without the PLAI.

\textsuperscript{281} See MPAA Statement, supra note 85, at 302 (“[W]e have indicated all along that provisions such as [the work for hire provisions] are the heart and soul of the operation of commercial and personnel relationships in our industry, without which there would be a very severe upset. Such remains true today and will be the cornerstone of our position with Congress.”). See also Copyright Law Revision, Part 2: Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law Before H. Comm. on the Judiciary, 88th Cong. 358–59 (1964) (statement of Motion Picture Association of America, Inc.).

\textsuperscript{282} See, e.g., H.R. Rep. No. 2237, at 115 (1966) (rejecting proposed “shop right” doctrine changes to the work for hire doctrine because “[w]hile the change might theoretically improve the bargaining position of screenwriters and others as a group, the practical benefits that individual authors would receive are highly conjectural.”).

\textsuperscript{283} Copyright Law Revision, Part 5: 1964 Revision Bill with Discussion and Comments Before H. Comm. on the Judiciary, 88th Cong. 239 (1965) (statement made by Irwin Karp, on behalf of the Authors League of America) (“The Dramatists Guild represents the very few professional playwrights in the United States whose work is presented on Broadway and who are able to take care of themselves.”).

The revision of the Copyright Act in 1976 was the culmination of two decades of research acquired from the testimony of approximately 200 witnesses before the Subcommittee on Copyrights.284 One of the major issues considered was the work for hire definition, specifically, the category of works prepared on special order or commission.285 The preliminary draft of the revision defined works made for hire as excluding all works made on special order or commission, but the first draft was met with “strenuous opposition from . . . motion picture companies.”286

The motion picture studios asserted that exclusion of specially ordered works or commissioned works would create insurmountable obstacles and major economic dislocation.287 Moreover, the motion picture studios argued that because they exercised creative control over a composite of screenwriters’ works, they should be considered the author for copyright purposes.288 While writers argued that the burden of bargaining

284 Smith, supra note 96, at 26–27.
285 Id.
287 See Copyright Law Revision, Part 4: Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law Before H. Comm. on the Judiciary, 88th Cong. 274 (1964); see also Copyright Law Revision, Part 2: Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law Before H. Comm. on the Judiciary, 88th Cong. 153 (1964) (“It must be borne in mind that motion picture producers may and do risk millions of dollars in the production and exploitation of a film, and by their efforts and expenditure substantially enhance the value of the story, novel, or play which is the basis of the picture.”).
288 Hill, supra note 286, at 568. Saul Rittenberg of MGM commented: “If I commission a work from a man, ordering a work specially for my purposes, and I pay for it, what difference does it make whether I put him under my employment contract or establish an independent contractor relationship?”
should be placed on the party with more ready access to legal advice. The motion picture studios countered that the writers were represented by guilds, lawyers, and accountants, and therefore bargaining power was equal.

Another main issue in contention was the writers request for something similar to the “shop right” doctrine in patent law, which would give the commissioning party the right to use the writer’s work to the extent needed but allow the writer to retain all other rights as long as she did not authorize a competing use. The motion picture producers also challenged this right, arguing that the costs would be too much to bear for producers. Specifically, the producers argued that while they took on a number of substantial financial risks, motion picture writers were insulated from loss, and writers already receive shares of producers’ revenue under collective-bargaining agreements set forth by the WGA.

Ultimately, Congress had to decide between excluding commissioned works and “possibly crippling the production of . . . composite works” like films or jeopardizing the rights of writers by including commissioned works in the work for hire definition. In the end, Congress accepted a compromise: in exchange for concessions from the commissioning parties for termination of transfer rights in limited circumstances, the writers consented to the second clause of the work for hire doctrine, which classified nine specific categories of works, including motion pictures, as works for hire if the parties expressly agreed in writing. The “shop right” proposal was altogether rejected as “mere conjecture”

Gorman, supra note 86, at 23.

Smith, supra note 96, at 26–27.

Id.


H.R. Rep. No. 2237, at 115. The writers receive their advance and option payments no matter what, but the producers take on the risk of loss if the film was not successful.

See supra text accompanying note 98.

Hill, supra note 286, at 569–70.


Gorman, supra note 86, at 23.
as to its ability to bring a benefit to writers.\textsuperscript{298}

2. \textit{Later Attempts at Revision}

While the writers may not have been as successful as they had wished with the Copyright Act of 1976, they continued to argue that the writing requirement—that a work for hire clause specifically be in contractual language—offered virtually no protection because of their inherent lack of bargaining power to exclude such a clause.\textsuperscript{299} Joining their cause, Senator Cochran subsequently attempted to revise the work for hire doctrine by regularly introducing a series of bills addressing writers’ concerns of a disadvantaged bargaining position.\textsuperscript{300} Of note, however, is that in the language of these bills Senator Cochran proposed to eliminate every category of works that may be specially ordered or commissioned except motion pictures.\textsuperscript{301} He argued to Congress that motion pictures were uniquely collaborative works requiring a work for hire relationship and employees in the motion picture industry were sufficiently protected by union and guild contracts and therefore less likely to be the victims of overreaching.\textsuperscript{302} None of Senator Cochran’s bills made it out of committee,\textsuperscript{303} and the

\textsuperscript{298} H.R. REP. NO. 2237, at 115 (“The presumption that initial ownership rights vest in the employer for hire is well established in American copyright law... To exchange it for the uncertainties of the shop right doctrine would not only be of dubious value to employers and employees alike, but might also reopen a number of other issues and produce dissension.”).

\textsuperscript{299} Hill, supra note 286, at 569.

\textsuperscript{300} See Smith, supra note 96, at 21 n.8 (citing S. 2044, 97th Cong. (1982); S. 2138, 98th Cong. (1983); S. 2330, 99th Cong. (1986), S. 1223, 100th Cong. (1987); S. 1253 101st Cong. (1989)).

\textsuperscript{301} See S. 2044; S. 2138; S. 2330; S. 1223; S. 1253.

\textsuperscript{302} See Smith, supra note 96, at 41. Cochran fails to recognize, however, that the guilds were formed out of necessity to fight overreaching. Victimization of employees in motion pictures is still quite pervasive even with the guilds. The guilds struggle every day to try and prevent pervasive overreaching.

Senate never adopted his proposal.\textsuperscript{304} Congress previously enacted work for hire legislation which led to studios retaining control over motion pictures by accepting arguments about equal bargaining strength between screenwriters (and their union) and studios. Congress should also fortify the American playwrights against the bargaining power of the motion picture studios as Broadway producers by passing the PLAI, thereby empowering groups of playwright to collectively bargain. Additionally, as a matter of policy, copyright law strives to protect and motivate individuals whose creativity produce works that will enhance the culture and development of society.\textsuperscript{305} By passing the PLAI, Congress will strengthen the bargaining power of the next generation of playwrights by giving them an assurance through the Dramatists Guild and any other voluntary peer organization that their rights are respected and their agreements include fair compensation.

CONCLUSION

Young screenwriters in Hollywood do not have to negotiate with large motion picture studios alone.\textsuperscript{306} As members of the WGA, they enter agreements with the collective voice of all screenwriters and strive for fair compensation for all.\textsuperscript{307} With the ever-expanding migration of Hollywood studios to Broadway, young playwrights increasingly face negotiations with these same motion picture studios—studios that are looking to do business in the same way that it is done in Hollywood.\textsuperscript{308} Congress must not leave these playwrights to negotiate alone and without any support. By passing the PLAI and allowing for the modernization of the Dramatists Guild’s APC, Congress will increase the strength of American playwrights’ bargaining power and ensure that the vibrancy of American live theater continues for years to come.

\textsuperscript{304} Hill, supra note 286, at 569.
\textsuperscript{305} Hill, supra note 286, at 580.
\textsuperscript{306} See supra Part II.A.
\textsuperscript{307} Id.
\textsuperscript{308} See supra Part IV.A.
DON’T PUT A CORK IN
GRANHOLM V. HEALD:
NEW YORK’S BAN ON INTERSTATE
DIRECT SHIPMENTS OF WINE IS
UNCONSTITUTIONAL

Andre Nance*

INTRODUCTION

A new chapter is unfolding in a liquor saga seventy-five years in the making that now concerns New York’s use of a state ban on interstate direct shipments of wine to grant in-state retailers exclusive access to New York’s lucrative direct shipment market at the expense of out-of-state competitors.¹ Such state-level economic

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¹ This year marks the seventy-fifth anniversary of the Repeal of Prohibition by the Twenty-first Amendment to the United States Constitution on December 5, 1933. Not limited to New York, this new chapter has national dimensions and is being written both in the courthouse and the legislature, with federal district courts in New York, Michigan, and Texas differing on how to address similarly discriminatory direct shipping bans, and legislatures in Maine, Tennessee, Virginia, Rhode Island, and Alabama considering revisions to their direct shipping laws. See Arnold’s Wines, Inc. v. Boyle, 515 F. Supp. 2d 401 (S.D.N.Y. 2007); Siesta Vill. Mkt. v. Granholm, No. 06-13041, 2007 WL 2984127 (E.D. Mich. Oct. 12, 2007); Siesta Vill. Mkt. v. Perry, 530 F. Supp. 2d 848 (N.D. Tex. 2008); see generally FEDERAL TRADE COMMISSION, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE, 6 (2003), available at http://www.ftc.gov/os/2003/07/winereport2.pdf [hereinafter FTC REPORT]; Reuters, Texas Judge Calls Bans on Wine Retailer Shipping
protectionism suffered a major defeat in 2005, when out-of-state wineries challenged the interstate ban in *Granholm v. Heald* and the Supreme Court concluded that allowing in-state wineries to bypass wholesalers and retailers and to ship directly to in-state consumers but denying such rights to out-of-state wineries and shippers violated the dormant aspect of the Commerce Clause of the United States Constitution.\(^2\) With this decision, the Supreme Court gave its imprimatur of approval to a balancing standard that


2 See 544 U.S. 460, 472 (2005) (“States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses. This mandate ‘reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.’”) (quoting Hughes v. Oklahoma, 441 U.S. 322, 325–26 (1979)). In *Granholm*, Justices Scalia, Souter, Ginsburg, and Breyer joined in Justice Kennedy’s majority opinion, while Justice Stevens, joined by Justice O’Connor, and Justice Thomas, joined by Justices Rehnquist, Stevens, and O’Connor, filed dissenting opinions. *Granholm*, 544 U.S. at 464.

