ARTICLE

AGGRAVATED CIRCUMSTANCES, REASONABLE EFFORTS, AND ASFA

Kathleen S. Bean

Abstract: This Article identifies circumstances that justify a state’s refusal to provide reasonable efforts to reunite parents with their abused or neglected children. Since 1980, federal legislation has explicitly required states receiving federal foster care dollars to make reasonable efforts to reunite parents with children removed because of abuse or neglect. Congress responded to widespread concerns that these efforts were responsible for children being returned to unsafe homes or being left in foster care limbo. Congress’s response, the Adoption and Safe Families Act of 1997 (ASFA), identifies three exceptions to the reasonable efforts requirement. This Article uses the aggravated circumstances exception to identify situations where reunification efforts should be denied. ASFA’s exceptions, including aggravated circumstances, recognize the harm that results from making efforts to reunite in situations not appropriate for reunification. The reasonable efforts provision recognizes the harm that results from disrupting the parent-child relationship. To best protect a child against both of these harms, a court should first consider all relevant circumstances, including the effects of the parental conduct, any derivative harm to the child, and any remedial efforts by the parents. Before denying reasonable efforts to reunite, the court should also determine that the past or current harm or parental conduct is sufficient to trigger an ASFA exception; determine that reunification efforts are likely to inflict a very serious harm—either a return to a dangerous home or a stay in foster care that is too long; and identify a nexus between the triggering harm and the predicted harm.
NOTES

IN THE NAME OF EFFICIENCY: HOW THE MASSACHUSETTS DISTRICT COURTS ARE LOBBYING AWAY THE CONSTITUTIONAL RIGHTS OF INDIGENT DEFENDANTS

Raisa Litmanovich

[pages 293–322]

Abstract: This Note explores the current practice of lobby conferences in Massachusetts district courts. At these proceedings, attorneys meet with the judge in chambers, without the defendant and off the record. The attorneys and the judge make one last attempt to settle the case before proceeding to trial. Court officials rely on the lack of record in lobby conferences to foster the type of candid discussion between the attorneys and the judge they believe to be necessary for efficient disposition of cases. As this Note examines the reasons why lobby conferences have a unique role in district courts, it also highlights how the lack of record makes it nearly impossible for indigent criminal defendants to hold their attorneys accountable for anything that happens at these proceedings. This Note argues that mandating recording of lobby conferences will be circumvented by the courts. Instead, appellate courts must recognize the inherent conflict of interest and change how they treat ineffective assistance of counsel claims that arise in the context of lobby conferences.

OFFSETTING JUSTICE: PROTECTING FEDERALLY-EXEMPT BENEFITS FROM GARNISHMENT AND BANK SET-OFFS

Arianna Tinsky-Brashich

[pages 323–356]

Abstract: For the millions of Americans who rely on direct deposit for receipt of their monthly federal benefits, section 207 of the Social Security Act provides a necessary protection against creditors. This federal law protects federal benefits from garnishment, attachment and other legal processes, but the courts, federal agencies, consumer groups and other stakeholders are in disagreement over its scope. This Note serves as a comprehensive review of the exemption, discussing its policy and history as well as case law that highlights the difficulty of applying its provisions to modern day banking practices. This Note concludes by advocating legislative and administrative actions to protect recipients of federal benefits payments.
COMMENTS

PUTTING POVERTY IN MUSEUMS: STRATEGIES TO ENCOURAGE THE CREATION OF THE FOR-PROFIT SOCIAL BUSINESS

Leslie Dougherty

[pages 357–380]

Abstract: In Creating a World Without Poverty, Muhammad Yunus introduces the social business model which aims to provide a social benefit, not just a monetary profit. This model is distinct from a typical non-profit charity because investors expect to eventually recover their financial contributions to the social business. Yunus describes the Danone Communities mutual fund’s ability to protect the company from liability to shareholders for lack of a monetary profit while simultaneously providing food to malnourished children in Bangladesh. This Comment examines two different successful social business structures and argues that companies have yet to embrace this innovative model due to a lack of clear guidelines for this type of business in United States corporate law. The enactment of mutual fund regulations encouraging the creation of this for-profit sustainable social business would allow it to be very successful in reducing poverty.

CORPORATE AIDING AND ABETTING LIABILITY UNDER THE ALIEN TORT STATUTE: A LEGISLATIVE PREROGATIVE

Michael Garvey

[pages 381–400]

Abstract: Since the landmark decision in Filártiga v. Pena-Irala, U.S. courts have struggled determining actionable claims under the enigmatic Alien Tort Statute (ATS). While the Supreme Court recognized the viability of the ATS as a jurisdictional statute in Sosa v. Alvarez-Machain, its scope was restricted to an amorphous “eighteenth century paradigm.” This model has proven to be a murky standard. One of the most contentious and uncertain claims under the ATS involves corporate liability for aiding and abetting human rights violations. This Comment argues that based upon the limited holding of Sosa, aiding and abetting liability would not be recognized as an actionable claim under the ATS. Therefore, similar to the Torture Victim Protection Act, it is Congress’s role to clarify the ATS and ensure that victims of human rights are able to hold complicit corporations liable.
Due Process Restrained: The Dual Dilemmas of Discriminate and Indiscriminate Shackling in Juvenile Delinquency Proceedings

Leah Rabinowitz

(pages 401–424)

Abstract: In Hidden in Plain Sight, Barbara Bennett Woodhouse argues for the advancement of children’s rights through the development of a child-centric perspective. She identifies five principles to further that goal, including the principles of agency and dignity. These principles shed light on the problem of shackling juveniles during their delinquency proceedings. While a recent United States Supreme Court ruling barred indiscriminate shackling for all adult defendants, the status of juveniles remains unclear. Yet even in states that do not shackle juveniles without cause, significant problems remain. This Comment identifies and examines these problems, arguing for increased attention to shackled juveniles’ due process and fundamental dignity rights. The Comment concludes with proposals to improve the discriminate approach, with Woodhouse’s child-centric model in mind.

Pharmaceutical Drug Testing in the Former Soviet Union: Contract Research Organizations as Broker-Dealers in an Emerging Testing Ground for America’s Big Pharma

Yeovgenia Shtilman

(pages 425–454)

Abstract: Developing countries are a fertile testing ground for the research and development of new drug products. Recently, Western pharmaceutical companies expanded their overseas drug testing from India and Africa to the former Soviet Union, where doctors in need of reliable income conduct clinical trials on subjects seeking access to medical care. Although U.S. government agencies monitor clinical drug trials sponsored by American pharmaceutical companies, the scope of governmental authority is effectively limited to the companies’ domestic activities. In October 2008, restrictions on the FDA’s supervisory powers were further reinforced by the agency’s substitution of the ethical research principles found in the Declaration of Helsinki with other, less subject-oriented standards. This revision threatens the health and safety of clinical trial participants in the former Soviet Union, where large populations of the ailing poor prevent local governments from imposing substantial restric-
tions on Western pharmaceuticals manufacturers. This Comment critiques the practice of exploiting underprivileged populations for Western scientific progress, and argues that Congress must immediately respond to the FDA’s October 2008 resolution by acknowledging the Nuremberg Code as customary international law by which American pharmaceutical companies must abide.
AGGRAVATED CIRCUMSTANCES,
REASONABLE EFFORTS, AND ASFA

KATHLEEN S. BEAN*

Abstract: This Article identifies circumstances that justify a state’s refusal to provide reasonable efforts to reunite parents with their abused or neglected children. Since 1980, federal legislation has explicitly required states receiving federal foster care dollars to make reasonable efforts to reunite parents with children removed because of abuse or neglect. Congress responded to widespread concerns that these efforts were responsible for children being returned to unsafe homes or being left in foster care limbo. Congress’s response, the Adoption and Safe Families Act of 1997 (ASFA), identifies three exceptions to the reasonable efforts requirement. This Article uses the aggravated circumstances exception to identify situations where reunification efforts should be denied. ASFA’s exceptions, including aggravated circumstances, recognize the harm that results from making efforts to reunite in situations not appropriate for reunification. The reasonable efforts provision recognizes the harm that results from disrupting the parent-child relationship. To best protect a child against both of these harms, a court should first consider all relevant circumstances, including the effects of the parental conduct, any derivative harm to the child, and any remedial efforts by the parents. Before denying reasonable efforts to reunite, the court should also determine that the past or current harm or parental conduct is sufficient to trigger an ASFA exception; determine that reunification efforts are likely to inflict a very serious harm—either a return to a dangerous home or a stay in foster care that is too long; and identify a nexus between the triggering harm and the predicted harm.

INTRODUCTION

In 1997, the Adoption and Safe Families Act (ASFA) was signed into law.1 With ASFA, Congress sought to achieve several objectives for children who are abused, neglected, or abandoned by their parents.2

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As its name suggests, one was to increase the number of adoptions for these children. Increasing adoptions, however, was primarily a means of serving and complementing the underlying objective of the Act reflected in the “safe families” part of the name. Foremost, Congress sought to shift the pendulum of the child protection system away from what many saw as an unreasonable emphasis on family preservation and towards permanency, and thus health and safety, for the children.

Congress was specifically concerned with a provision in the earlier Adoption Assistance and Child Welfare Act of 1980 (AACWA) that required states receiving federal foster care funding to make “reasonable efforts” to reunite families with children removed from their homes. ASFA’s legislative history reveals a widespread perception, by Congress and others, that reasonable efforts had become unreasonable, resulting in a system that was out of balance. States were too focused on efforts to return abused and neglected children to their homes, thus endangering children in the name of family preservation.

Returning children to homes made safe, and doing so quickly, does protect the children; it minimizes the psychological damage that can come from disrupting the parent-child relationship. Returning children to homes that are not yet safe, however, does not. Nor does requiring children to wait in foster care for years, while efforts are expended to make their homes safe. For a child in one of these situations, health and safety often means adoption by a new family.


3 See Roberts, supra note 2, at 113 n.5.
4 See id.
5 See generally id. (discussing the shift towards protecting children’s health and safety and away from protecting family integrity).
8 See id. at 8.
10 See id. at 646–48.
11 Id. at 655–56.
To better protect these children, Congress attempted to clarify AACWA’s reasonable efforts requirement. A key part of this clarification was to single out a handful of circumstances where efforts to reunite were not required. States were granted discretion to bypass reasonable efforts when a parent had committed murder or voluntary manslaughter of another child of the parent; when a parent had been complicit in such a murder or manslaughter, or an attempted murder or manslaughter; when a parent had committed a felony assault resulting in serious bodily injury to the child or another child of the parent; and when the parent’s rights to a sibling of the child had been terminated involuntarily. One additional circumstance was more ambiguous, however. Under ASFA, “reasonable efforts to reunite children with their parents” are not required if “the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse).”