U.S. CONST. art. I, § 8, cl. 3, otherwise known as the Commerce Clause, grants Congress the exclusive power “to regulate commerce . . . among the several states . . .” and is understood not only as an affirmative “grant of power to Congress to regulate interstate commerce” but also as an “implied limitation on States from regulating matters that interfere with interstate commerce—the so-called ‘Dormant’ Commerce Clause.” Michael A. Lawrence, Toward A More Coherent Dormant Commerce Clause: A Proposed Unitary Framework, 21 HARV. J.L. & PUB. POL’Y 395, 407 (1998).

The effect of *Granholm* on direct-to-consumer shipping has been profound. See Garrett Peck, The Future of the Three-Tier System, 84.4 BEVERAGE MEDIA METRO NEW YORK 22, 26–27 (2008) (quoting Wine America president Bill Nelson: “*Granholm* opened markets for direct-to-consumer shipping. ‘We’ve moved from 27 to 35 states because of the Supreme Court decision.’”) (quoting Free the Grapes! executive director Jeremy Benson: “Wine wrestlers have the option of shipping into states that represent 81% of U.S. wine consumption, up from 50% in January 2005.”); see also Free the Grapes! Press Releases, available at http://www.freethegrapes.org/news.html (last visited Apr. 4, 2008).
weighs and attempts to harmonize the federal Commerce Clause interest in free trade among the states against each state’s Twenty-first Amendment interest in regulating alcohol.³ Although an exception to the interstate direct shipping ban now exists for out-of-state wineries, New York continues to engage in economic protectionism at the expense of out-of-state retailers.⁴

With the national wine retail market standing at thirty billion dollars in 2007 and New Yorkers consuming far more wine than any other market except California and Florida, the stakes are high, and the State of New York has understandably, if shortsightedly, tried to favor resident businesses by banning direct shipments to consumers by their out-of-state competitors.⁵ In September 2007,

³ Prior to the Supreme Court’s decision in Granholm, other courts applied this balancing standard. See, e.g., Beskind v. Easley, 325 F.3d 506, 519 (4th Cir. 2003) (“With the elimination of the local preference statute, no interest of the Twenty-first Amendment is implicated, yet the discrimination violating the Commerce Clause is eliminated.”); see also Elizabeth D. Lauzon, Interplay Between Twenty-First Amendment and Commerce Clause Concerning State Regulation of Intoxicating Liquors, 116 A.L.R. 5th 149 (2004).

⁴ This economic protectionism involves an almost textbook case of facial discrimination against interstate commerce. In Granholm, the Court noted that it had struck down New York laws that “directly regulate[] or discriminate[] against interstate commerce, or when [their] effect is to favor in-state economic interests over out-of-state interests.” 544 U.S. at 487 (quoting Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986)); see also Maine v. Taylor, 477 U.S. 131, 148 (1986) (“Shielding in-state industries from out-of-state competition is almost never a legitimate local purpose, and state laws that amount to ‘simple economic protectionism’ consequently have been subject to a ‘virtually per se rule of invalidity.’”) (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); see also City of Philadelphia, 437 U.S. at 624 (“The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State’s borders.”); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981); H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537–38 (1949); Toomer v. Witsell, 334 U.S. 385, 403–06 (1949); Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511, 525 (1935); Buck v. Kuykendall, 267 U.S. 307, 315–16 (1925); Welton v. Missouri, 91 U.S. 275 (1875).

⁵ In 2003, New Yorkers consumed 20,336,000 cases of wine behind California’s 46,067,000 and Florida’s 20,588,000 but well ahead of Texas’s fourth-place 12,791,000. See ANDERSON ECONOMIC GROUP, CONSUMPTION OF TOTAL WINE RANKED BY STATE, 1993–2003 (Top 12), available at
the United States District Court for the Southern District of New York determined in *Arnold’s Wines, Inc. v. Boyle* that New York’s interest in using its ban on interstate shipping to favor in-state retailers so outweighed the federal interest in free trade that the court declined “to undertake a dormant Commerce Clause analysis” and simply assessed New York’s use of the ban as “within the authority granted to New York by the Twenty-first Amendment.”

Using suspect logic, the court held that New York’s use of the direct shipping ban to favor in-state retailers was “integral” to New York’s three-tier system of regulating the importation and sale of wine. The reality, however, is more complex, and requires a more nuanced and measured approach than that found in *Arnold’s Wines*.

Under a basic three-tier liquor licensing and distribution system, a state issues licenses to producers, wholesalers, and retailers, who must operate separately. In the case of wine, wineries licensed as producers make it, wholesalers distribute it, and retailers sell it to consumers. Federal and state laws limit vertical overlap between tiers of licensees. See *Arnold’s Wines, Inc.*, 515 F. Supp. 2d at 413–14. See also *Granholm*, 544 U.S. at 466 (citing FTC REPORT, supra note 1, at 5–7).


8 See *Granholm*, 544 U.S. at 466 (citing FTC REPORT, supra note 1, at 5–7). Federal and state laws limit vertical overlap between tiers of licensees. Id. (citing FTC REPORT, supra note 1, at 5; 27 U.S.C. § 205 (2007); Bainbridge v. Turner, 311 F.3d 1104, 1106 (11th Cir. 2002)); see also *Arnold’s Wines, Inc.*, 515 F. Supp. 2d at 403 (“The three-tiers refer to: (1) the producer; (2) the distributor or wholesaler; and (3) the retailer. Under the three-tier system, a producer sells its wine to a licensed in-state wholesaler, who pays excise taxes and delivers the wine to a licensed in-state retailer. The retailer, in turn, sells the wine to consumers and, where applicable, collects sales taxes.”).
and retailers sell it to the public. Focusing on the Supreme Court’s general approval of this system, the *Arnold’s Wines* court interpreted *Granholm* as addressing only an exception to the three-tier system—shipping laws that allow wineries to bypass wholesalers and retailers by shipping directly to the public—and not other aspects of the three-tier system that discriminate against out-of-state businesses.

Subsequent decisions in two nearly identical Michigan and Texas cases have differed from the outcome in New York, and the Texas court even criticized the *Arnold’s Wines* decision as “a misreading of *Granholm* . . . [that] elevates a state’s rights under the Twenty-first Amendment to a level that improperly supersedes the dormant Commerce Clause.” These courts rightly disagreed with the *Arnold’s Wines* assertion that the Twenty-first Amendment completely shields New York’s discriminatory shipping laws from Commerce Clause analysis. Though a final district court decision in Michigan is pending, bans on direct shipments from out-of-state retailers are now unconstitutional in Texas, and the New York decision, in declining to balance fully the federal interest in free trade against New York’s interest in

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9 See N.Y. ALCO. BEV. CONT. LAW §§ 3(20), (26), (35), 103–05 (Gould 2007).

10 See *Arnold’s Wines, Inc.*, 515 F. Supp. 2d at 411. In doing so, the *Arnold’s Wines* decision tried to isolate wineries from retailers, two of the three tiers of licensees New York, Michigan, and Texas use to regulate alcohol, a regulatory scheme “under which alcohol producers must go through wholesalers and distributors, who must in turn go through retailers, who can then sell to consumers.” Vijay Shanker, *Alcohol Direct Shipment Laws, The Commerce Clause, and the Twenty-First Amendment*, 85 Va. L. Rev. 353, 353 (1999).


12 The Twenty-first Amendment granted states the power to regulate alcohol. See U.S. CONST. amend. XXI. In particular, Section 2 of the amendment states: “The transportation or importation into any State, Territory, or possession of the United States for delivery or use there in of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” U.S. CONST. amend. XXI, § 2.
regulating alcohol, is deeply flawed.\textsuperscript{13}

If the Second, Fifth, and Sixth Circuits uphold these district court opinions, the Supreme Court itself will soon have to resolve the conflicting interpretations of \textit{Granholm}. In the \textit{Granholm} decision itself, though, the Court gave an indication of how it will approach the matter by declaring that discrimination is “neither authorized nor permitted by the Twenty-first Amendment,” “contrary to the Commerce Clause[,] and . . . not saved by the Twenty-first Amendment.”\textsuperscript{14} The Court further explained that the “Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give a discriminatory preference to their own producers” and that “[s]tates may not enact laws . . . simply to give a competitive advantage to in-state businesses.”\textsuperscript{15} Most of all, the Court determined that “[Section 2 of the Twenty-first Amendment] does not allow States to regulate the direct shipment of wine on terms that discriminate. . . .”\textsuperscript{16} New York has no compelling justification for discriminating against out-of-state retailers, and striking down this differential treatment does not abrogate New York’s core Twenty-first Amendment rights. Accordingly, the Supreme Court will likely strike down New York’s use of the ban on interstate direct shipping to favor in-state retailers.\textsuperscript{17}

Part One of this Note argues that, contrary to the analysis of the recent New York \textit{Arnold’s Wines} decision, the federal interest in free trade with respect to interstate wine shipping is quite strong.\textsuperscript{18} As a threshold matter, New York discriminates between “similarly situated” entities—in-state and out-of-state retailers—

\textsuperscript{13} See Arnold’s Wines, Inc. v. Boyle, 515 F. Supp. 2d 401, 412 (S.D.N.Y. 2007) (“[T]his Court is not aware of any pre-\textit{Granholm} authority calling into question the legitimacy of state laws that limit licenses to retailers and wholesalers located within the state.”).


\textsuperscript{15} \textit{Id.} at 486, 472.

\textsuperscript{16} \textit{Id.} at 476.

\textsuperscript{17} See Siesta Vill. Mkt. v. Perry, 530 F. Supp. 2d 848, 867 n.19 (N.D. Tex. 2008).

\textsuperscript{18} Perry, 530 F. Supp. 2d at 862–64, 867.
that would compete in New York’s wine consumer market, and thus the State invites a high level of judicial scrutiny.\textsuperscript{19} The ban on direct to customer shipments into the state creates a legal barrier limiting access to New York’s market.\textsuperscript{20} The burden on interstate commerce is “clearly excessive” in relation to the two local benefits New York put forward—efficient tax collection and preventing minors’ access to alcohol—because these benefits can be achieved without discriminating against out-of-state businesses by requiring all retailers to file taxes in a timely fashion and all shippers to require an adult signature upon delivery.\textsuperscript{21}

Part Two of this Note argues that the national interest in free

\textsuperscript{19} See Gen. Motors Corp. v. Tracy, 519 U.S. 278, 307 n.15 (1997) (“[I]f a State discriminates against out-of-state interests by drawing geographical distinctions between entities that are otherwise similarly situated, such facial discrimination will be subject to a high level of judicial scrutiny even if it is directed toward a legitimate health and safety goal.”); see, e.g., City of Philadelphia v. New Jersey, 437 U.S. 617, 626–28 (1978); Dean Milk Co. v. Madison, 340 U.S. 349, 353–54 (1951).