Providing states with the explicit discretion to deny reasonable efforts when circumstances indicate that children and parents cannot safely be reunited within a reasonable time should protect children. ASFA’s aggravated circumstances exception, however, by itself, fails to provide a meaningful basis for distinguishing cases where reasonable efforts should be bypassed. Director of the Children’s Defense Fund MaryLee Allen, warned of this danger in an early hearing on the provi-

This bill addresses the frustrating problem of how to promote adoption of foster children who through no fault of their own are unable to return to their natural parents and who have languished for far too long in the foster care system. It is time to stop the revolving door of foster care that sends children from home to home to home with little or no hope that they will live with the same families from one month to another. . . . H.R. 867 places the safety and well-being of children above efforts by the State to reunite them with biological parents who have abused or neglected them.

*Id.*; see also Susan Vivian Mangold, *Transgressing the Border Between Protection and Empowerment for Domestic Violence Victims and Older Children: Empowerment as Protection in the Foster Care System*, 36 *New Eng. L. Rev.* 69, 93–95 (2001) (discussing ASFA’s “shift away from reunification and toward adoption”).

15 Id. § 671(a)(15)(D)(ii), (iii).
16 See id. § 671(a)(15)(D)(i).
17 Id. § 671(a)(15)(D)(i) (emphasis added).
18 See id. § 671(a)(15)(D).
19 See id.
When addressing legislative efforts to clarify the reasonable efforts provision, Allen advised that: “Congress must proceed cautiously so as to not create new problems by using terms that are subject to numerous interpretations (such as ‘aggravated circumstances’) or widening the arc of pendulum swings in an area of policy that is already too volatile for children’s well-being.” Similarly, shortly after ASFA was enacted, Sheila Harrigan, Executive Director of the New York Public Welfare Association, warned that New York needed to statutorily define “aggravated circumstances,” to give courts some direction for when to bypass reunification efforts. “Otherwise,” she explained, “much time, [effort], and money will be wasted before case law [will] slowly begin to define the concept of aggravated circumstances.”

The impact on the health and safety of children when reunification efforts are not required can be tremendous. It ends the state’s “responsibility to provide services,” it ends the “duty to facilitate and encourage visitation,” and it “almost inevitably places the parent just steps away from termination of parental rights.” Without reasonable efforts, the opportunity to address the problems that contributed to the child’s removal and to work towards reunification to avoid the damage from disrupting the parent-child relationship is remote.

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21 The “Adoption Promotion Act of 1997”: Hearing on H.R. 867 Before the Subcomm. on Human Resources of the H. Comm. on Ways and Means, 105th Cong. 49 (1997) (statement of MaryLee Allen, Director, Child Welfare and Mental Health Division, Children’s Defense Fund) [hereinafter Hearing on H.R. 867]. Allen noted that most of the cases to which child protection workers are assigned present health and safety concerns: “[T]he challenge for the worker in interpreting the reasonable efforts provision is to decide when services or other efforts can reasonably prevent these health and safety concerns from endangering the child.” Id. at 50.


23 Id. (“It is very likely that case law definition would also result in uneven definition across the state, which would be unfair to children and families. Everyone involved should be on fair notice of what egregious abusive actions may result in a court ruling that efforts will not be made to reunite the family.”)


25 Id. (noting that without services and visitation provided for the parent, “there is little, if any, hope for reunification”).

26 See IV CHRISTINE P. COSTANTAKOS, NEBRASKA JUVENILE COURT LAW AND PRACTICE § 10.2(E)(1) (2008); see also In re Jac’Quez N., 669 N.W.2d 429, 435 (Neb. 2003) (noting that “dispensing with reasonable efforts at reunification frequently amounts to a substantial step toward termination of parental rights”).
ness of the aggravated circumstances exception contributes to the likelihood that life-altering decisions will be arbitrary, capricious, and discriminatory.\(^{27}\) The phrase invites inconsistent, unpredictable decisions about when a state should expend efforts to reunite a child with his or her parents.\(^{28}\)

The aggravated circumstances exception was written in anticipation of decisions to forego reasonable efforts at the outset of dependency cases.\(^{29}\) Decisions on whether a state should discontinue reasonable efforts once begun, however, raise the same question: based on what we know about this child and these parents at this time, will reunification efforts so threaten the child’s health or safety that we should forego or discontinue those efforts? By examining the aggravated circumstance exception in detail, I hope to contribute to a more systematic approach that will help judges, lawyers, and social workers responsible for answering this question.\(^{30}\)

My analysis of ASFA’s aggravated circumstances exception first chronicles what seems fairly apparent—the purpose of Congress in passing ASFA. It includes a quick review of the 1980 AACWA and its reasonable efforts provision, along with a more detailed discussion of the related provisions of ASFA. I then look at the legislative history of ASFA, with a particular focus on reasonable efforts and the aggravated circumstances exception. At the same time I examine the case law, especially those cases that have made pointed efforts to define aggravated circumstances.

Ultimately, I conclude that decisions to deny reasonable efforts must be based on more than the existence of past or current “aggravated circumstances.” A decision to deny reasonable efforts must articulate how the circumstances predict a sufficiently serious harm to the child should reunification efforts be attempted. While I offer an analytical approach for these cases, I have no neat and tidy solution for the

\(^{27}\) See Hearing on H.R. 867, supra note 21, at 49–50; Burt, supra note 22, at 314–15.

\(^{28}\) See Hearing on H.R. 867, supra note 21, at 49–50.


\(^{30}\) According to a 2002 U.S. Government Accountability Office report, limited data suggest that some judges are reluctant to allow the state to bypass reunification efforts. See U.S. Gov’t Accountability Office, Foster Care: Recent Legislation Helps States Focus on Finding Permanent Homes for Children, but Long-Standing Barriers Remain 24–25 (2002), available at http://www.gao.gov/new.items/d02585.pdf (reporting that “some judges believe that parents should always be given the opportunity to reunify with their children”). There should be reluctance. But with a better understanding of what should constitute aggravated circumstances, and why, judges may be more willing to deny reasonable efforts when necessary to protect the health and safety of the child.
individuals who must ultimately make these difficult decisions. I hope, however, that my discussion will contribute to the health and safety of the children in the dependency system.

I do make certain assumptions when writing in this area, all of which are consistent with ASFA: first, as specifically provided by ASFA, a child’s health and safety must be paramount;\textsuperscript{31} second, as is implicit in ASFA, preserving the parent-child relationship presumptively contributes to a child’s health and safety;\textsuperscript{32} third, some parents are so harmful to their children that “the harm outweighs the presumptive benefit of the parent-child relationship”;\textsuperscript{33} and finally, children are usually harmed by a long and indefinite stay in foster care.\textsuperscript{34} Each of these assumptions can conflict with another, however, and identifying an ana-


\textsuperscript{32} See Roberts, \textit{supra} note 2, at 117 (stating that “[c]hildren have an interest in maintaining a bond with their parents and other family members and are terribly injured when this bond is disrupted. The reason for limiting state intrusion in the home, therefore, is not only a concern for parental privacy, but also the recognition that children suffer when separated from their parents and community”); \textit{see also \textit{Ex Parte D.J.}}, 645 So. 2d 303, 305 (Ala. 1994) (citing \textit{Striplin v. Ware}, 36 Ala. 87, 89–90 (1860)) (stating that “[t]he law devolves the custody of infant children upon their parents, not so much upon the ground of natural right in the latter, as because the interests of the children, and the good of the public, will, as a general rule, be thereby promoted”); Bean, \textit{supra} note 31, at 322–23; Gordon, \textit{supra} note 9, at 652–54 (noting that the reasonable efforts provision in AFSA minimizes the chances children will suffer a harmful separation from their parents).

\textsuperscript{33} Gordon, \textit{supra} note 9, at 654–55 (noting that “an abusive parent assaults psychological as well as physical health, ultimately destroying the child’s ability to feel safe, wanted, and loved”); \textit{see \textit{In re J.W.}}, 578 A.2d 952, 958 (Pa. Super. Ct. 1990) (“When parents act in accordance with the natural bonds of parental affection, preservation of the parent-child bond is \textit{prima facie} in the best interest of the child, and the state has no justification to terminate that bond. On the other hand, a court may properly terminate parental bonds which exist \textit{in form} but not \textit{in substance} when preservation of the parental bond would consign a child to an indefinite, unhappy, and unstable future devoid of the irreducible minimum parental care to which that child is entitled.”); \textit{see also} Bean, \textit{supra} note 31, at 322–23.

\textsuperscript{34} Gordon, \textit{supra} note 9, at 655 (“Recent empirical work confirms . . . that long periods of multiple [foster] placements or ‘drift’ will be seriously harmful. Even in a loving, long-term foster home, the uncertainty of . . . foster care . . . may cause hardship.” (internal footnote omitted)); \textit{see \textit{In re Guardianship of DMH}}, 736 A.2d 1261, 1270 (N.J. 1999) (concerning children who had been in long term foster care: “a delay in establishing a stable and permanent home will cause harm to both these children”); Bean, \textit{supra} note 31, at 322–23; Kay P. Kindred, \texti{Of Child Welfare and Welfare Reform: The Implications for Children When Contradictory Policies Collide}, 9 WM. & MARY J. WOMEN & L. 413, 463 (2003) (noting the “potential negative consequences of foster care”).
lytical approach that yields consistent and appropriate results for abused and neglected children is the challenge.

I. BACKGROUND: STATE LEGISLATIVE AND JUDICIAL RESPONSES TO ASFA

Because ASFA explicitly charged the states with the task of defining aggravated circumstances, a quick survey of state legislative and judicial responses to this delegation provides context for this discussion.\footnote{Adoption and Safe Families Act (ASFA) of 1997, Pub. L. No. 105-89, § 101(a), 111 Stat. 2115 (codified as amended at 42 U.S.C. § 671(a)(15)(D)(i) (2006)) (“Reasonable efforts . . . shall not be required . . . if the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse)”)}

A. STATE LEGISLATION

With some exceptions, state legislative definitions model the federal legislation by providing lists of circumstances or conduct that can constitute aggravated circumstances.\footnote{See generally Child Welfare Info. Gateway, U.S. Dep’t of Health & Human Servs., Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children: Summary of State Laws (2006), available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/reunifyall.pdf (summarizing the conditions under which reasonable efforts are required by state law).} Some closely adhere to the ASFA language and say no more; the Georgia statute allows a bypass of reunification efforts when “[t]he parent has subjected the child to aggravated circumstances which may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse.”\footnote{Ga. Code Ann. § 15-11-58(a)(4)(A) (2008).} Most include some version of the examples in the federal provision.\footnote{See id. at 7–45 (listing circumstances unique to certain state laws).} Beyond that, however, the legislation varies greatly and demonstrates the need for a focused inquiry on the meaning of aggravated circumstances.\footnote{See, e.g., N.D. Cent. Code § 27-20-02(3)(b) (2007); Utah Code Ann. § 78A-6-312 (3)(d)(i)(J) (2008).} Some listed provisions are very specific.\footnote{N.D. Cent. Code § 27-20-02(3)(b).} For example, those of North Dakota declare that reasonable efforts are not required when the parent “[h]as been incarcerated under a sentence for which the latest release date is: (1) [i]n the case of a child age nine or older, after the child’s majority; or (2) [i]n the case of a child, after the child is twice the child’s current age, measured in days.”\footnote{N.D. Cent. Code § 27-20-02(3)(b).}
permits the termination of reunification efforts when “[t]he parent permitted the child to reside . . . at a location where the parent knew or should have known that a clandestine laboratory operation was located.” Other provisions are more encompassing. South Dakota law allows termination when a parent has “subjected the child or another child to torture, sexual abuse, abandonment for at least six months, chronic physical, mental, or emotional injury, or chronic neglect.”