\textsuperscript{20} New York shipping laws expressly prohibit shipments to consumers that originate outside the state. See N.Y. ALCO. BEV. CONT. LAW §§ 102(1)(a), 102(1)(b) (Gould 2007) (prohibiting shipments “into the state”). In contrast, shipments originating within the state are authorized. See N.Y. ALCO. BEV. CONT. LAW §§ 94, 105.8, 105.9, 116 (Gould 2007); N.Y. COMP. CODES R. & REGS. tit. 9, § 67 (2007). As a “package store licensee,” a New York wine retailer may sell and deliver liquor and wine “to homes and offices not to be resold by the purchaser[,] by messenger afoot[,] by trucking and delivery companies who hold a trucking permit issued by the Authority[, and] in a vehicle owned and operated, or hired and operated by the package store licensee.” New York State Liquor Authority Compliance FAQs, available at http://abc.state.ny.us/JSP/content/faq.jsp (last visited Apr. 2, 2008) [hereinafter NYSLA Compliance FAQs].

\textsuperscript{21} See Granholm v. Heald, 544 U.S. 460, 491 (2005); see also Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (“Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.”) (emphasis added).
trade among the states outweighs New York’s interest in using its ban on interstate direct shipping to grant in-state retailers exclusive access to New York’s direct shipping consumer market. Though *Grantholm*, on the facts, pertains to direct shipping by wineries and the differential treatment of in-state and out-of-state producers, the plain language of *Grantholm* stresses the need to protect out-of-state “economic interests” broadly from economic protectionism, not producers exclusively. Banning shipments by out-of-state retailers is not critical to maintaining the centralized control of New York’s “unquestionably legitimate” three-tier system. Though wine shipped directly to New York consumers by out-of-state retailers would bypass in-state wholesalers, New York can maintain centralized control over out-of-state retailers and enforce compliance with its regulations “by requiring a permit as a condition of direct shipping.” Without an exception for out-of-state retailers, however, New York’s use of the ban on direct shipping clearly burdens interstate commerce in a way unnecessary to maintaining New York’s central control in regulating alcohol.

Part Three of this Note further argues that extending the current permit exception to New York’s ban on interstate direct shipments does not abrogate New York’s right to regulate alcohol. Though the Twenty-first Amendment is understood to grant New York “virtually complete control” over in-state liquor distribution,

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22 See *Grantholm*, 544 U.S. at 472.
23 Id. (“This Court has long held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate ‘differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.’”) (quoting Or. Waste Sys., Inc. v. Dep’t of Envtl. Quality of Or., 511 U.S. 93, 99 (1994)).
24 See id. at 488–89 (quoting North Dakota v. United States, 495 U.S. 423, 432 (1990)); see also *North Dakota*, 495 U.S. at 447 (Scalia J., concurring).
26 *Grantholm*, 544 U.S. at 491; see also Siesta Vill. Mkt. v. Perry, 530 F. Supp. 2d 848, 867 (N.D. Tex. 2008).
28 Cal. Retail Liquor Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97, 100 (1980); see also *North Dakota*, 495 U.S. at 432 (holding that the three-tier
“there is a marked difference between ‘virtually complete control’ and absolute control.’”

Further, extending the permit exception to the ban has no effect on New York’s ability to regulate alcohol using the three-tier system. Unless New York establishes that these core interests are impaired in a concrete way, it cannot be said as a matter of law that New York’s Twenty-first Amendment interest in using the ban to favor in-state businesses outweighs the federal Commerce Clause interest in promoting free trade.

For these reasons, this Note argues that the decision in Arnold’s Wines should be overturned. As it stands, New York’s use of the ban on interstate direct shipping denies out-of-state retailers access to New York’s lucrative wine consumer market, facially discriminating against out-of-state economic interests while providing in-state retailers with exclusive access. This Note argues that New York can and must give out-of-state retailers system is “unquestionably legitimate”).


30 In Arnold’s Wines, Inc. v. Boyle, New York did not make a concrete showing of any harm to the three-tier system, instead asserting only that “requiring alcohol to pass through the three-tier system allows the State to collect taxes more efficiently and to decrease the sale of alcohol to minors” and that “[d]irect shipment laws . . . are integral to maintaining centralized control over alcohol sales because they ensure that every drop of alcohol flows through the three-tier system.” 515 F. Supp. 2d 401, 407 (S.D.N.Y. 2007). Without concrete evidence to support these assertions, New York failed the standard set by the Supreme Court: “Our Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods.” Granholm, 544 U.S. at 492. “The Court has upheld state regulations that discriminate against interstate commerce only after finding, based on concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable.” Id. at 493.

31 Id.


33 See Maine v. Taylor, 477 U.S. 131, 148 (1986) (“Shielding in-state industries from out-of-state competition is almost never a legitimate local purpose, and state laws that amount to ‘simple economic protectionism’ consequently have been subject to a ‘virtually per se rule of invalidity.’”) (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)).
“access [to its market] . . . on equal terms.”

I. New York’s Ban on Direct Shipping Violates the Federal Commerce Clause Interest in Free Trade

When states attempt to regulate interstate commerce, they encroach on Congress’s exclusive power under the Commerce Clause of the United States Constitution “[t]o regulate Commerce . . . among the several States.” According to James Madison, a “dormant” or “negative” aspect of the Clause grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged, and this dormant aspect is understood to limit state’s power to enact laws that interfere with or burden interstate commerce. New York’s shipping laws implicate this constitutional “prohibition against border-closing laws” by giving unequal treatment to in-state and out-of-state wine retailers. By assigning to in-state retailers the right to ship directly to New York consumers while generally denying this right to out-of-state retailers, New York engages in the kind of blatant economic protectionism that clearly benefits in-state businesses at the expense of out-of-state competitors.

35 U.S. CONST. art. I, § 8, cl. 3; see generally, e.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36–38 (1937).
37 See Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 851 (7th Cir. 2000); see also Gen. Motors Corp. v. Tracy, 519 U.S. 278, 287 (1997); Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951); Welton v. Missouri, 91 U.S. 275, 280 (1875); Cooley v. Bd. of Port Wardens, 53 U.S. 299, 319 (1851).
38 See Taylor, 477 U.S. at 148; see also City of Philadelphia v. New
A. In-State and Out-of-State Wine Retailers are “Similarly Situated” for Dormant Commerce Clause Purposes

A threshold question in determining whether a state law violates the dormant aspect of the Commerce Clause is whether the in-state and out-of-state entities in question are “similarly situated.” There can be no violation of this dormant aspect unless in-state and out-of-state wine retailers are “similarly situated.” The Supreme Court has found that entities are similarly situated when there exists “actual or prospective competition between the supposedly favored and disfavored entities in a single market.” Further, the Supreme Court explained:

[If] the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed. . . . eliminating the . . . regulatory differential would not serve the dormant Commerce Clause’s fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors.

Where, as here, in-state and out-of-state wine retailers engage in the same business—selling wine to retail consumers—and seek access to the exact same market—New York’s lucrative wine consumer base—the retailers are potential competitors that are “similarly situated” for purposes of the dormant aspect of the Commerce Clause.

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40 Id. at 298–99.
41 Id. at 300.
42 Id. at 299.
B. New York Discriminates Against Interstate Commerce by Allowing In-State Retailers to Ship Directly to New York Consumers and Banning Shipments by Out-of-State Retailers

Through a combination of shipping provisions promulgated under its Alcohol Beverage Control Law (“ABC Law”), New York discriminates against out-of-state wine retailers.\(^44\) First, New York authorizes wine retailers residing in New York to sell and ship wine directly to consumers within New York.\(^45\) Second, New York generally prohibits wine shipments “into the state,” unless the in-state recipient is a licensed wholesaler or the out-of-state shipper has previously received a permit available only to licensed out-of-state wineries.\(^46\) Together, these shipping provisions mandate “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”\(^47\) This combination of shipping provisions facially discriminates against out-of-state business interests, including wine retailers, by singling out shipments “into the state” while ignoring shipments originating within New York, thereby effectively giving in-state retailers exclusive access to New York’s consumers while denying out-of-state wine retailers access to the same market.\(^48\)

Specifically, ABC Law provisions 94, 105.8, 105.9, and 116, and Rule 10 of the Rules of the State Liquor Authority authorize

\(^{44}\) See N.Y. ALCO. BEV. CONT. LAWS §§ 1–164 (Gould 2007).

\(^{45}\) See N.Y. ALCO. BEV. CONT. LAWS §§ 94, 105.8, 105.9, 116 (Gould 2007); N.Y. COMP. CODES R. & REGS. tit. 9, § 67 (2007).


\(^{47}\) Id.; see also New Energy Co. v. Limbach, 486 U.S. 269, 274 (1988) (“[S]tate statutes that clearly discriminate against interstate commerce are routinely struck down.”).

\(^{48}\) See Or. Waste Sys., Inc. v. Dep’t of Envtl. Quality of Or., 511 U.S. 93, 99 (1994); see also Lewis v. BT Inv. Managers, 447 U.S. 27, 39 (1980) (holding that a statute burdens interstate commerce if “it overtly prevents foreign enterprises from competing in local markets”).
in-state retailers to sell and ship wine directly to consumers. As a “package store licensee,” a New York retailer may deliver the wine that they sell: “to homes and offices not to be resold by the purchaser[,] by messenger afoot[,] by trucking and delivery companies who hold a trucking permit issued by the Authority[,] and in a vehicle owned and operated, or hired and operated by the package store licensee.”

To become such a licensee, a candidate residing in New York applies to the agency that oversees enforcement of the state’s ABC Laws, the New York State Liquor Authority (“NYSLA”). If the NYSLA approves the application, the newly licensed New York retailer can deliver directly to a New York consumer’s residence immediately.