In addition, some of the qualifying circumstances are defined by parental conduct and some by the effect of the conduct on the child; some exceptions use both. States that include provisions requiring only that the parent has subjected the child to certain parental conduct include Missouri, where no reasonable efforts are required if the parent “has subjected the child to a severe act or recurrent acts of physical, emotional or sexual abuse toward the child.” Oklahoma includes chronic drug abuse as a ground for denying reunification efforts, without regard to the effect on the child.

On the other hand, many states refer to the effect of the circumstances. A South Dakota provision concerning chronic drug and alcohol abuse states that reasonable efforts are not required when the parent “[has] a documented history of abuse and neglect associated with chronic alcohol or drug abuse.” A Nevada provision similarly refers to the effect of the parental conduct: no reasonable efforts are required when the parent “[c]aused the abuse or neglect of the child . . . which resulted in substantial bodily harm to the abused or neglected child.” Under Arizona law, no reasonable efforts are required when “a child is the victim of serious physical or emotional injury by the parent.”

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44 Id.
47 Okla. Stat. Ann. tit. 10 § 7003–4-6(13) (“The parent . . . of the child has a history of extensive, abusive and chronic use of drugs or alcohol and has resisted treatment for this problem during a three-year period immediately prior to the filing of the deprived petition which brought that child to the court’s attention.”)
reasonable efforts when the parent has engaged in “egregious conduct” that “threatens the life, safety, or physical, mental, or emotional health of the child or the child’s sibling.”

Other states use “aggravated” as an adjective to suggest that the harm or detriment needs to be substantial, either inherently or in its effect. For example, New Jersey law considers whether the parent has “subjected the child to aggravated circumstances of abuse.” North Carolina’s statute also emphasizes the aggravated aspect in its definition: “Any circumstance attending to the commission of an act of abuse or neglect which increases its enormity or adds to its injurious consequences, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse.”

Several states favor the fairly encompassing “subjected the child to” language of ASFA. Some provisions explicitly include circumstances involving another child or sibling; some do not. For example, Alaska includes an exception for when the parent has “subjected the child to circumstances that pose a substantial risk to the child’s health or safety; these circumstances include abandonment, sexual abuse, torture, chronic mental injury, or chronic physical harm.” South Dakota uses close to the same language, but also includes other children.

Most state legislative provisions focus on current or past conduct when defining aggravated circumstances and list parental conduct, or results of parental conduct, that qualify. Many, however, include a general provision or catch-all phrase that focuses on, or explicitly encompasses, the future of the child. In effect, this latter group of stat-

57 See Alaska Stat. § 47.10.086(c)(1); S.D. Codified Laws § 26-8A-21.1.
58 Alaska Stat. § 47.10.086(c)(1).
59 S.D. Codified Laws § 26-8A-21.1(3) (stating that reunification is not required when a parent has “subjected the child or another child to torture, sexual abuse, abandonment for at least six months, chronic physical, mental, or emotional injury, or chronic neglect if the neglect was a serious threat to the safety of the child or another child”).
utes requires the state to consider whether remediation will be effective. For example, under New Mexico’s statute, a court may find that reasonable efforts are not warranted when “the efforts would be futile.” North Carolina states that reasonable efforts are not required when “[s]uch efforts clearly would be futile or would be inconsistent with the juvenile’s health, safety, and need for a safe, permanent home within a reasonable period of time.” Connecticut provides that courts may terminate parental rights without reasonable efforts if the “parent is unable or unwilling to benefit from reunification efforts.” Arkansas allows bypass of reasonable efforts when “a determination has been made by a judge that there is little likelihood that services to the family will result in successful reunification.” Iowa requires the state to establish, in addition to physical or sexual abuse or neglect, that the “abuse or neglect posed a significant risk to the life of the child or constituted imminent danger to the child” and that there is “clear and convincing evidence that the offer or receipt of services would not correct the conditions which led to the abuse or neglect of the child within a reasonable period of time.”

B. Judicial Responses

State courts have also tried to define aggravated circumstances. Opinions in two cases, one from an appellate court and one from a trial court, illustrate some of the issues. In the first, State v. Risland, the parents claimed that the trial court improperly relieved child protective services from making reasonable efforts to reunite the child and parents. A unanimous panel of the Oregon Court of Appeals found that the circumstances of the case qualified for the state’s aggravated cir-

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64 Iowa Code § 232.116(1)(i)(2), (3) (incorporated by reference in § 232.57(2)(b)).

65 Conn. Gen. Stat. Ann. § 17(a)-112(j)(1); see also § 17(a)-111b(b)(1) (incorporating by reference § 17(a)-112(j)).


67 See Smith, 896 A.2d at 189–90; Risland, 51 P.3d at 705.


69 Smith, 896 A.2d at 189–90; Risland, 51 P.3d at 705.

70 Risland, 51 P.3d at 699.
cumstances exception. The 2002 opinion illustrates the relationship of the aggravated circumstances to the future of the child before the court.

*Risland* involved a nine-year-old child, the youngest of three children. The applicable Oregon statute defined aggravated circumstances as “including, but not limited to” seven specific or groups of circumstances, such as “[t]he parent has subjected any child to intentional starvation or torture.” It also included ASFA’s other discretionary exceptions, including when there has been a prior involuntary termination of parental rights or when a parent has committed murder or involuntary manslaughter of another one of his or her children. The *Risland* facts did not fit into any of the enumerated examples, however, and the court was faced with defining aggravated circumstances generally.

The court initially focused on the operative phrase, examining first the meaning of “aggravate.” It looked at the dictionary definition—“to make worse, more serious, or more severe: INTENSIFY”—and at the specific circumstances listed in the statute. Relying on plain meaning and the canon of *ejusdem generis*, the court concluded that “aggravated” circumstances “are those involving relatively more serious types of harm or detriment to a child.”

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71. Id. at 699, 706. While the Oregon Court of Appeals in *Risland* did not specifically refer to ASFA, the same court noted in a later decision that the Oregon legislature had adopted its aggravated circumstances provision in response to ASFA. *State v. Williams*, 130 P.3d 801, 804 (Or. Ct. App. 2006) (“In response to ASFA, the Oregon legislature enacted Senate Bill (SB) 408 (1999) . . . [which] sets out three categories of circumstances where a court may excuse . . . reasonable efforts to make possible the child’s return home . . . .”).

72. See *Risland*, 51 P.3d at 705–06.

73. Id. at 699.


75. See Or. Rev. Stat. § 419B.340(5); *Risland*, 51 P.3d at 703–04.

76. See *Risland*, 51 P.3d at 705.

77. See id.

78. Id. (quoting Webster’s Third New International Dictionary 41 (unabr. ed. 1993)).

79. Id. at 705 (citing State v. Johnston, 31 P.3d 1101, 1104 (Or. Ct. App. 2001)) (“[U]nder [the] principle of *ejusdem generis*, the general category will partake of the same characteristics as the specifically enumerated examples.”). In *Modern Statutory Interpretation*, the authors explain the doctrine of *ejusdem generis* as “[w]hen general words in a statute precede or follow the designation of specific things . . . , the general words should be construed to include only objects similar in nature to the specific words.” LINDA JELLUM & DAVID CHARLES HRICIK, MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES 159 (2006). The authors also note that *ejusdem generis* is a species of another canon, *noscitur a sociis*. *Id.* *Noscitur a sociis* requires that “the meaning of words
The court then looked at the plain meaning of “circumstances”—defined as “the total complex of essential attributes and attendant adjuncts”—and concluded that a court could consider not only the parents’ conduct, but also the “results of those actions and conditions, including effects, direct and indirect, on [the] child.” The court also noted that the specifically enumerated circumstances in Oregon’s statute that could constitute aggravated circumstances “may be found in regard to ‘any’ child,” not only the child before the court.

The court considered a number of circumstances, including the parents’ problems and conduct. The opinion noted the parents had a history of drug abuse—another child was born with methamphetamine in his system, the mother was convicted of methamphetamine possession and driving under the influence, and the father had been convicted of several felonies “including drug manufacture, weapons possession, and child neglect.” In addition, the children had witnessed domestic violence between their mother and her boyfriend, and the father had been convicted of assault based on a domestic violence incident with his girlfriend. The court then looked at the effects of the conduct—the current and past harms—first, to a sibling, who had “suffered severe mental injury as a result of his exposure to significant domestic violence, the parents’ drug use, and a highly unstable home life.” It then recounted the harms to the child before the court, noting that he had “suffered serious psychological and social damage including, among other disorders, posttraumatic stress disorder, oppositional defiant disorder, and parent-child relational disorder,” and that the “disorders were caused, in substantial part, by the parents’ conduct.”

The factor that seemed to distinguish the circumstances before the court as appropriate for an aggravated circumstances exception, however, was what the court deemed a second “aggravated” circumstance—

that are placed together in a statute . . . be determined in light of the words with which they are associated.”

80 Risland, 51 P.3d at 705.

81 Id. The court also noted that the Oregon legislature listed two “circumstances” that could involve the parent’s unintentional conduct: specifically, parental neglect resulting in either a child’s death, or in a serious physical injury. Id. Accordingly, the court did not consider aggravated circumstances to be limited to a parent’s intentional conduct toward a child. Id.

82 See id. at 699–706.

83 Id. at 699.

84 Id. at 699, 700, 706.

85 Risland, 51 P.3d at 705–06.

86 Id. at 706.
that “the parents’ harmful actions and conditions persist[ed], despite extensive efforts to remediate them before the court assumed jurisdiction.” Without explicitly doing so, the court predicted that the child before the court would be harmed by reunification efforts because the parents’ prior failures predicted future failures. The court thus concluded the trial court was authorized to allow the child protection agency to deny reasonable reunification efforts.

The Oregon Court considered a fairly typical statute in a fairly logical manner. It also had before it a set of facts that was not atypical for an abuse and neglect case. To distinguish a situation that might not otherwise fit within the aggravated circumstances exception, however, the court emphasized not only the conduct of the parents and how it contributed to the serious problems of the child, but also that attempts to remediate the parents’ problems failed in the past.