Meanwhile, ABC Law provisions 100(1), 102(1)(a), and 102(1)(b) ban all direct shipments “into the state” and generally require all wine shipped into the state to pass first through a New York business entity, a wholesaler, licensed by the State of New York. Because of this general prohibition against direct shipments into the state, even if out-of-state retailers were eligible for retail licenses within the state, those out-of-state retailers who had received licenses would still be prohibited from shipping directly “into the state” to New York consumers.
In an exception to this general ban on interstate shipping, however, in the aftermath of Granholm, out-of-state wineries have won the right to apply for an “Out of State Direct Shipper’s License” that permits them to ship directly to New York consumers. This direct shipping permit operates as an exception to New York’s ban on direct shipments into the state. The permit, however, is only available to persons who are recognized as wine producers by the federal government and another state. As such, out-of-state wine retailers, who do not produce wine themselves, are ineligible for this permit. Under the status quo, then, out-of-state retailers are deprived both of the opportunity to sell wine directly to customers within New York and the right to deliver wine to customers within New York. Meanwhile, their retail counterparts and would-be competitors in New York receive these advantages by virtue of being located within the state. This combination of laws confers markedly different rights to in-state and out-of-state retailers with respect to their ability to sell and deliver wine directly to New York consumers.

New York’s discrimination against out-of-state wine retailers strikingly mirrors its discrimination against out-of-state wineries that was struck down by the Supreme Court in Granholm. In that case, when faced with New York’s statutory scheme of allowing its own wineries to bypass in-state wholesalers and retailers and to sell directly to consumers while denying such a

56 See N.Y. ALCO. BEV. CONT. LAW § 79(c) (Gould 2007).
57 Id.
58 Id.
59 See NYSLA Compliance FAQs, supra note 20; see also N.Y. ALCO. BEV. CONT. LAW §§ 94, 105.8, 105.9, 116 (Gould 2007); N.Y. COMP. CODES R. & REGS. tit. 9, § 67 (2007).
clear economic advantage to out-of-state wineries, the Supreme Court had “no difficulty concluding that New York . . . [had] discriminate[d] against interstate commerce through its direct-shipping laws”\(^6\) and struck down New York’s discriminatory scheme.\(^\text{62}\) The *Granholm* majority found that “[a]llowing States to discriminate against out-of-state [wine producers] ‘invite[s] a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.’”\(^\text{63}\) Similarly, New York’s facial discrimination against out-of-state wine retailers creates a de facto preferential trade area and gives New York wine retailers exclusive access to New York consumers.\(^\text{64}\) By burdening interstate commerce to favor in-state businesses, New York’s direct shipping laws inhibit free trade among the states and violate the dormant aspect of the Commerce Clause of the United States Constitution.

\(^{61}\) *Id.* at 476. The *Granholm* majority’s succinct criticism of both schemes is well illustrated by its comments regarding Michigan’s discriminatory scheme:

Michigan allows in-state wineries to ship directly to consumers, subject only to a licensing requirement. Out-of-state wineries, whether licensed or not, face a complete ban on direct shipment. The differential treatment requires all out-of-state wine, but not all in-state wine, to pass through an in-state wholesaler and retailer before reaching consumers. These two extra layers of overhead increase the cost of out-of-state wines to Michigan consumers. The cost differential, and in some cases the inability to secure a wholesaler for small shipments, can effectively bar small wineries from the Michigan market.

*Id.* at 473–74.

\(^{62}\) See *id*.


\(^{64}\) See *Granholm*, 544 U.S. at 473.
C. New York’s Putative Interests—Preventing Minors’ Access to Alcohol and Efficient Tax Collection—Can Be Achieved Through Nondiscriminatory Alternatives

New York is unable to justify its discrimination against interstate commerce because it is unable to put forward legitimate local purposes that “cannot be adequately served by reasonable nondiscriminatory alternatives.” When New York’s legislature enacted its three-tier liquor licensing system seventy-five years ago, its primary goals were to prevent minors’ access to alcohol and to assist state tax collection. The legislature also aimed “to promote temperance by keeping the price of alcohol artificially high.” To justify its discrimination against out-of-state retailers,

65 New Energy Co. v. Limbach, 486 U.S. 269, 278 (1988); see also Hughes v. Oklahoma, 441 U.S. 322, 337 (1979) (“Facial discrimination by itself may be a fatal defect” and “at a minimum . . . invokes strictest scrutiny.”); see also Maine v. Taylor, 477 U.S. 131, 138 (1986) (“[O]nce a state law is shown to discriminate against interstate commerce either on its face or in practical effects, [the Supreme Court has held] the burden falls on the State to demonstrate both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means.”) (internal quotation marks omitted).


67 Having the producers sell to distributors who then sold the alcoholic beverages to retailers raised the price of alcohol by creating an extra link in the chain of distribution. By raising the price of alcohol, one might argue, one lowers the rate of consumption. It is hard to gauge the extent to which this goal still guides lawmakers, but to the extent that it does, it would explain why some lawmakers are less receptive to the argument that direct shipping is a good thing because it increases competition and lowers prices for alcohol consumers. See FTC REPORT, supra note 1, at 6.
the State of New York again put forward two of these interests: preventing the access of minors to alcohol and efficiently collecting taxes. These two interests, however, failed to justify similar discrimination in Goodholm, where the majority concluded that “the State . . . provide[d] little concrete evidence for the sweeping assertion that they cannot police direct shipments by out-of-state wineries,” and for the same reasons, these two interests again do not justify discriminating against out-of-state retailers.

First, preventing minors’ access to alcohol can be achieved by the nondiscriminatory alternative of requiring an adult signature upon delivery. As the NYSLA itself has announced, “shipping companies like FedEx are required . . . to receive approval from the [NYSLA] before transporting wine directly to New York residents, ensuring that common carriers have the proper systems in place enabling them to accurately capture and verify a recipient’s age.” These safeguards achieve the state’s interest in preventing minors’ access to alcohol without discriminating against out-of-state retailers. Further, of the twenty-six States that allow direct shipping, none report problems with underage drinking and officials openly recognize a number of reasons why underage drinkers find online wine purchases unappealing, not least of which is that underage drinkers seek immediate gratification, not several days of waiting for a shipment to arrive. Because preventing

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70 Id. at 489–91.
72 See Goodholm, 544 U.S. at 490 (“A recent study by . . . the FTC found that the 26 States currently allowing direct shipments report no problems with minors’ increased access to wine. This is not surprising for several reasons. First, minors are less likely to consume wine, as opposed to beer, wine coolers, and hard liquor. Second, minors who decide to disobey the law have more direct means of doing so. Third, direct shipping is an imperfect avenue of obtaining alcohol for minors who, in the words of the past president of the National Conference of State Liquor Administrators, ‘want instant gratification.’
minors’ access to alcohol can be achieved without discriminating against out-of-state retailers, this state interest does not support discriminating against out-of-state retailers.73

Second, with respect to efficient tax collection, as the Supreme Court explained in Granholm: “[I]mprovements in technology have eased the burden of monitoring out-of-state wineries. Background checks can be done electronically. Financial records and sales data can be mailed, faxed, or submitted via e-mail.” 74 New York is equally capable of running background checks on out-of-state retailers, especially in light of out-of-state retailers’ ability to provide New York with their financial records and sales data. Further, the risk of tax evasion presented by online sales does not change with or without the prohibition on direct sales by out-of-state wine retailers.75 Further still, since Granholm, New York has collected “taxes directly from out-of-state wineries whose products are sold in the state.” 76 In projecting whether New York will be able to collect taxes efficiently from out-of-state retailers, it is particularly instructive that New York has not reported problems collecting taxes from out-of-state wineries. 77 In sum, because modern technology allows taxes to be collected efficiently without discriminating against out-of-state retailers, this interest does not justify New York’s discrimination against out-of-state retailers.78

(emanating why minors rarely buy alcohol via the mail or the Internet).”

73 Id.
74 Id.
76 Id.
77 See N.Y. STATE LIQUOR AUTH., DIV. OF ALCOHOLIC BEVERAGE CONTROL, 2006 ANNUAL REPORT; N.Y. STATE LIQUOR AUTH., DIV. OF ALCOHOLIC BEVERAGE CONTROL, 2005 ANNUAL REPORT; see also Press Release, State of New York Executive Dep’t Div. of Alcoholic Beverage Control, State Liquor AuthorityAnnounces Approval Of Fedex To Make Direct Wine Shipments To New Yorkers (Feb. 9, 2006), http://www.abc.state.ny.us/system/files/mediaadvisory020906.pdf.
78 See Granholm, 544 U.S. at 491; see also Siesta Vill. Mkt., 2007 WL
Despite the Supreme Court’s clear guidance on these issues, the *Arnold’s Wines* decision nevertheless cited these two state interests without any analysis of whether the interests could be achieved in a manner that avoided discrimination against out-of-state retailers.\(^{79}\) In making the case for judgment in favor of its discrimination, New York should have been required to provide “more than mere speculation to support discrimination against out-of-state goods” and should have been required to meet the higher burden of showing that “the discrimination is demonstrably justified.”\(^{80}\) However, unlike in *Granholm*, where the Supreme Court refused to allow New York to make sweeping assertions about its inability to police direct shipments by out-of-state wine producers without concrete evidence,\(^{81}\) the *Arnold’s Wines* opinion appears to have accepted New York’s justifications without further scrutiny.\(^{82}\) New York should have had to make at least a concrete showing that it could neither collect taxes effectively nor prevent minors’ access to alcohol without the discriminatory direct shipping laws.\(^{83}\) The State likely would have been unable to produce such evidence and meet such a burden.\(^{84}\) At bottom, neither interest put forward excuses New York’s discrimination against out-of-state retailers because both efficient tax collection and preventing minors’ access to alcohol can be achieved without such discrimination.

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\(^{81}\) See *id.* at 490.

\(^{82}\) See *Arnold’s Wines, Inc.*, 515 F. Supp. 2d at 407.

\(^{83}\) See *Granholm*, 544 U.S. at 492 (quoting *Chem. Waste Mgmt., Inc.*, 504 U.S. at 344).

\(^{84}\) See *id.* at 490; see also *Siesta Vill. Mkt.*, 2007 WL 2984127, at *4–5.*
II. THE NATIONAL INTEREST IN FREE TRADE OUTWEIGHS NEW YORK’S INTEREST IN AN ABSOLUTE BAN ON INTERSTATE DIRECT SHIPPING

The federal interest in free trade outweighs New York’s interest in using its ban on interstate direct shipping to favor in-state retailers with exclusive access to the New York direct shipping consumer market. As the Arnold’s Wines decision correctly observed, on the facts, the Supreme Court’s Granholm decision pertains directly to differential treatment of in-state and out-of-state producers.\(^5\)\(^5\) The Arnold’s Wines decision, however, errs in arguing that the principles in Granholm only apply to an exception to the three-tier licensing system, direct shipping by wine producers to wine consumers that bypasses wholesalers and retailers, and not to the three-tier licensing system itself.\(^6\)\(^6\) More to the point, however, a challenge to New York’s use of its ban on interstate shipping to favor in-state retailers at the expense of out-of-state retailers in no way amounts to an attack on the entire three-tier system, and striking down New York’s use of the ban to unfairly privilege its own retailers would neither invalidate nor undermine the three-tier system, even if out-of-state retailers bypass in-state wholesalers.\(^7\)\(^7\) First of all, it is a logical fallacy to argue that “allowing out-of-state retailers to compete in a state’s domestic market ‘is clearly an attack on the three-tier system itself.’”\(^8\)\(^8\) On a practical level, though, New York could maintain centralized control and enforce compliance with its regulations by


\(^6\) Id. at 411.