A 2005 Delaware family court decision similarly discussed how reliance on past or current circumstances—the narrow fact of prior involuntary terminations of parental rights—can be insufficient when sorting out cases for which reasonable efforts may be inappropriate. In *In re Division of Family Services v. Smith*, the Delaware child protection agency asserted the involuntary termination of parental rights exception as a basis for denying reasonable efforts for a mother who had two earlier terminations, in 2001 and 2002. The court expressed concern about a prior involuntary termination being used to deny reasonable efforts in a current case, indicating that such a waiver might effectively result in denying parental rights to a parent who “has instituted major positive changes in their life between the first involuntary termination of the child and subsequent court proceedings involving another child.”

Like the Oregon court’s opinion in *Risland* and its focus on the failure of prior efforts to remediate problems, the Delaware family court decision implicitly acknowledged that prior terminations of pa-

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87 Id.
88 See id.
89 Id.
90 See *Risland*, 51 P.3d at 703–06.
91 See id.
92 Id. at 706.
93 See *Smith*, 896 A.2d at 188–90.
94 Id. at 187–88. The particular focus of the trial court was a separation of powers issue: namely, whether the agency or the court had the authority to make the decision of whether or not to pursue reasonable efforts. Id. at 189–90.
95 Id. at 189.
rental rights are relevant to the reasonable efforts decision because a parent’s prior failures presumably predict future failure.96 Thus, attempting to reunite a child with a parent who has a prior involuntary termination would likely cause harm to the child involved in the reunification efforts.97 Like the Oregon court, however, the Delaware court noted that relying on a past circumstance, without considering additional and relevant present circumstances, could result in a denial of reasonable efforts when such efforts would be appropriate, such as “[i]f this case involved circumstances in which [the parent] . . . had now improved considerably her parenting skills and ability to provide adequate and loving care to her child.”98 However, the court noted that “the mother in this particular action is not such a parent . . . .”99

Both the Oregon appellate and the Delaware trial court opinions reflect the core issue concerning any discretionary exception to the reasonable efforts requirement: the likelihood of harm to the child before the court and specifically the harm that may result from an attempt to reunite the child with his or her parents.100 This same concern is evident in the legislative history of ASFA.101

II. Congressional Intent and Legislative Context for ASFA’s “Aggravated Circumstances”

It is plain that Congress meant for the states to provide their own definitions of the aggravated circumstances exception.102 While the language of the exception provides some examples, it also states that aggravated circumstances “need not be limited” to these examples.103 The legislative history emphasizes this.104 For example, U.S. Senator Mike DeWine (R-OH) declared:

Mr. President, let me point out now very carefully so there is no risk of misinterpretation on this floor . . . . The authors of

96 See id. at 190.
97 See id.
98 See Smith, 896 A.2d at 190.
99 Id.
100 See id.; Risland, 51 P.3d at 706.
101 See infra Part II.
103 Id.
this legislation do not—do not—intend these specified items to constitute an exclusive definition of which cases do not require reasonable efforts to be made.

Rather, these are examples—these are just examples—of the kind of adult behavior that makes it unnecessary, that makes it unwise, makes it simply wrong for the Government to make continued efforts to send children back to their care. This is not meant to be an exclusive list. We make this clear in the text of the bill. 105

Additional understanding, however, requires a closer look. While the specific language of the aggravated circumstances exception is instructive, some of the broader aspects of ASFA, along with its related legislative history, provide a better beginning for identifying how decision-makers can single out the parent-child relationships for which states should be able to deny reunification efforts. These include ASFA’s emphasis on the health and safety of the child, ASFA’s retention of the “reasonable efforts” requirement, and the immediate legislative context of the aggravated circumstances exception. 106

A. The Health and Safety of the Child Under ASFA

“[I]n determining reasonable efforts to be made[,] . . . the child’s health and safety shall be the paramount concern . . . .” 107 Thus begins ASFA’s “Clarification of the Reasonable Efforts Requirement.” 108 Legislative history underscores the strength of Congress’s resolve to protect the health and safety of children and also identifies the ways Congress perceived those health and safety issues were created or exacerbated. 109 Two concerns repeatedly surface. 110 First, required reunification efforts were resulting in children being returned to dangerous homes, homes that “present[ed] too great a risk” to the health and safety of the chil-

105 Id.
106 See infra Part II(A)–(B).
108 Id.
dren.\textsuperscript{111} Second, required reunification efforts were also responsible for too many children spending too many years in foster care while states made “fruitless attempts to reunify certain families that simply cannot be fixed.”\textsuperscript{112} Ironically, the second of these concerns, lengthy stays in foster care, was a motivating factor in the initial adoption of the reasonable efforts provision.\textsuperscript{113}

Congress’s determination to make paramount the health and safety of children in dependency proceedings has been consistently recognized by the state courts since ASFA’s enactment.\textsuperscript{114} One Connecticut trial court judge called ASFA’s “health and safety shall be paramount” clause the “mantra” of ASFA.\textsuperscript{115} A New York Family Court judge referred to “ASFA’s unequivocal statement of public policy that children must be protected from depraved parental conduct.”\textsuperscript{116} A Delaware Family Court judge stressed the health and safety provision of ASFA: “[C]hildren’s safety . . . must be the paramount concern of all child welfare decision-making. . . . [T]he safety of the child and the child’s need for permanency are the foremost concerns . . . . To stress the importance of the safety principle, ASFA states explicitly that child health and safety is the paramount consideration.”\textsuperscript{117}

\textsuperscript{111} Id.
\textsuperscript{112} Abused and Neglected Children Hearing, supra note 109, at 1 (statement of Sen. DeWine).
\textsuperscript{113} See Alice C. Shotton, Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later, 26 Cal. W. L. Rev. 223, 224 (1990). For five years before passing the Adoption Assistance and Child Welfare Act of 1980 (AACWA), Congress heard testimony about the foster system’s treatment of abused and neglected children, and found that

[t]he most striking fact presented was the astonishing number of children who were being removed from their families and placed in foster care, many for the entire duration of their childhoods. . . . While lost in a system that could neither return them to their families nor place them with adoptive parents, these children often moved from foster home to foster home, becoming more and more disturbed with each move.

\textit{Id.}

\textsuperscript{115} In re Sheneal W. Jr., 728 A.2d at 552.
\textsuperscript{116} In re Marino, 693 N.Y.S.2d at 834. The court’s opinion noted “[t]he impact of . . . ASFA’s mandates is so obvious that the Superior Court of Pennsylvania was influenced by it in a termination of parental rights case decided even before that state passed its implementing legislation.” Id. at 834 n.9 (citing In re Lilley, 719 A.2d 327, 332 (Pa. Super. Ct. 1998)).
\textsuperscript{117} In re Rasheta D., 2000 WL 1693157, at *20.
1. AACWA and Reasonable Efforts

The phrase “reasonable efforts” was first evoked in the Adoption Assistance and Child Welfare Act of 1980 (AACWA), when Congress responded to concerns about “foster care drift” and “foster care limbo.” Both were familiar terms in the debate about when the states should pursue adoptions for abused and neglected children and when the states should attempt to reunite these children with their parents. AACWA was designed to address the prevailing belief that states were placing too many children in foster care and leaving them there, while failing to make sufficient efforts to reunite those children with their families. AACWA required states receiving federal foster care funding to make reasonable efforts to keep children in their homes, and, if removal was necessary, to make reasonable efforts to return the children to their homes. While AACWA included provisions supporting adoption, the thrust of the Act was keeping children with their families. States were required to provide “child welfare services,” which were defined in a way that made keeping children with their families presumptive and primary. The health and safety of children, beyond

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[t]ypically, [foster families] are urged to avoid becoming too attached or allowing the child to become too attached, so as to avoid disrupting bonds with the biological family with whom the child will be reunited.

. . . Many [foster] children have spent the bulk of their lives moving from temporary foster placement to foster placement—a syndrome critics have described as “foster care drift.” These children suffer developmental and emotional damage from a loss of trust in adults and from a lack of stability and continuity.

Id. In addition, “[f]oster care limbo refers to the existence of children who live in foster care for lengthy periods of time. Limbo results when a foster care child cannot be safely returned home; yet he or she is not free for adoption because the state has not terminated the parent-child relationship.” Sherry A. Hess, Note, Texas Family Code Section 263.401: Improving the Mandatory Dismissal Deadline to Be Truly in the Best Interest of the Child, 9 Tex. Wesleyan L. Rev. 95, 98 (2002) (internal footnotes omitted).

119 Woodhouse, supra note 118, at 158–59.


121 AACWA § 101(a)(1).

122 See id.

123 Id. The Act defined “child welfare services” to mean public social services which are directed toward the accomplishment of the following purposes: (A) protecting and promoting the welfare of all children
general references to protecting the welfare of children, were not explicitly mentioned.\footnote{See id.}

For a while, AACWA appeared to succeed as the number of children in foster care decreased.\footnote{Stephanie Jill Gendell, In Search of Permanency: A Reflection on the First Three Years of the Adoption and Safe Families Act Implementation, 39 Fam. & Conciliation Cts. Rev. 25, 27 (2001) (citing Thomas P. McDonald et al., Assessing the Long-Term Effects of Foster Care: A Research Synthesis 15 (1996)) (reporting that the foster care population was 276,000 in 1985); Shotton, supra note 113, at 224 (citing Edna McConnell Clark Found., Keeping Families Together: The Case for Family Preservation 1 (1985)) (noting a foster care population as high as 502,000 in 1977).} By 1997, however, when ASFA was enacted, the number had returned to its 1977 level, three years prior to AACWA.\footnote{See Gendell, supra note 125, at 25.} As the numbers rose, many in the child protective services field expressed concerns to Congress, most of which were pegged to AACWA’s reasonable efforts requirement.\footnote{Celeste Pagano, Adoption and Foster Care, 36 Harv. J. on LEGIS. 242, 243 (1999). The Department of Health and Human Services did adopt regulations listing services that could be provided for reasonable efforts, but the regulations did not define what constituted “reasonable.” See id. at 243–44.} Some argued the reasonable efforts requirement was not the problem, but rather that the services provided to the families were inadequate “due to chronic underfunding and mismanagement of child welfare agencies and courts.”\footnote{Developments in the Law—The Law of Marriage and Family: Unified Family Courts and the Child Protection Dilemma, 116 Harv. L. Rev. 2099, 2114 (2003) [hereinafter Developments in the Law]; see also Theresa Glennon, Walking With Them: Advocating for Parents With Mental Illnesses in the Child Welfare System, 12 Temp. Pol. & Civ. Rts. L. Rev. 273, 278 (2003) (noting that advocates for parents argued “that the family services provided were often inadequate or of poor quality” and “social supports to keep a family together were not available”).} In effect, they argued that states were failing to comply with the reasonable efforts provision.\footnote{See, e.g., Suter v. Artist M., 503 U.S. 347, 347–48 (1992) (ruling that—where child beneficiaries brought suit seeking declaratory and injunctive relief against state officials arguing that the state had failed to provide reasonable efforts to prevent removal of children from their homes and to reunite families where children had been removed—the...
charges that reunification efforts were being pursued at the expense of the children’s safety or psychological well-being, resulting in children continuing to be left in foster care for too long and children being returned to unsafe homes.