\(^8\) See Perry, 530 F. Supp. 2d at 867 n.19 (“[I]t does not follow that allowing out-of-state retailers to compete in a state’s domestic market ‘is clearly an attack on the three-tier system itself.’”) (quoting Arnold’s Wines, Inc., 515 F. Supp. 2d at 411).
using a direct shipping permit system similar to the one it currently administers to out-of-state wineries. In balancing and attempting to harmonize the Twenty-first Amendment with the federal Commerce Clause, on the particular issue of New York’s use of its ban on interstate shipping to favor its in-state retailers, the federal Commerce Clause interest in promoting free trade surely outweighs New York’s Twenty-first Amendment in regulating alcohol.

A. The Supreme Court Struck Down Shipping Laws That Discriminated Against Out-of-State “Economic Interests”

The most ready explanation for why, on the facts, the Supreme Court’s Granholm decision applies to out-of-state producers is because it was out-of-state producers who were challenging New York’s ban on direct shipping. The Granholm majority, however, broadened the prospective effect of the decision by focusing “more on discrimination against out-of-state economic interest and access to out-of-state markets, rather than, specifically, on out-of-state wine producers.” The plain language of the Granholm majority opinion stresses the need to broadly protect out-of-state “economic interests” from economic protectionism as opposed to protect out-of-state wine producers exclusively. Out-of-state wine retailers who want to compete with in-state retailers in the New York market possess such an “economic interest.”

The Granholm majority articulated an underlying principle of “mutual economic interests” behind the enforcement of the

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89 See Granholm v. Heald, 544 U.S. 460, 491 (2005); see also Perry, 530 F. Supp. 2d at 867.
90 See Granholm, 544 U.S. at 489.
92 Granholm, 544 U.S. at 472 (“Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate ‘differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.’”) (quoting Or. Waste Sys., Inc. v. Dep’t of Envtl. Quality of Or., 511 U.S. 93, 99 (1994)).
93 Id. at 474–75.
Commerce Clause in which “[r]ivalries among the States are . . . kept to a minimum, and a proliferation of trade zones is prevented.” The Granholm majority used these broad principles to scrutinize laws that allowed in-state, but not out-of-state, wineries to ship directly to customers. The majority wrote:

Laws of the type at issue in the instant cases contradict these principles. They deprive citizens of their right to have access to the markets of other States on equal terms. The perceived necessity for reciprocal sale privileges risks generating the trade rivalries and animosities, the alliances and exclusivity, that the Constitution and, in particular, the Commerce Clause were designed to avoid.

In short, the laws were offensive and violated the Commerce Clause not because they discriminated against out-of-state producers and their products in particular, but because the laws offended an underlying principle of “mutual economic interests” by “depriv[ing] citizens of their right to have access to the markets of other States on equal terms.” In transposing the principles of Granholm to the ongoing discrimination against out-of-state retailers, then, it is more reasonable to focus on the majority opinion’s broad language with respect to protecting out-of-state “economic interests” than to narrowly limit, as in the improvident Arnold’s Wine decision, the rights recognized in Granholm to only out-of-state “wine producers.”

94 See Granholm, 544 U.S. at 472 (“The rule prohibiting state discrimination against interstate commerce follows also from the principle that States should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens. States do not need, and may not attempt, to negotiate with other States regarding their mutual economic interests.”) (citing U.S. CONST., art. I, § 10, cl. 3) (emphasis added).


97 Id.

98 Id.
“State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent.” This language of Granholm does not mean that the Twenty-first Amendment shields New York’s use of shipping laws to reserve “the exclusive right to sell, deliver, and transport wine directly to New York consumers” to in-state retailers simply because their out-of-state retail competitors are not producers. The same general principles enunciated in Granholm still generally apply. It thus sounds willfully obtuse to declare, as in Arnold’s Wines, that “In upholding the three-tier system, the Supreme Court acted intentionally to limit application of the nondiscrimination principle enunciated in Granholm to products and producers as opposed to wholesalers and retailers...” In Siesta Village Market v. Perry, the Texas district court “respectfully disagree[d]” with this interpretation, and observed that “[t]he laws in question in Arnold’s Wines do not appear to satisfy that requirement [of treating out of state and domestic liquor the same].”

In Siesta Village Market, Texas residents and out-of-state retailers challenged the Texas Alcoholic Beverage Code’s provisions restricting the right to ship directly to Texas customers to retailer residing in the same county. The court determined that “[t]he Code facially discriminates... [by] giving in-state wine retailers access to the direct-shipping markets of their respective counties, while denying the same access to out-of-state wine retailers.” Similarly, in Michigan, where the same out-of-state retailer, Siesta Village Market, is currently challenging shipping provisions nearly identical to New York’s provisions, the court

99 Id. at 489.
101 515 F. Supp. at 412.
102 530 F. Supp. 2d at 867 n.19.
103 See 530 F. Supp. 2d 848; TEX. ALCO. BEV. CODE ANN. §§ 6.03, 11.46(a)(11), 11.61(b)(19), 22.03, 24.01(c), 24.03, 54.12, 107.05(a), 107.07(a), 107.07(f), 109.53 (Vernon 2007).
104 Perry, 530 F. Supp. 2d at 864.
denied the State of Michigan’s motion to dismiss and disagreed with the State’s explanation for the discrimination against out-of-state retailers.\textsuperscript{105} Michigan argued that under its bans on interstate direct shipping, “liquor produced out-of-state” was treated “the same as its domestic equivalent”\textsuperscript{106} and that “whether produced in Michigan or elsewhere, . . . wine cannot be directly shipped to Michigan consumers from out-of-state retailers, and [that] in that sense the products are treated equally.”\textsuperscript{107} Michigan essentially asserted that because its shipping laws discriminated between retailers based on a wine product’s current location rather than its origin, the federal interest in promoting free trade was not implicated.\textsuperscript{108} Refusing to “limit the holding of Granholm in a way that is debatable,”\textsuperscript{109} the court recognized that the general language in \textit{Granholm} made it difficult to limit its effect to producers.\textsuperscript{110}

In light of the plain reading of \textit{Granholm} found in the \textit{Siesta Market} analyses, there is little support for the \textit{Arnold’s Wines} holding that the principles found in the \textit{Granholm} decision narrowly apply to an \textit{exception} to the three-tier licensing system—direct shipping by wine producers to in-state wine consumers—and do not apply to other discriminatory aspects of the three-tier licensing system.\textsuperscript{111} The Supreme Court in \textit{Granholm}, far from distinguishing shipping laws pertaining to wine producers from those pertaining to retailers, directly compared the shipping rights of wine producers and retailers, observing: “Michigan, for example, already allows its licensed retailers (over 7,000 of them) to deliver alcohol directly to consumers.”\textsuperscript{112}

\begin{thebibliography}{9}
\bibitem{106} \textit{Id.}
\bibitem{107} \textit{Id.}
\bibitem{108} \textit{Id.}
\bibitem{109} \textit{Id.}
\bibitem{110} \textit{Id.} (“[I]n light of a broad reading of \textit{Granholm}, [the argument that a State is treating out-of-state products equally] may not pass constitutional muster under the Commerce Clause.”).
\end{thebibliography}
Granholm decision gives ample reason to conclude that the principles and holding of the case protect out-of-state retailers as well as producers from economic protectionism.\footnote{See generally id.; see also Best & Co. v. Maxwell, 311 U.S. 454, 455–56 (1940) (“The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.”).}

B. Treating Out-of-State Competitors the Same as In-State Wine Retailers Would Not Invalidate New York’s “Unquestionably Legitimate” Licensing System

It is illogical to argue that striking down New York’s use of its ban on direct shipping to favor in-state retailers with exclusive access to New York’s direct shipping wine consumer market “is clearly an attack on the three-tier system itself.”\footnote{Siesta Vill. Mkt. v. Perry, 530 F. Supp. 2d 848, 867 n.19 (N.D. Tex. 2008). (“[A] state can treat in-state and out-of-state entities on equal terms and still preserve its three-tier system. Therefore, it does not follow that allowing out-of-state retailers to compete in a state’s domestic market ‘is clearly an attack on the three-tier system itself.’”) (quoting Arnold’s Wines, Inc., 515 F. Supp. 2d at 411).} To the contrary, treating out-of-state competitors the same as in-state retailers neither invalidates nor undermines New York’s long-standing three-tier system.\footnote{Id.} As observed in the Texas Siesta Village Market decision, “a state can treat in-state and out-of-state entities on equal terms and still preserve its three-tier system.”\footnote{Id.} Similarly, when it struck down New York’s use of its ban on interstate direct shipping to favor in-state wineries, the Granholm majority declared that striking down the provisions did not “call into question [the constitutionality of New York’s] three-tier system.”\footnote{Granholm, 544 U.S. at 488.} As in Granholm and Siesta Village Market, it does not follow that striking down New York’s protectionist use of its ban on interstate direct shipping “is clearly an attack on the three-tier
Simplifying a complex matter, the Fourth Circuit opined in *Brooks v. Vassar* that any “argument that compares the status of an in-state retailer with an out-of-state retailer—or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart—is nothing different than an argument challenging the three-tier system.” Under the *Brooks* analysis, then, the Supreme Court’s act in upholding the challenge to New York’s differential treatment of in-state and out-of-state wineries, that is, an “in-state entity” with its “out-of-state counterpart,” was ultimately a “challenge to the three-tier system” acceptable to the Supreme Court. As the *Arnold’s Wine* decision correctly observed, “all nine Justices [in *Granholm*] agreed that [New York’s three-tier system] is within the scope of Commerce Clause immunity granted [to] the States by Section 2 of the Twenty-first Amendment and that ‘state policies are protected under the Twenty-first Amendment when they treat liquor produced out-of-state the same as its domestic equivalent.’” What is crucial in this language, however, is that under *Granholm*, provisions of such laws are only protected under the Twenty-first Amendment to the extent that they treat “liquor produced out-of-state the same as its domestic equivalent.” The Twenty-first Amendment neither shields state laws that violate other provisions of the Constitution nor abrogates Congress’s federal Commerce Clause powers with regard to liquor, not least of which is that

118 Id.
120 Id.
122 *Granholm*, 544 U.S. at 489.
124 See, e.g., Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 712–13 (1984) (“[To conclude] that the Twenty-first Amendment has somehow operated to ‘repeal’ the Commerce Clause wherever regulation of intoxicating liquors is concerned would . . . be an absurd over-simplification. . . . Notwithstanding the
“state regulation of alcohol is limited by the Commerce Clause’s nondiscrimination principle.”\textsuperscript{125}

Despite guidance from the Supreme Court on the enduring applicability of this principle to state regulation of alcoholic beverages in general, the \textit{Arnold’s Wines} court incorrectly determined that “the nondiscrimination principle enunciated in \textit{Granholm} [is limited] to products and producers as opposed to wholesalers and retailers. . .”\textsuperscript{126} The \textit{Granholm} court, however, did not specify that the Commerce Clause governs state regulation of \textit{products} but instead used more encompassing language, such as referring to “state regulation of alcohol” in general.\textsuperscript{127} Though it may sound fair to argue that “[t]he limited exception afforded under the Code for direct sales by wineries does not permit the conclusion that [a State] has relinquished its right to regulate the vast remainder of wine sales through its three-tier system,” this argument misplaces a basic proposition in \textit{Granholm}: the right to regulate wine sales through the three-tier system is not a right to discriminate against interstate commerce with impunity, or even to dictate that all wine must flow through the three-tier system.\textsuperscript{128} On this latter point, a majority of the Supreme Court in \textit{North Dakota v. United States} determined that the Twenty-first Amendment did not authorize North Dakota to require all liquor sold for use in the State to be purchased from a licensed in-state wholesaler; in other words, the military could bypass North Dakota’s three-tier system.\textsuperscript{129}

\footnotesize{Amendment’s broad grant of power to the States, therefore, the Federal Government plainly retains authority under the Commerce Clause to regulate even interstate commerce in liquor.”) (internal quotations and citations omitted).}


\footnotesize{\textsuperscript{126} Arnold’s Wines, Inc. v. Boyle, 515 F. Supp. 2d 401, 412 (S.D.N.Y. 2007); see also id. at 487; Bacchus Imports, Ltd., 468 U.S. at 276.}

\footnotesize{\textsuperscript{127} Granholm, 544 U.S. at 487 (citing, e.g., Bacchus Imports, Ltd., 468 U.S. at 276).}

\footnotesize{\textsuperscript{128} Siesta Vill. Mkt. v. Perry, 530 F. Supp. 2d 848, 870 (N.D. Tex. 2008) (citing Brooks v. Vasser, 462 F.3d 341, 345, 349, 350 n.2 (4th Cir. 2006); Brooks, 462 F.3d at 352 n.3 (Neimeyer, J., concurring); Granholm, 544 U.S. at 487.}

\footnotesize{\textsuperscript{129} See North Dakota v. United States, 495 U.S. 423, 432 (1990).}
C. Though New York’s Long-Standing Three-tier System Has Historical Pedigree, It Can and Must Be Modified When It Harms the Federal Interest in Free Trade

Like other states that have adopted a ‘three-tier’ licensing system, New York regulates the importation and sale of wine by requiring separate licenses for producers, wholesalers, and retailers.\(^{130}\) Of these three “tiers” of licensees, producers are licensed to make wine; wholesalers to distribute it within the state; and retailers to sell it to New York consumers.\(^{131}\) This three-tier system remains a testament to the man perhaps most responsible for its basic form, John D. Rockefeller, Jr., a self-described teetotaler and supporter of Prohibition who near its end in 1933 commissioned a study on how New York could best regulate the alcohol industry.\(^{132}\)

From 1920 to 1933, the Eighteenth Amendment had banned the sale, manufacture, and transportation of alcoholic beverages within the United States.\(^{133}\) By 1933, however, the lack of legal regulation had resulted in a nationwide illegal industry that produced and distributed alcoholic beverages, keeping the American public well supplied.\(^{134}\) New York’s licensing system thus began as a direct response to the failure of Prohibition.\(^{135}\)

In early 1933, as it became clear that the proposed Twenty-first Amendment would probably be ratified, then Governor

\(^{130}\) See Granholm, 544 U.S. at 466; see also FTC REPORT, supra note 1, at 5–7. Federal and state laws limit vertical overlap between tiers of licensees. See Granholm, 544 U.S. at 466; 27 U.S.C. § 205 (2007); see, e.g., Bainbridge v. Turner, 311 F.3d 1104, 1106 (11th Cir. 2002).

\(^{131}\) See N.Y. ALCO. BEV. CONT. LAW §§ 3(20), (26), (35), 103–05 (Gould 2007).


\(^{133}\) See U.S. CONST. amend. XVIII, § 1 (“[T]he manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.”), repealed by U.S. CONST. amend. XXI.

\(^{134}\) See Levine, supra note 132, at 83.

\(^{135}\) Id. at 84.
Lehman of New York asked Rockefeller to commission a private study that compared methods of alcohol regulation. In late 1933, Rockefeller published the study, entitled *Toward Liquor Control*, which was popularly known as the *Rockefeller Report*. Rockefeller’s report gave detailed proposals for two methods of liquor regulation: state-run monopolies and state licensing systems. New York’s state legislators adopted the state licensing system. By 1937, twenty-six States had implemented licensing systems, eighteen States had implemented monopolies, and the rest remained dry, that is, they continued to ban the sale of alcohol.

Almost every state that implemented a licensing system limited the retail, wholesale, and manufacturing licenses it issued to residents of the state or domestic corporations. Today, most States still use the three-tier system to regulate alcohol, and the system enjoys wide support as the preferred means of regulating the alcoholic beverages industry within the federal system.

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136 *Id.*
137 *Id.* at 86–87; see also John D. Rockefeller, Jr., *Foreword* to *Toward Liquor Control*, at viii (Raymond B. Fosdick & Albert L. Scott, eds., 1933).
138 See Levine, *supra* note 132, at 93.
139 *Id.* at 89, 95; see also FTC REPORT, *supra* note 1, at 6.
141 Notes, *Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-First Amendment*, 72 HARV. L. REV. 1145, 1148 (1959); see also Granholm v. Heald, 544 U.S. 460, 518 n.6 (2005) (Thomas J., dissenting) (listing the residency, citizenship, or physical presence requirements of twenty States during the 1930s of Colorado ("residency"), Florida ("prohibiting out-of-state manufacturers from being distributors"), Illinois ("residency"), Indiana ("residency"), Maryland ("residency"), Massachusetts ("residency"), Michigan ("residency"), Missouri ("citizenship"), Nebraska ("residency" and "physical presence"), Nevada ("residency and physical presence"), New Jersey ("citizenship and residency"), North Carolina ("residency"), North Dakota ("citizenship and residency"), Ohio ("residency and physical presence"), Rhode Island ("residency"), South Dakota ("residency"), Vermont ("residency"), Washington ("physical presence" and "citizenship and residency"), Wisconsin ("citizenship and residency"), and Wyoming ("citizenship and residency").
142 See *State Shipping Laws—The Wine Institute, available at*
limiting direct shipment to in-state wine retailers, then, New York’s three-tier system is consistent with the practices of the majority of states that permit some level of direct shipping.\(^{143}\) Currently, of the thirty-five States that permit some level of direct shipping to in-state consumers, only fourteen permit out-of-state wine retailers to ship directly to consumers.\(^{144}\)

Although the three-tier system is long-standing, widely used, and “unquestionably legitimate,” this is not to say that the system is perfect or inviolate.\(^{145}\) As Granholm demonstrated, the system can and must be modified when it violates the dormant aspect of the Commerce Clause.\(^{146}\) In that case, out-of-state wineries challenged Michigan and New York shipping laws that allowed in-state wineries to bypass wholesalers and retailers and ship directly to in-state consumers while denying that same opportunity to out-of-state wine retailers.\(^{147}\) The Supreme Court rejected New York’s argument that out-of-state wineries were seeking “nothing less than the dismantling of New York’s 70-year-old three-tier distribution system.”\(^{148}\) The Granholm majority explained:

The States argue that any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system. This does not follow from our holding. . . . States may . . . assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system. . . . State policies

\(^{143}\) See id.


\(^{145}\) Granholm, 544 U.S. at 488–89 (quoting North Dakota v. United States, 495 U.S. 423, 432 (1990)); see also North Dakota, 495 U.S. at 447 (Scalia J., concurring).

\(^{146}\) See Granholm, 544 U.S. at 489.

\(^{147}\) See id. at 465–66.

are protected under the Twenty-first Amendment when they treat liquor produced out-of-state the same as its domestic equivalent. The instant cases, in contrast, involve straightforward attempts to discriminate in favor of local producers. The discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment.\(^{149}\)

As Granholm demonstrated, although the general three-tier system may be legitimate, certain portions are severable and can be struck down as unconstitutional without rendering the remainder of the regulatory scheme impractical or invalid.\(^{150}\) New York’s use of the ban on interstate direct shipping to provide its in-state retailers with exclusive access to New York’s lucrative consumer market\(^ {151}\) are not “an integral part of the three-tier system upheld by the Supreme Court in Granholm.”\(^ {152}\) If New York ceased its discrimination against out-of-state wine retailers, it could still maintain centralized control over the regulation of alcohol “by requiring a permit as a condition of direct shipping.”\(^ {153}\) The Supreme Court’s reaffirmation of “the constitutionality of the three-tier system” in no way supports the conclusion that any challenge to ABC Laws “must fail.”\(^ {154}\) To the contrary, the Granholm majority at once upheld the constitutionality of the three-tier system and severed and struck down the unequal

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\(^{151}\) See N.Y. ALCO. BEV. CONT. LAW §§ 100(1), 102(1)(a), 102(1)(b) (Gould 2007).


\(^{153}\) Granholm, 544 U.S. at 491; see also Perry, 530 F. Supp. 2d at 867 (holding that the lack of proof that Texas would encounter difficulty collecting taxes in the context of alcohol sales is fatal).