2. The Concerns about Reasonable Efforts

As early as 1993, four years before ASFA was signed into law, Congress held hearings on “reasonable efforts.” During these hearings and throughout ASFA’s legislative journey, Congress heard from and responded to witnesses concerned that reunification efforts were being made in situations where it was unreasonable—where homes could never be made safe for children. Always the concerns were two: returning children to unsafe homes and keeping children in foster care for too long.

Among those appearing before Congress were Connie Binsfeld, then Michigan’s Lieutenant Governor, and Peter Digre, then Director of the Los Angeles County Department of Children and Family Services. Binsfield told Congress that states were making reasonable efforts in “egregious” situations, that children were either being left in dangerous homes or “they [are] taken out of the home and put in foster care and delayed and delayed in foster care while all of the services to rehabilitate the parents [are] going on.” Digre argued to committee members in the House of Representatives that “[t]he word ‘reasonable’

plaintiffs had no enforceable private right under the reasonable efforts provision of AACWA).

See Michael J. Bufkin, The “Reasonable Efforts” Requirement: Does It Place Children at Increased Risk of Abuse or Neglect?, 35 U. LOUISVILLE J. FAM. L. 355, 374 (1997) (“Ironically, the emphasis on family preservation means abused children linger in foster homes while social workers try to repair hopelessly dysfunctional families.”).

See Deborah L. Sanders, Toward Creating a Policy of Permanence for America’s Disposable Children: The Evolution of Federal Funding Statutes for Foster Care from 1961 to Present, 17 INT’L J.L. POL’Y & FAM. 211, 222 (2003). Courts were criticized for refusing to remove children from their sometimes dangerous homes because reasonable efforts had not been made to keep the children there; they were also criticized for refusing to terminate parental rights when reasonable efforts to reunite had not been made. See id. The former resulted in children being left in homes where they might be harmed; the latter resulted in children being left in foster care, “without the hope of a plan for permanency.” See id.

See, e.g., Hearing on H.R. 867, supra note 21, at 48–50.

See id. at 48–49.

is often read out of ‘reasonable efforts[,]’ creating a situation in which children are placed in danger and re-abused in the name of family preservation and reunification. . . . In short, we too often engage in ‘futile efforts’ which are inherently unreasonable.”  

Digre talked about foster care as “tragically unstable” and urged Congress to “[r]ecognize . . . that there are classes of parents for whom ‘reasonable efforts’ and family preservation and reunification are or may be inherently unreasonable.”  

Examples provided by Digre included “parents who kill or maim children,” “parents who aggressively sexually assault children,” “parents with histories of violent criminal behavior,” “parents who abandon children in life-threatening circumstances,” and “parents with long-term and chronic addictions.”

Helen Leonhart-Jones, then Executive Director of Montgomery County Children Services in Dayton, Ohio, also noted “there are some parents for whom all our best efforts will never be enough,” and argued for “clearly identified criteria” to allow the professionals to bypass reasonable efforts for those parents.  

Leonhart-Jones, like others, listed certain situations that so clearly fit these criteria that they should be exempt from reunification efforts, for example, “[p]arents with histories of violent criminal behavior or domestic violence.”

Members of Congress responded with like concerns and commentary. Representative Tim Roemer talked about the “two major problems” in the foster care system: “[Too often we] reunite our children with their families only to find catastrophe to happen later on that week or that month when that child was abused again. . . . The second problem is now we have too many children languishing in foster care situations.”  

Upon introducing the early Senate version of ASFA, Senator John H. Chafee (R-R.I) indicated that the goals of his bill were twofold: to “ensure that abused and neglected children are in safe settings, and to move children more rapidly out of the foster care system
and into permanent placements.”\textsuperscript{143} Senator DeWine, a self-proclaimed strong and early supporter of legislation to clarify reasonable efforts, referred frequently to the problem of foster care limbo and returning children to dangerous homes—problems he saw as exacerbated by the reasonable efforts requirement.\textsuperscript{144} DeWine also talked about social workers’ concerns and perceptions that reunification efforts were still required, “even when . . . everybody with any common sense would know there is not one chance in a million that we are ever going to be able to fix that family.”\textsuperscript{145}

In addition, witnesses and members of Congress alike related accounts or referenced news reports of heartbreaking stories of children removed from foster homes prematurely and of children who suffered horrific crimes or died by the hands of, or in the care of, parents to whom the states had returned them.\textsuperscript{146} Child advocate Leonhart-Jones told of a seven-year-old boy she worked with in Cincinnati, who died after falling from a third story window while he was at home, unsupervised, with his three-year-old brother.\textsuperscript{147} Representative Barbara Kennelly referred to “the terrible, heartbreaking case with little Emily in Michigan” and “other cases across these United States, headlines telling us the very worst can happen.”\textsuperscript{148} Senator Chafee pointed to the notorious abuse and death of Sabrina Green\textsuperscript{149} and Senator DeWine related the tragic story of Elisa Izquierdo.\textsuperscript{150} Both girls’ families were being

\textsuperscript{143} See id. The bill excepted several situations from the requirement of reasonable efforts: where the parent has committed a Child Abuse and Prevention Act Amendments of 1996 (CAPTA) criminal act; where the parent is found “to have abandoned, tortured, chronically abused, or sexually abused the child”; and where returning the child to the home would “endanger the child’s health or safety.” Id. at 2702. It also acknowledged that states could specify the cases where, “because of circumstances that endanger the child’s health or safety,” no reasonable efforts were required. Id.


\textsuperscript{145} Barriers to Adoption Hearing, supra note 135, at 13–14 (statement of Rep. DeWine).
\textsuperscript{146} See id.

\textsuperscript{147} See, e.g., Abused and Neglected Children Hearing, supra note 109, at 52 (testimony of Leonhart-Jones).

\textsuperscript{150} Barriers to Adoption Hearing, supra note 135, at 10–11.
monitored by child protective services at the time of their deaths.\textsuperscript{151} Sabrina’s body “was found with fractured skull and a gangrenous severed thumb.”\textsuperscript{152} *Time* magazine reported the police as saying, in reference to Elisa, that, “there was no part of the six-year-old’s body that was not cut or bruised.”\textsuperscript{153} In addition, child advocate Richard Gelles’s *The Book of David* is credited with “galvaniz[ing] support for ASFA.”\textsuperscript{154} The book tells the story of David, whose sister had been removed from the home because of severe abuse by David’s parents.\textsuperscript{155} David was also reported twice as abused, but was left with his parents.\textsuperscript{156} Ultimately, his mother suffocated him.\textsuperscript{157} These and other similarly tragic stories are credited with influencing Congress’s response to the reasonable efforts provision of AACWA.\textsuperscript{158}

While members of Congress seemed to give the most attention to decisions that returned children to danger or death in their homes, they also faulted the system for leaving children in foster care for too long.\textsuperscript{159}

\begin{itemize}
\item \textsuperscript{151} Emily Bazelon, Note, *Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*, 18 YALE L. & POL’Y REV. 155, 183–84 (1999).
\item \textsuperscript{152} Id. at 183.
\item \textsuperscript{154} See Roberts, supra note 2, at 115.
\item \textsuperscript{155} Bufkin, supra note 130, at 375 (citing Richard J. Gelles, *The Book of David: How Preserving Families Can Cost Children’s Lives* 1–7 (1996)).
\item \textsuperscript{156} See id.
\item \textsuperscript{157} See id.
\item \textsuperscript{158} See Bridget A. Blinn, *Focusing on Children: Providing Counsel to Children in Expedited Proceedings to Terminate Parental Rights*, 61 WASH. & LEE L. REV. 789, 818 (2004); see also DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189, 192–93 (1989) (noting that the state had temporary custody of Joshua but returned him to his father even though the caseworker observed “a number of suspicious injuries” in the next six or seven months; Joshua’s father eventually beat the four-year-old so severely that he suffered permanent and severe brain injury); Crossley, supra note 153, at 273–74 (recounting the stories of fifteen-month-old David, who was killed by his mother despite reports to child protective services and a prior voluntary termination of parental rights because case manager did not feel the state made reasonable efforts; of six-year-old Elisa, who was killed by her mother after years of substantial abuse because case manager failed to remove her despite not being subject to the reasonable efforts requirement; and of Joseph, who was to be removed from his mother’s care, but was returned home and subsequently killed by her when the county lost his records).
Prior to AACWA, agencies were charged with not doing enough to reunite parents and children, and thus the children were languishing in foster care. After AACWA, the result was the same, but now agencies were said to be trying too hard to reunite children with their families, and the blame was placed on the reasonable efforts requirement.

Senator DeWine, for example, complained in May 1997 that abusive parents were being given a “second chance, a third chance, a fourth chance, a fifth chance, and on and on, to get their lives back together.” Meanwhile, “their poor little children are shuttled from foster home to foster home, spending their most formative years deprived of what all children should have—a safe, stable, loving, and permanent home.” Congressman Earl Pomeroy emphasized the uncertainty foster children live with and suffer from:

In some instances, abused children live daily with the fear that they may be sent back by some people in some process they do not begin to understand into a home where the abuse occurred in the first place. They do not even go to bed at night with the sense of personal safety and security.

Finally, while ASFA’s legislative history does not reveal an explicit emphasis on cost effectiveness, common sense points to the wisdom of conserving scarce resources for reunification efforts that have a chance

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See supra notes 118–120 and accompanying text.


Id. Senator DeWine told of twins who were placed in foster care when their mother, who had “serious substance abuse problems” abandoned them. Id. at S3947–48. While reunification efforts resulted in a decision to reunite the children and parent, this result took three and one-half years to come about. Id.; see also 143 Cong. Rec. S12,673, S12,675 (daily ed. Nov. 13, 1997) (statement of Sen. Craig) (noting that the system is “trapping [children] in what was supposed to be ‘temporary’ foster care, instead of moving them into permanent homes”); (statement of Sen. Jeffords) (“Too often, children languish in foster care for years—years—before they find a safe, loving family.”); (statement of Sen. Moynihan) (“[ASFA] . . . accelerates the process for determining the permanent placement for a child in foster care, so that children do not spend years bouncing among foster homes.”).

of working, and for using them to benefit children, not harm them.\textsuperscript{165} As Cristine Kim wrote in her oft-cited student note, “[r]easonable efforts has its optimal effect if made with respect to parents who are not ‘bad’ but have external problems or parents who may be ‘bad’ but exhibit a sincere desire and clear potential to change.”\textsuperscript{166}

The reallocation of resources made possible from being able to deny reasonable efforts in certain circumstances has not escaped the notice of state courts.\textsuperscript{167} The Pennsylvania Superior Court commented, shortly after ASFA was enacted, on the serious and costly problems that foster care creates.\textsuperscript{168} Quoting a \textit{U.S. News and World Report} article entitled \textit{Adoption Gridlock}, the court discussed the “cost to the taxpayer” of using foster care for long-term placements “rather than as a pass through program, as originally intended.”\textsuperscript{169} The article explained that “[k]eeping these kids stuck in temporary homes is not only devastating to the kids—it has been a fiscal disaster.”\textsuperscript{170} The Maine Supreme Judicial Court also emphasized the economic considerations two years later, in a 2000 prior involuntary termination of parental rights case:

\begin{quote}
The State also has a legitimate interest in making the best use of its limited resources. . . . [T]he Department’s resources are limited and in many instances are insufficient even to meet the needs of parents who are able and willing to work on the impediments to the return of their children. . . . If difficult decisions regarding allocation of scarce resources must be made, the Legislature’s determination that a prior involuntary termination is a factor to be considered is both reasonable and legitimate.”\textsuperscript{171}
\end{quote}

In 2003, the South Dakota Supreme Court commented that one of the effects of ASFA is that “the child protection system is not required to expend its limited resources attempting to reunify children with abusive parents if certain circumstances exist,” and under these circum-

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{165}] See Burt, supra note 22, at 314.
\item[\textsuperscript{168}] See \textit{In re Lilley}, 719 A.2d at 334 (noting “a serious and costly problem in human lives and public monies relating to the grid lock of foster care in this country”).
\item[\textsuperscript{169}] \textit{Id.} at 335.
\item[\textsuperscript{170}] \textit{Id.}
\item[\textsuperscript{171}] \textit{In re Heather C.}, 751 A.2d at 456.
\end{enumerate}
\end{footnotesize}
stances, states can move “more efficiently” toward termination of parental rights.\textsuperscript{172}

3. ASFA’s Clarification and Retention of Reasonable Efforts

Although Congress continued the reasonable efforts requirement in ASFA, it also responded to the criticisms that reasonable efforts were, under AACWA, too often “unreasonable,” and that children were too often being subjected to dangerous homes or lengthy foster care stays.\textsuperscript{173} It thus took care to include language emphasizing the primacy of the health and safety of the children, and it also included several specific provisions designed to limit the reasonable efforts requirement.\textsuperscript{174}

Congress first required state plans to “[contain] assurances that . . . the safety of the children to be served shall be of paramount concern.”\textsuperscript{175} Congress then emphasized this hierarchy by liberally sprinkling “safe,” “safety,” and “safely” throughout the applicable provisions of the United States Code.\textsuperscript{176} Under AACWA, for example, reasonable efforts were required “to make it possible for the child to return to his home.”\textsuperscript{177} Under ASFA, reasonable efforts are required to make it possible for children to “safely return” to their homes.\textsuperscript{178} AACWA also required states to make reasonable efforts to return children to their homes “in each case.”\textsuperscript{179} A centerpiece of ASFA’s clarification of reasonable efforts is its provision allowing states to deny reunification efforts in three categories of circumstances.\textsuperscript{180}

\textsuperscript{172} People ex rel. D.B., 670 N.W.2d at 70; see also In re Ashley, 762 A.2d 941, 947 (Me. 2000) (“[T]he Act gives courts the discretion to identify the most egregious cases, from early stages of the child protection process . . . without providing fruitless reunification services.”); In re I.H., 674 N.W.2d 809, 812 (S.D. 2004) (“ASFA provides an exception to the reasonable efforts requirement in cases where the court determines that a parent has subjected a child to ‘aggravated circumstances’ as defined by state law.”).

\textsuperscript{173} See supra Part II(A)(2).

\textsuperscript{174} See, e.g., ASFA of 1997, Pub. L. No. 105-89, §§ 101(a), 305(b), 111 Stat. 2115 (codified as amended at 42 U.S.C. §§ 629b(a)(9), 671(a)(15)(B)(ii), (D)(i)–(iii) (2006)); see also Sanders, supra note 131, at 227 (noting that “ASFA has not abandoned the family preservation model, but merely subordinated it to child safety”); Developments in the Law, supra note 128, at 2116 (“Under current policy a child’s health and safety is the primary concern.”).

\textsuperscript{175} ASFA § 305(b), 42 U.S.C. § 629b(a)(9).

\textsuperscript{176} Id. §§ 622, 675 (titled “Including Safety In Case Plan And Case Review System Requirements”).


\textsuperscript{179} AACWA § 101(a).

\textsuperscript{180} ASFA § 101(a), 42 U.S.C. § 671(a)(15)(D)(i)–(iii).
One exception incorporates the Child Abuse and Prevention Act Amendments of 1996 (CAPTA).181 CAPTA had already identified several criminal acts that would release states from required reasonable efforts, for example, where the parent had committed murder of another child of the parent or committed a felony assault resulting in a serious bodily injury to the child or another child of the parent.182 A second exception releases states from required efforts when the parental rights of the parent to a sibling of the child have been terminated involuntarily.183

The aggravated circumstances exception makes reasonable efforts discretionary where “the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse).”184 Each of ASFA’s exceptions, including the aggravated circumstances exception, identifies past or current circumstances that operate not only to rebut the presumption of reasonable efforts being in the child’s best interests, but also to trigger a presumption that serious harm or detriment will result to the child if reunification efforts are attempted.185 While the harm can be a return to a dangerous home, Representative Clay Shaw recognized these exceptions as an important part of the response to lengthy foster stays and their threat to children’s safety: “If families will not or cannot change within a reasonable period of time, we must, in the interest of the children, be willing to terminate parental rights and move expeditiously toward adoption.”186

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182 Id. Reasonable efforts are not required where the parent has committed certain criminal acts: murdered or committed voluntary manslaughter of another child of the parent; aided or abetted, attempted, conspired, or solicited to commit a murder or voluntary manslaughter of another child of the parent; or committed a felony assault that resulted in a serious bodily injury to the child or another child of the parent. ASFA § 101(a), 42 U.S.C. § 671(a)(15)(D)(ii).


184 Id. § 671(a)(15)(D)(i).

185 See Herring, supra note 2, at 337 (noting the state is excused from attempting to reunify the family and that the law presumes that the parent is unfit); see also Sallie K. Christie, Note, Foster Care Reform in New York City: Justice for All, 36 Col. J.L. & Soc. Probs. 1, 4–5 (2002). If a parent has committed a CAPTA criminal act, ASFA requires the state, with some exceptions, to file a termination of parental rights (TPR) petition. See 42 U.S.C. § 675(5)(E). The same requirement does not apply to the prior TPR or aggravated circumstances exceptions, however. See id.; see also infra notes 193–194 and accompanying text.

Representative Shaw went on to explain that “[w]e do this by allowing States to define what we call aggravated circumstances that allow them to dispense with services for the family and get on with the business of finding an adoptive home for the child.”

In connection with the reasonable efforts exceptions, Congress took precautions to ensure the primacy of health and safety. It included its own statutory construction rule, applicable to the reasonable efforts requirement, providing that “[n]othing in this part shall be construed as precluding State courts from exercising their discretion to protect the health and safety of children in individual cases, including cases other than those [exempted from reasonable efforts].”

Finally—and significantly—Congress took additional steps to protect the emotional and psychological well-being of children who were spending too much of their childhoods in “temporary” foster care, by directing states to focus on finding, more quickly, permanent situations for these children. If reasonable reunification efforts are denied (or discontinued), ASFA also requires the states to expend reasonable efforts “to complete whatever steps are necessary to finalize the permanent placement [including adoption] of the child.” Along with this, Congress shortened the timeline for dispositional or “permanency” hearings from eighteen months to twelve months, requiring states to decide more quickly whether a child will go back to his or her parents or be placed for adoption (thus necessitating a termination of parental rights). In addition, Congress shortened the time for reasonable ef-

187 Id. Representative Shaw’s remarks were about the Adoption Promotion Act of 1997—an earlier version of ASFA, which also required that a TPR petition be filed if a child younger than ten had been in foster care for eighteen of the most recent twenty-four months. Id. at H2024; Adoption Promotion Act (APA) of 1997, H.R. 867, 105th Cong. § 3(a)(3)(E). See H.R. Rep. No. 105-77, at 9 (1997), reprinted in 1997 U.S.C.C.A.N. 2737, 2741.


189 Id. § 678. Section 101(d) of ASFA states that the rule of construction amends Part E of title IV, 42 U.S.C. §§ 670–679 (and thus it applies to the reasonable efforts provision and the exceptions to the reasonable efforts provision). Id. Robert Gordon suggests that while this provision allows states to deny reasonable efforts in cases other than those explicitly excepted in ASFA, a parent could still demand a judicial hearing authorizing the denial of services. Gordon, supra note 9, at 680 n.250 (citing ASFA § 101(a), 42 U.S.C. § 671(a)(15)(D), which provides that “reasonable efforts . . . shall not be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that” one of the exceptions exists).


191 Id. § 671(a)(15)(C).

192 See id. § 675(5)(C). A legal guardianship or another planned permanent living arrangement may also be part of the “permanency plan” for the child. Id. § 675(1)(E).
forts by requiring a termination of parental rights petition to be filed if a child is in foster care for “15 of the most recent 22 months,” if the child is an abandoned infant, or if any of the subsection (ii) of section 671(15)(D) (CAPTA criminal acts) circumstances exist. In each of these situations, the state is required, with some exceptions, to file a termination of parental rights petition and move towards adoption. Finally, to complement this emphasis on permanency, Congress also heightened and provided support for adoptions, including adoption incentive payments, concurrent planning (placing children in their pre-adoptive homes while reasonable efforts are on-going), and specific requirements to identify and approve families for adoptions.

The multiple provisions in ASFA targeting lengthy foster stays emphasize the concern Congress had about the threat of these stays to the health of children. Interpreting aggravated circumstances, then, in line with the broader legislative provisions and aims of ASFA, requires recognizing not only the risk of harm that comes from children being returned to dangerous parents, but also the risk of delayed or denied permanence that comes from long and uncertain stays in foster care. It also requires recognizing one additional harm—that which is inflicted on a child when parental rights to that child are terminated.