\(^{154}\) Arnold’s Wines, Inc., 515 F. Supp. 2d at 411.
treatment of in-state and out-of-state shippers, establishing that state laws regulating the distribution of alcohol must be in harmony with the dormant aspect of the Commerce Clause.\(^{155}\)

If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms. Without demonstrating the need for discrimination, New York and Michigan have enacted regulations that disadvantage out-of-state wine producers. Under our Commerce Clause jurisprudence, these regulations cannot stand.\(^{156}\)

By choosing to allow the direct shipment of wine to in-state consumers, New York took on the added responsibility of treating in-state and out-of-state business interests equally. Although the Arnold’s Wines court may validly maintain that “[the Twenty-first Amendment] authorizes the States to require all sellers of alcoholic beverages to obtain permits and . . . nothing in Granholm alters this result,”\(^{157}\) it cannot use this line of reasoning to undermine the basic proposition in Granholm that New York, after allowing direct shipments of wine in general, cannot grant this right to some and deny it to others on the basis of state citizenship alone.\(^{158}\)

In upholding the constitutionality of the three-tier system in general in North Dakota v. United States, the Supreme Court did so without using a Commerce Clause analysis.\(^{159}\) The plurality opinion found that the challenged regulations were “within the core of the State’s power under the Twenty-first Amendment” because North Dakota’s legislature had enacted them “in the interest of promoting temperance, ensuring orderly market conditions, and raising revenue.”\(^{160}\) In his concurring opinion, Justice Scalia observed that the Twenty-first Amendment “empowers North


\(^{156}\) Id. at 493.

\(^{157}\) Arnold’s Wines, Inc., 515 F. Supp. 2d at 411; see also State Bd. of Equalization of Cal. v. Young’s Mkt. Co., 299 U.S. 59, 60–62 (1936) (affirming that the Twenty-first Amendment authorizes a state licensing fee to wholesale importers even though it is a “direct burden on interstate commerce”).

\(^{158}\) See Granholm, 544 U.S. at 493 (“If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms.”).


\(^{160}\) Id. at 432.
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Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler.” As observed in Arnold’s Wines, Inc. v. Boyle, nine Supreme Court justices were in agreement that North Dakota’s three-tier system was “unquestionably legitimate.” A majority of the Court, however, declined to join Justice Scalia in arguing that the Twenty-first Amendment allowed North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler. This is not a matter of settled law, but what is clear is that New York’s use of a ban on interstate direct shipping is not so clearly, as asserted in Arnold’s Wines, “within the authority granted to New York by the Twenty-first Amendment.”

III. STRIKING DOWN NEW YORK’S USE OF THE BAN DOES NOT ABROGATE NEW YORK’S TWENTY-FIRST AMENDMENT RIGHTS

Striking down New York’s use of the ban on interstate direct shipping laws to discriminate against out-of-state retailers would not be an abrogation of New York’s Twenty-first Amendment rights because the shipping laws exist within the limitations of a superseding federal framework in which the dormant aspect of the Commerce Clause prohibits discrimination against interstate commerce. Section 2 of the Twenty-first Amendment states: “The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” The language of the amendment differs subtly but importantly from the language of the predecessor Webb-Kenyon Act, which prohibited the interstate shipment of liquor into a State “in violation of any law of such State,” with the phrase “any law” suggesting that “any law, including a ‘discriminatory’ one,” was

161 Id. at 447.
163 Id. at 413 (citing North Dakota, 495 U.S. at 432).
164 Id.
166 U.S. CONST. amend. XXI, § 2.
permissible.\textsuperscript{167} As the Court explained in \textit{Granholm}, this notable change in language from “any laws” in the Webb-Kenyon Act to simply “laws” in the amendment reflects the basic proposition that the “Twenty-first Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give a discriminatory preference to their own producers.”\textsuperscript{168}

Although the court in \textit{Arnold’s Wines} correctly observed that the \textit{Granholm} majority “concluded that Section 2 [of the Twenty-first Amendment] restored to the States the Commerce Clause immunity provided by the Wilson and Webb-Kenyon Acts,”\textsuperscript{169} a review of these Acts and their reception by the Supreme Court demonstrates that these Acts did not immunize State regulation of alcohol from the dormant aspect of the Commerce Clause.\textsuperscript{170} To the contrary, when the Wilson and Webb-Kenyon Acts were passed into law, States were no more able to discriminate against out-of-State liquor providers than they were against in-state providers.\textsuperscript{171} Rather than empower States to treat in-state and out-of-state competitors differently, these Acts standardized how a State regulated domestic and imported liquor, giving States the power to treat both equally.\textsuperscript{172} To the extent that the Twenty-first Amendment was modeled on the language of these predecessor Acts, and these Acts did not immunize states from the nondiscrimination principle of the Commerce Clause, the Twenty-first Amendment itself must be understood as existing within the ambit of the Commerce Clause.\textsuperscript{173} As contemporary commentators explained in the aftermath of the repeal of Prohibition:

The adoption of the Twenty-first Amendment does not, as many people think, wipe the slate clean for completely new

\textsuperscript{167} \textit{Arnold’s Wines, Inc.}, 515 F. Supp. 2d at 413 (quoting \textit{Granholm}, 544 U.S. at 500 (Thomas, J., dissenting)) (quoting 27 U.S.C. § 122 (2007)).

\textsuperscript{168} \textit{Granholm}, 544 U.S. at 486.


\textsuperscript{170} See \textit{Granholm}, 544 U.S. at 489.

\textsuperscript{171} \textit{Id.}

\textsuperscript{172} \textit{Id.}

\textsuperscript{173} \textit{Id.}
systems of liquor control. It leaves untouched the laws and constitutional provisions now existing in the various states. Moreover, a number of federal statutes relating to liquor were passed before the adoption of the Eighteenth Amendment and have never been repealed. After a period of more or less suspended animation, these laws now revive and may become potent instruments of control.\footnote{Raymond B. Fosdick & Albert L. Scott, Toward Liquor Control 20 (1933).}

\textit{A. Before Prohibition and the Passing of the Twenty-first Amendment, the Commerce Clause Prohibited States from Burdening Interstate Commerce Involving Alcohol}

The Twenty-first Amendment was drafted with the knowledge that preexisting laws and doctrines, like the Commerce Clause, would prevent states from using the Amendment to burden interstate commerce.\footnote{Granholm, 544 U.S. at 476.} It was commonly understood that the Amendment did not “wipe the slate clean.”\footnote{Fosdick & Scott, supra note 174, at 20.} In particular, prior Supreme Court cases interpreted two pre-Prohibition statutes—the Wilson Act and the Webb-Kenyon Act—that both influenced the drafting of Section 2 of the Twenty-first Amendment.\footnote{Granholm, 544 U.S. at 476.} When the Supreme Court reviewed these cases in \textit{Granholm}, two distinct principles emerged.\footnote{Id.} First, the cases collectively held that the Commerce Clause prohibited state discrimination against imported liquor.\footnote{Id.} Second, the cases as a group held that the dormant aspect of the Commerce Clause prohibited states from passing “facially neutral laws that placed an impermissible burden on interstate commerce.”\footnote{Id. at 477.} These two distinct principles stand for the proposition that the dormant aspect of the Commerce Clause prevents states from using the Twenty-first Amendment to burden
interstate commerce.\footnote{181}{Id. at 476.}

In the earliest cases, before the Wilson Act was passed in 1890, the Supreme Court used the dormant aspect of the Commerce Clause to invalidate state liquor regulations.\footnote{182}{Id. at 476–78.} In Bowman v. Chicago & Northwestern Railway Co., for instance, the Supreme Court struck down an Iowa law that prohibited common carriers from transporting liquor into Iowa from another State unless it was certified beforehand that the recipient was authorized to sell the liquor.\footnote{183}{See 125 U.S. 465, 496–98 (1888).} The Supreme Court explained that the Commerce Clause prohibits even nondiscriminatory regulations “directly affecting interstate commerce.”\footnote{184}{Id. at 497.} After Bowman, however, the question remained whether a State could ban the sale of imported liquor after it had arrived in the State.\footnote{185}{See Leisy v. Hardin, 135 U.S. 100, 124–25 (1890).} This issue was resolved two years later in Leisy v. Hardin, when the Supreme Court held that Iowa could not ban the sale of imported beer sold in “original packages,” and that, “in the absence of congressional permission to do so, the state had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer.”\footnote{186}{Id.} Under Leisy, States could ban the sale of liquor made within the State but could not stop sales of imported liquor.\footnote{187}{Id. at 125; see also Granholm v. Heald, 544 U.S. 460, 478 (2005).}

To remedy this unequal treatment of in-state and out-of-state liquor, Congress passed the Wilson Act in 1890, which gave States the power to regulate imported liquor “upon arrival in such State . . . to the same extent and in the same manner” as domestic liquor.\footnote{188}{Granholm, 544 U.S. at 478 (quoting Act of Aug. 8, 1890, ch. 728, 26 Stat. 313 (codified as amended at 27 U.S.C. § 121)).} Eight years later, however, the Supreme Court held that the Wilson Act did not authorize States to prohibit the importation of liquor for personal use.\footnote{189}{See generally Rhodes v. Iowa, 170 U.S. 412 (1898); Vance v. W.A. Vandercook Co., 170 U.S. 438 (1898).} Although the Supreme Court

\begin{thebibliography}{99}
\item \footnote{181}{Id. at 476.}
\item \footnote{182}{Id. at 476–78.}
\item \footnote{183}{See 125 U.S. 465, 496–98 (1888).}
\item \footnote{184}{Id. at 497.}
\item \footnote{185}{See Leisy v. Hardin, 135 U.S. 100, 124–25 (1890).}
\item \footnote{186}{Id.}
\item \footnote{187}{Id. at 125; see also Granholm v. Heald, 544 U.S. 460, 478 (2005).}
\item \footnote{188}{Granholm, 544 U.S. at 478 (quoting Act of Aug. 8, 1890, ch. 728, 26 Stat. 313 (codified as amended at 27 U.S.C. § 121)).}
\item \footnote{189}{See generally Rhodes v. Iowa, 170 U.S. 412 (1898); Vance v. W.A. Vandercook Co., 170 U.S. 438 (1898).}
\end{thebibliography}
recognized that States could ban the sale of imported liquor in its “original package,” the Court interpreted the phrase “upon arrival” to mean that State law only controlled after delivery to the in-state recipient and not when the imported liquor entered into the State.\(^{190}\) The practical result of this decision was a thriving mail order liquor business because States could ban the sale of imported liquor within the State but not the importation of the liquor itself.\(^{191}\) In effect, the *Rhodes* decision created a “direct-shipment loophole.”\(^{192}\)

Congress closed this loophole with the Webb-Kenyon Act of 1913.\(^{193}\) The Act solidified the States’ power to regulate the sale of alcohol and provided that:

[T]he shipment . . . of any . . . intoxicating liquor of any kind from one State . . . into any other State . . . which . . . is intended . . . to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State . . . is prohibited.\(^{194}\)

Four years later, in *Clark Distilling Co. v. Western Maryland Railway Co.*, the Supreme Court acknowledged that, with the passage of the Webb-Kenyon Act, States had the power to regulate the transportation of liquor, even though this additional regulatory power imposed a direct burden on interstate commerce.\(^{195}\) However, as the *Granholm* majority observed, “The Wilson Act reaffirmed, and the Webb-Kenyon Act did not displace, the Court’s line of Commerce Clause cases striking down state laws that discriminated against liquor produced out of state. . . . States were required to regulate domestic and imported liquor *on equal terms*.”\(^{196}\)

As the *Granholm* majority further observed, “The wording of §

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\(^{190}\) *Rhodes*, 170 U.S. at 420.