The reasonable efforts requirement was meant to preserve families and to prevent terminations of parental rights. Central to any analysis of aggravated circumstances is reading each of ASFA’s exceptions as it is presented—as a part of the “Clarification of the Reasonable Efforts Requirement.” Although most of the commentary in the legislative history focuses on circumstances when reasonable efforts should not be made, a sprinkling of specific comments confirm the underlying agreement on the rationale behind reasonable efforts. Senator DeWine stated that “[f]amily reunification is very important. It is a laudable goal[;] we all want to try that.” Representative Dave Camp explained

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194 ASFA § 103(a), 42 U.S.C. § 675(E) (requiring that the state “concurrently . . . identify, recruit, process, and approve a qualified family for adoption”).
195 Bean, supra note 31, at 328.
196 Id. at 327–29.
198 ASFA § 101.
200 Barriers to Adoption Hearing, supra note 135, at 41.
that “[ASFA] calls upon States to continue efforts to reunite the family.”201 More explicit is the House Report on ASFA, which addresses “the importance and essential fairness of the reasonable efforts criterion” and instructs that ASFA does not seek to effect “a wholesale reversal of reasonable efforts.”202 “Rather than abandoning the Federal policy of helping troubled families, what is needed is a measured response to allow States to adjust their statutes and practices so that in some circumstances States will be able to move more efficiently toward terminating parental rights and placing children for adoption.”203 ASFA’s emphasis on permanency, in fact, fully encompasses the rationale for reasonable efforts—to “minimiz[e] the likelihood that [children] will suffer harmful separation from their parents.”204

States thus retain the discretion to provide reunification services when appropriate, even when an exception applies.205 Representative William Goodling highlighted this discretionary aspect when discussing the CAPTA criminal acts exceptions, noting the amendments are “intended to give the States flexibility in this area. . . . States may still seek to reunify the family, but will no longer be required to do so by Federal law.”206 State courts have also recognized this distinction by consistently speaking of the “discretion” to deny reasonable efforts when considering the bypass provisions.207 The New Mexico Court of Appeals discussed the “discretionary nature of the statute” in a 2002 termination of parental rights case, noting that New Mexico’s statute “does not mandate that the state cease reasonable efforts once there has been a prior termination of parental rights. . . . [Our ASFA statute] provides the trial court with discretion to relieve the state of the burden of providing services.”208 The Maine Supreme Judicial Court also emphasized the dis-
tinction, noting that Maine’s ASFA statute “is written to allow, but does not mandate, that the Department be relieved of its responsibilities.” Still, a discussion of whether an exception applies usually takes place only when the state seeks to deny reunification efforts. In this sense, they are one and the same.

B. The Immediate Legislative Context of the Aggravated Circumstances Exception

Words are known by the company they keep. The aggravated circumstances exception keeps company with two others, the CAPTA criminal acts exception (murder, manslaughter, and so forth) and the prior involuntary termination of parental rights (TPR) exception. How these exceptions operate is instructive in several ways. They first suggest that Congress intended states to be able to deny reasonable efforts only with evidence of an act or circumstance that was meant to inflict or did inflict a very serious harm or detriment on a child.

The CAPTA circumstances are particularly serious, in part because of their immediacy. The extremes in this exception include murder, defined by the United States Code as “the unlawful killing of a human being with malice aforethought,” and voluntary manslaughter, “the unlawful killing of a human being without malice[,] upon a sudden quarrel or heat of passion.” The harm resulting from a felony assault is similarly serious and justifies the termination of reunification efforts if committed against the child or another child of the parent. Generally, a crime is classified as a felony when the punishment is imprisonment for more than one year, and the felony circumstance also re-
quires, by definition, that the assault result in “serious bodily injury.”

The final CAPTA circumstance is simply an extension of the murder and voluntary manslaughter provisions, that is, when a parent has aided, abetted, attempted, conspired, or solicited to commit the murder or voluntary manslaughter:

The involuntary TPR exception similarly captures only very serious harms or circumstances. A termination of parental rights can be said to inflict two harms on a child. In addition to the severance of the parent-child relationship, the child is harmed by the circumstances that justify the termination. The termination of parental rights has been

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217 Model Penal Code § 1.04(2) (1962) (“A crime is a felony if . . . persons convicted thereof may be sentenced [to death or] to imprisonment for a term that . . . is in excess of one year.” (brackets in original)). The phrase “serious bodily injury” was defined in CAPTA to mean “bodily injury which involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.” CAPTA of 1996, Pub. L. No. 104-235, § 107(b)(4)(B), 110 Stat. 3036 (codified as amended at 42 U.S.C. § 5106a(b)(4)(B) (Supp. V 2005)). Under the Model Penal Code, ASFA’s felony assault provision would probably fit within the definition of aggravated assault, which includes: “causes [a serious bodily injury to another] purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life.” Model Penal Code § 211.1(2)(a). A section 211.1(2)(a) aggravated assault under the Model Penal Code is a second degree felony. Id.; see also In re Janet J., 666 N.W.2d 741, 751 (Neb. Ct. App. 2003) (holding that a spiral fracture of the leg of the child involved “a substantial risk of disfigurement or protracted loss or impairment of the function of that leg and was therefore a serious bodily injury”), disapproved of on other grounds by In re Jac’Quez N., 669 N.W.2d 429, 435 (Neb. 2003); Brown v. Spotsylvania Dep’t of Soc. Servs., 597 S.E.2d 214, 218 (Va. Ct. App. 2004) (construing “felony assault resulting in serious bodily injury” as being concerned with the effect the crime had on the child).

218 ASFA § 101(a), 42 U.S.C. § 671(15)(D)(ii). Congressional Record references to the 1996 CAPTA amendments further indicate that Congress was focused on very serious circumstances. See 142 Cong. Rec. H11,148–53 (daily ed. Sept. 25, 1996). The listed exceptions were adopted, according to Representative William Goodling, to prevent “overzealous attempts of ‘family preservation’” that place “children back into homes where parents have been convicted of egregious acts.” Id. (statement of Rep. Goodling) (emphasis added).


221 Id. The “immensely influential” writings by Joseph Goldstein, Anna Freud, Albert Solnit, and Sonja Goldstein on the best interests of the child have persuaded most professionals in the field that “disrupting the parent-child relationship seriously hurts children of all ages.” Gordon, supra note 9, at 652–53 (noting that the work had been “harshly criticized for its lack of empirical support, among other things,” but that the “work is nonetheless compelling in view of what is now known”); see also Catherine J. Ross, The Tyranny of Time: Vulnerable Children, “Bad” Mothers, and Statutory Deadlines in Parental Termination Proceedings, 11 Va. J. Soc. Pol’y & L. 176, 221–22 (2004); Blinn, supra note 158, at 812–13. One author asserts, with some justification, that AACWA, in fact, “was based on the premise that removal of a child from his or her home was so harmful to his or her psyche that it was virtually never in the child’s best interests to be removed.” Pagano, supra note 127, at
characterized as a civil “death penalty” by many state courts, and thus requires a substantial justification. Legislative examples of grounds for termination include (a) abandonment; (b) abuse or neglect; (c) unfitness of the parent; (d) parent’s failure to provide child support; (e) mental or physical disability of the parent; (f) incarceration of the parent; (g) risk of serious physical, mental or emotional injury to the child; and (f) dependency. In most states, a termination must be supported by clear and convincing evidence showing that the parent is unfit and, additionally, that the termination is in the best interest of the child. In other words, the harm that justified the termination is, by definition, very serious.

Moreover, CAPTA and CAPTA-like acts can also be the basis for an involuntary termination of parental rights, and thus ASFA’s TPR exception predicts and protects against these same harms. But terminations additionally occur because of ongoing and chronic circum-

222 State ex rel. S.A.C., 938 So. 2d 1107, 1109 (La. Ct. App. 2006); In re P.D., 144 S.W.3d 907, 911 (Mo. Ct. App. 2004); In re Parental Rights as to K.D.L. 58 P.3d 181, 186 (Nev. 2002); In re A.C., 827 N.E.2d 824, 831 (Ohio Ct. App. 2005); In re N.R.C., 94 S.W.3d 799, 811 (Tex. App. 2002). While the grounds for termination are many and varied, it is generally recognized that an involuntary termination of parental rights interferes with the right of a parent to the care, custody and management of his or her child. See, e.g., Santosky v. Kramer, 455 U.S. 745, 753 (1982) (discussing the “fundamental liberty interest of natural parents in the care, custody, and management of their child”).


224 Santosky, 455 U.S. at 747–48; see In re Lilley, 719 A.2d at 330–31 (noting that the trier of fact must “come to a clear conviction, without hesitancy, of the truth of the precise facts in issue”).

225 See, e.g., Emily Buss, “Parental” Rights, 88 Va. L. Rev. 635, 678 (2002) (stating the Court’s analysis in Santosky “endorsed a high, unfitness-based standard”); see also In re Lilley, 719 A.2d at 329 (Pennsylvania requires clear and convincing evidence, and petitioner must prove “(1) repeated and continued incapacity, abuse, neglect or refusal; (2) that such incapacity, abuse, neglect or refusal caused the child to be without essential parental care, control or subsistence; and (3) that the causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied”).


227 See Santosky, 455 U.S. at 747–48; In re Lilley, 719 A.2d at 329–31; Buss, supra note 225, at 678; Dwyer, supra note 226, at 955–56; Ferguson, supra note 226, at 93.

stances. Consequently, it is important to ask what harms these triggering circumstances are designed to protect against. The immediate effect of the harm inflicted on a child returned to a chronic situation, while sufficient to require state intervention, is often not as serious as that in a CAPTA circumstance. Further, the parents may have more of an opportunity to show change and not merely compliance. Parents who have neglected a child as a result of a drug addiction, for example, may be able to submit test results to show they are no longer doing drugs. While not proving lasting change, the evidence does establish a drug-free status quo and may suggest a diminished risk to the child should reunification occur. Finally, if the parent relapses, the state may be able to intervene before the harm to the child becomes too serious and irreparable. These types of harms, by themselves, are not necessarily serious enough to trigger an exception to the requirement of reasonable reunification services.

If, however, chronic abuse or neglect circumstances have been an issue, and such that they resulted in a termination of parental rights—which is the measurement of harm recognized by ASFA’s TPR exception—the parent apparently failed to remediate, even when faced with the loss of parental rights. Thus, even if the current circumstances are such that the child before the court can be removed before a serious or irreparable harm accrues, the parent’s involuntary termination of parental rights with another child predicts that such a removal will be necessary, that the parent will lapse in his or her remediation, and thus, the child will be subject to a lengthy and uncertain foster stay.

In addition, the CAPTA and TPR exceptions suggest that the harm triggering the exception for the child before the court can be derivative. But for the CAPTA felony assault circumstance, which can involve either the child before the court or another child, the other circumstances in the CAPTA and TPR exceptions involve only “another child” of the parent. The risk of harm to the child currently before the court, should the state make efforts to reunite parent and child, is most often predicted by a very serious harm inflicted upon another child. This type of presumption is not new to abuse and neglect law.

229 See, e.g., In re Adoption of Melvin, 885 N.E.2d 874, 880 (Mass. App. Ct. 2008) (“[T]he mother’s marginal improvement in parenting skills despite her long-time involvement with the department showed that her unfitness was highly likely to continue into the indefinite future.”).