\(^{191}\) See *Granholm*, 544 U.S. at 480.

\(^{192}\) *Id.* at 481.

\(^{193}\) *Id.*


\(^{195}\) See 242 U.S. 311, 320–23 (1917).

2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers’ clear intention of constitutionalizing the Commerce Clause framework established under those statutes. In conclusion, the Granholm majority determined that:

The aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use. The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time.

The Court found that “[s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out-of-state the same as its domestic equivalent.”

B. The Commerce Clause has Come to Limit States from Using the Twenty-first Amendment to Burden Interstate Commerce

Even though the Twenty-first Amendment grants States the power to regulate alcohol within their borders, the amendment does not prevent the application of the Commerce Clause to individual provisions that are clearly discriminatory in nature. In rejoicing that “the power of a dry state to exclude liquor shipments, previously protected only by Act of Congress, will be given the added sanction of an express constitutional guarantee,” commentators at the time of the passing of the amendment give telling insight into the fact that the Twenty-first Amendment was commonly understood to have been designed to preserve a state’s right to ban completely the sale of alcoholic beverages, not to ban

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197 Id. at 484 (quoting Craig v. Boren, 429 U.S. 190, 205–06 (1976)).
198 Id. at 484–85.
199 Id. at 489.
the sale of out-of-state beverages while allowing in-state sellers exclusive access to local markets.\textsuperscript{201} A series of Supreme Court cases following the enactment of the amendment illustrate how “the Twenty-first Amendment did not entirely remove state regulation of alcohol from the reach of the Commerce Clause.”\textsuperscript{202}

In \textit{Bacchus Imports, Ltd. v. Dias}, for instance, the Supreme Court struck down a Hawaii statute that exempted local producers from a state excise tax on liquor and rejected the State of Hawaii’s argument that the Twenty-first Amendment authorized the State to discriminate against out-of-state liquor products.\textsuperscript{203} Similarly, in \textit{Healy v. Beer Institute}, the Supreme Court struck down “price affirmation” statutes that forced liquor producers to affirm that they were not charging lower prices for liquor in other states.\textsuperscript{204} In his concurrence to the opinion, Justice Scalia asserted that the statute’s “invalidity is fully established by its facial discrimination against interstate commerce,” and that this “discriminatory character eliminates the immunity afforded by the Twenty-first Amendment.”\textsuperscript{205} These decisions reaffirmed the Supreme Court’s basic proposition articulated in \textit{Hostetter v. Idlewild Bon Voyage Liquor Corp.} that “[l]ike other provisions of the Constitution,” the Commerce Clause and the Twenty-first Amendment “each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.”\textsuperscript{206}

\begin{footnotes}
\textsuperscript{201} Fosdick & Scott, supra note 174, at 21.
\textsuperscript{203} See 468 U.S. at 274–76 (“The central purpose of the [Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition.”).
\textsuperscript{204} 491 U.S. at 343.
\textsuperscript{205} Id. at 344 (Scalia, J., concurring).
\textsuperscript{206} 377 U.S. 324, 332 (1964).
\end{footnotes}
C. The Granholm Majority Determined that Shipping Laws Favoring In-State Businesses Burden Interstate Commerce

In reviewing Michigan and New York’s ban on interstate direct shipping that favored in-state wineries at the expense of out-of-state competitors, the Granholm majority found that the statutes “involve[d] straightforward attempts to discriminate in favor of local producers.”\(^\text{207}\) The Granholm majority held that “the Twenty-first Amendment does not immunize all [state liquor] laws from Commerce Clause challenge.”\(^\text{208}\) As the Texas Siesta Village Market plaintiffs observed, “Nowhere in the majority opinion in Granholm is there the slightest whiff of a suggestion that a discriminatory part of a three-tier system is legitimate.”\(^\text{209}\) As the Granholm majority explained:

State laws that discriminate against interstate commerce face a ‘virtually per se rule of invalidity. . . .’ The Michigan and New York laws by their own terms violate this proscription. The two States, however, contend their statutes are saved by § 2 of the Twenty-first Amendment. . . . The States’ position is inconsistent with our precedents and with the Twenty-first Amendment’s history. Section 2 does not allow States to regulate the direct shipment of wine on terms that discriminate. . . .”\(^\text{210}\)

Within this framework, the Granholm Court concluded that the States’ direct shipment laws, allowing in-state, but not out-of-state, wineries to ship directly to in-state customers, were not authorized by the Twenty-first Amendment.\(^\text{211}\) Where, as here, the aspect of New York’s ban on interstate direct shipping that discriminates in favor of in-state retailers comes as a direct result of New York’s choice to allow the direct shipment of wine, such

\(^{208}\) Id. at 488.
\(^{210}\) Granholm, 544 U.S. at 476 (citations omitted and emphasis added).
\(^{211}\) Id. at 493.
discrimination finds no protection in the Twenty-first Amendment under *Granholm*. Though New York has “virtually complete control” over in-state liquor distribution, “there is a marked difference between ‘virtually complete control’ and absolute control,” and New York cannot unduly burden interstate commerce. The Supreme Court has declared that it will strike down New York law that “‘directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests.” By giving exclusive access to New York’s lucrative direct shipping wine market to its own in-state retailers, New York has protected its own business at the expense of interstate commerce. Nothing in the Twenty-first Amendment justifies such economic protectionism.

**CONCLUSION**

The issue of direct shipping is a complex matter. The difficulty in weighing the federal interest in promoting free trade among the States against each individual State’s interests in regulating alcohol is reflected in the differing approaches taken by the New York, Michigan, and Texas courts when addressing whether a state may create an in-state direct shipping market and grant its in-state retailers exclusive access to that market by banning interstate direct shipments of wine. Even in the Texas *Siesta Village Market* decision, though it correctly balances the federal Commerce Clause interest in free trade against the States’ Twenty-first Amendment

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214 See id. (referring to *Brown-Forman Distillers Corp.*, 476 U.S. at 579).

interest in regulating alcohol, the court falters in determining that, while bans on direct interstate shipping are unconstitutional, the Texas Code requirement that out-of-state retailers can only sell wine to Texans that had been purchased from Texas wholesalers withstands Commerce Clause analysis. This holding effectively allows the State of Texas to continue discriminating against out-of-state retailers whose home states prohibit them from purchasing wine from wholesalers in other states, including Texas.

The underlying problem faced by both the New York and Texas courts is how to remove the provisions within the three-tier system that harm the federal interest in free trade without hamstringing the functionality of the three-tier system. The Texas court at least addressed this problem in good faith, recognizing that treating similarly situated businesses, e.g., in-state and out-of-state retailers, differently based solely on their location amounts to base economic protectionism. The New York Arnold’s Wines decision, however, failing as it does to fully appreciate the federal interest in free trade and in its eagerness to accept the ban on direct shipping as necessary for upholding the State interest in maintaining its three-tier system—without a showing that the three-tier system would fail without the ban on direct shipping—departs from the nuanced and measured approach articulated by the Supreme Court in Granholm.

The Granholm majority sought to broadly protect out-of-state “economic interests” as well as producers from discriminatory state practices and demonstrated that aspects of the three-tier

216 See Perry, 530 F. Supp. 2d at 869–70.
217 See id. at 870–71.
218 See Arnold’s Wines, Inc., 515 F. Supp. 2d at 407–08, 413–14; Perry, 530 F. Supp. 2d at 869–70.
219 See Perry, 530 F. Supp. 2d at 862.
220 See Arnold’s Wines, Inc., 515 F. Supp. 2d at 413–14 (“Because the Court finds that [New York’s ban on direct shipping into the state is] an integral part of the three-tier system upheld by the Supreme Court in Granholm, . . . the Court finds it unnecessary to undertake a dormant Commerce Clause analysis.”) (emphasis added).
221 See Granholm, 544 U.S. at 472 (quoting Or. Waste Sys., Inc. v. Dep’t of Envtl Quality of Or., 511 U.S. 93, 99 (1994)).
system can and must be modified when they burden free trade between the States.\(^\text{222}\) By allowing in-state but not out-of-state wine retailers to ship directly to in-state customers, New York discriminates against interstate commerce when a reasonable nondiscriminatory alternative is available and preferable to restricting in-state retailers—allowing out-of-state retailers to apply and qualify for direct shipping permits.\(^\text{223}\) Modifying New York’s use of its ban on interstate shipping does not abrogate New York’s Twenty-first Amendment power to regulate alcohol because that power exists within a federal framework in which state laws regulating alcohol cannot discriminate against out-of-state businesses with impunity and burden interstate commerce.\(^\text{224}\)

For these reasons, the *Arnold’s Wines* decision should be reversed. New York should not be able to treat in-state and out-of-state wine retailers differently solely on the basis of their residence. Such discrimination violates the federal interest in promoting free trade among the States, and while New York may try to put a cork in *Granholm v. Heald*, there is still plenty left in the bottle.

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\(^{222}\) *See Granholm*, 544 U.S. at 493.

\(^{223}\) *See Perry*, 530 F. Supp. 2d at 871–72 (“[D]iscriminatory direct-shipping laws should be cured by extending rights to out-of-state retailers rather than by increasing restrictions on in-state retailers. . . . ‘[T]he extension of benefits, not the extension of burdens—is [the goal] inherent in a claim under the Commerce Clause . . . . [A] Commerce Clause claim can only be redressed in the form of eliminating discriminatory restrictions that have been imposed on out-of-state interests.’”) (quoting Dickerson v. Bailey, 336 F.3d 388, 407–09 (5th Cir. 1990)).

\(^{224}\) *See Granholm*, 544 U.S. at 493.