231 Id.

232 See, e.g., In re K.O., 933 S.W.2d 930, 934 (Mo. Ct. App. 1996).
In 1996, a year before ASFA, the Missouri Court of Appeals captured the concern that a parent who has caused severe harm to one child will cause severe harm to another child.\textsuperscript{233} In \textit{In re K.O.}, the mother argued that the termination of her parental rights to two children, based on her murder of a stepsibling, was not supported by clear, cogent, and convincing evidence, as required by law.\textsuperscript{234} “The termination of parental rights of an abusing parent under this subsection,” said the court, “is premised on the belief that requiring the child to suffer the fate of his or her sibling (or step-sibling) prior to termination of the rights of the abusing parent would defeat the purpose of the law.”\textsuperscript{235} A New York Family court articulated the implicit qualifiers that often go with this belief and assumption: the abuse must be serious, not too remote in time, and demonstrative of a fundamental defect in the parent’s understanding of his or her duties.\textsuperscript{236} If these circumstances exist, a court need not “await broken bone or shattered psyche before extending its protective cloak around [a] child.”\textsuperscript{237}

Further, in \textit{In re Marino S.}, the New York courts emphasized not only the validity of derivative abuse, but also ASFA’s recognition of derivative abuse and harms.\textsuperscript{238} \textit{Marino} involved only one child who was directly abused, but the trial court relied on this abuse to deny reasonable efforts for the child’s siblings.\textsuperscript{239} The trial court noted that the “premise” of ASFA encompasses the reasoning of derivative abuse by assuming that “in certain types of cases, . . . the dangers of reunification efforts often outweigh any potential benefit.”\textsuperscript{240} On appeal, the Appellate Division affirmed.\textsuperscript{241} It too commented on the derivative nature of ASFA’s discretionary bypass provisions, noting that one of ASFA’s “goals was to prevent the return of a child to unrehabilitated abusive or neglectful parents, and, to that end, the Act created categories of cases in which ‘reasonable efforts’ to provide for a return of the child to the parent(s) were not required.”\textsuperscript{242} Finally, the New York Court of Appeals, also affirming, relied on both the validity of derivative findings

\textsuperscript{233} See id.
\textsuperscript{234} Id.
\textsuperscript{235} Id. at 934 (citing \textit{In re P.M.}, 801 S.W.2d 773, 776 (Mo. Ct. App. 1991)).
\textsuperscript{237} Id. at 596–97 (quoting \textit{In re Maria Anthony}, 366 N.Y.S.2d 333, 336 (Fam. Ct. 1975)).
\textsuperscript{239} \textit{In re Marino}, 693 N.Y.S.2d at 831.
\textsuperscript{240} Id.
\textsuperscript{241} \textit{In re Marino}, 741 N.Y.S.2d at 211.
\textsuperscript{242} Id.
and ASFA’s recognition of derivative harms. The court noted that a “derivative [finding] of severe abuse may be ‘predicated upon the common understanding that a parent whose judgment and impulse control are so defective as to harm one child in his or her care is likely to harm others as well.’” Further, the Court of Appeals emphasized that ASFA was meant to expedite permanency planning for abused children by allowing the agency to be excused from expending “considerable effort in preparing an obviously unfit parent for permanent placement.”

If the aggravated circumstances exception is interpreted consistently with the CAPTA and TPR exceptions, then it may be triggered only with evidence of a very serious harm. That harm may have been directed at either the child before the court or another child of the parent. These triggering harms are the central and defining feature of the CAPTA and TPR exceptions, but their purpose is to protect the child before the court from the harms they predict. Thus, understanding the harms the CAPTA and TPR exceptions predict is also helpful.

The CAPTA criminal acts exception most frequently predicts that one of two very serious harms will occur if reunification efforts are attempted. The child will either be returned to a dangerous home or will linger in foster care. In most CAPTA circumstances, the parent has shown the capacity to inflict a very serious harm, often instantaneously. A parent who has demonstrated the capacity to murder his or her own child, for example, predicts not only a very serious risk to the subject-child if the child is returned to parent, but a risk that has little warning or opportunity for the state to remove the child if the parent acts again. In addition, given the nature of the risk associated with most CAPTA acts, it is more difficult for parents to assure the state that they have successfully remediated their problem. The situation thus also risks leaving the child in foster care for too long.

A 2005 “shaken baby” case in South Dakota reflected both of these dangers. An eight-month-old boy and his sister were removed from the mother after the boy suffered life-threatening injuries. After the children were placed in foster care, the mother contacted the child

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243 In re Marino, 795 N.E.2d at 28.
244 Id. at 28 (quoting In re Marino, 693 N.Y.S.2d at 831). But see Robert May, Note, Derivative Neglect in New York State: Vague Standards and Over-Enforcement, 40 COLUM. J.L. & SOC. PROBS. 605, 613–14 (2007) (criticizing the similar “fundamental defect” or “fundamentally flawed” standard).
245 In re Marino, 795 N.E.2d at 26.
247 Id.
The South Dakota Supreme Court affirmed the trial court’s holding and termination of parental rights.\textsuperscript{251} The risk the court recognized most was that of returning the child to the mother.\textsuperscript{252} The court noted that the caseworker believed the children would be at risk if they were returned and relied on the caseworker’s testimony that “even though” the mother’s assault of the child was a “split second poor decision,” it provided a reason “to believe it could happen again.”\textsuperscript{253} The risk of extended foster care in such a situation was also demonstrated, as the court conceded the mother had completed “all that was asked of her” in the reunification plan and that she had even “sought out more in an attempt to regain custody of her children.”\textsuperscript{254} However, “just because Mother completed the objectives of her [reunification plan] does not establish that Mother would no longer be a risk to the safety of the children.”\textsuperscript{255}

The South Dakota court’s concern has been identified by the child welfare expert Richard Gelles as one of distinguishing change from compliance.\textsuperscript{256} Compliance is when the parents have done what they have been asked to do—for example, attend an anger management class or keep the house clean.\textsuperscript{257} But social workers, lawyers, and judges must make child placement decisions based on “risk and change, not simply the passage of time and compliance.”\textsuperscript{258} Given the serious and

\textsuperscript{248} Id. at 844.

\textsuperscript{249} Id.

\textsuperscript{250} Id. at 844–45.

\textsuperscript{251} In re E.L. \& R.L., 707 N.W.2d at 843, 849.

\textsuperscript{252} See id. at 847.

\textsuperscript{253} Id.

\textsuperscript{254} Id.

\textsuperscript{255} Id.

\textsuperscript{256} Abused and Neglected Children Hearing, supra note 109, at 10 (statement of Richard J. Gelles). Professor Gelles currently holds the Joanne and Raymond Welsh Chair of Child Welfare and Family Violence in the School of Social Policy \& Practice at the University of Pennsylvania, is the Director for the Center for Research on Youth \& Policy, and is Co-Director of the Field Center for Children’s Policy Practice \& Research. University of Pennsylvania School of Social Policy \& Practice, Richard J. Gelles, PhD., http://www.sp2.upenn.edu/people/faculty/gelles/ (last visited Apr. 19, 2009).

\textsuperscript{257} See Abused and Neglected Children Hearing, supra note 109, at 14.

\textsuperscript{258} Id. at 15.
irreparable harm that may await a child in a CAPTA-like circumstances case, the risk is great. If reunification efforts are made, the child might be returned to a dangerous home, but equally likely is that the child will be kept in foster care for too long, out of fear that the parents have merely complied and not changed.

The very serious harm that can come from returning a child to a home where parents have committed a CAPTA-like act and have not yet remediated their problems is apparent. The harm that comes from placing a child in a foster home is just as serious, however, as it results in an extended delay of permanence for the child. In many of the chronic circumstances, the child may stay in foster care for too long because the parents have failed, yet again, to change. As stated by the California Court of Appeals,

> delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child’s best interests. “Childhood does not wait for the parent to become adequate.”

In the CAPTA-like situation, the child may stay in foster care because the state is waiting to be reassured the parent will not strike again—a

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259 See id. at 11 (recounting the story of a fifteen-month-old boy who was killed by his mother despite several reports of physical abuse).
260 See id. at 10, 13–15.
261 See id. at 11.
262 See Gordon, supra note 9, at 655–56. Professor Catherine Ross recognized this harm when comparing circumstances she perceived to be “aggravated” to circumstances where a child was in foster care for fifteen of the last twenty-two months. See Ross, supra note 221, at 196–97. Her comparison assumes that aggravated circumstances are easy to identify and generally assumes aggravated circumstances will be more immediately life-threatening and thus not involve foster care. See id. at 197. But her comment highlights the different types of harms that can be inflicted on a child:

> Generally, the aggravated circumstances cases are not complex in terms of either law or morality. The facts of those cases are so heinous that line-drawing should not prove difficult. In cases involving “aggravated circumstances” the parent has already put the child’s life at risk. In contrast, the cases in the second group [foster care for fifteen of the last twenty-two months] are not so straightforward. With the passage of time, termination becomes more and more likely, and the needs all children have for stability and permanence are pitted directly against the claims of their parents.

Id.

263 See In re Casey D., 82 Cal. Rptr. 2d 426, 432 (Ct. App. 1999).
264 Id. (quoting In re Baby Boy L., 29 Cal. Rptr. 2d 654, 670 (Ct. App. 1994) (internal cites and editing marks omitted)).
wait that may never end.\textsuperscript{265} ASFA recognizes that the lack of permanency that comes with foster care limbo, no matter what the reason, almost always endangers a child’s health and safety in a serious and irreparable way.\textsuperscript{266}

Ultimately, the CAPTA and TPR exceptions protect the child before the court from two harms—the same two harms Congress consistently recognized when it enacted ASFA: children being returned to dangerous homes and children being left in foster care for too long. If the aggravated circumstances exception is interpreted as consistent with the company it keeps, the exception should apply only (1) when a very serious harm has occurred to either the child before the court or another child of the parent and (2) when those circumstances suggest the risk of either a return to a dangerous home or a too-long foster stay.\textsuperscript{267}

Finally, the presence of the involuntary TPR exception emphasizes that the details of the triggering circumstances must be relevant.\textsuperscript{268} One criticism of ASFA’s TPR exception is that it applies without regard to the circumstances or timing of the termination.\textsuperscript{269} As explained by one child advocate, “[a] parent whose rights to another child were terminated when the parent was a teenager, for example, would be deprived of services even though, when the parent was older and more mature, reunification efforts might be appropriate.”\textsuperscript{270} While the fear behind the criticism is understandable, the exception does not require states to deny reunification efforts; it only allows the state to do so.\textsuperscript{271} If the circumstances of the termination of parental rights and the child before the court indicate no undue risk of harm to the child, reunification efforts should be provided.

\textsuperscript{265} See id.
\textsuperscript{266} See Gordon, supra note 9, at 653–55.
\textsuperscript{267} See generally id. (discussing the rationale of ASFA).
\textsuperscript{269} See Pagano, supra note 127, at 245 (citing Bill Grimm, ASFA Brings Big Changes, Youth L. News 1–2, (1997)) (arguing that an involuntary termination of parental rights when a parent was a teenager could be used to deprive the parent of reasonable efforts in a current abuse or neglect case when efforts might “be appropriate” given the parent’s current age and maturity); see also Naomi R. Cahn, Children’s Interests in a Familial Context: Poverty, Foster Care, and Adoption, 60 Ohio St. L.J. 1189, 1190 n.4 (1999) (noting that the timing and circumstances of a prior termination are irrelevant for determining whether the discretionary bypass provision applies).
\textsuperscript{270} Pagano, supra note 127, at 245 (citing Grimm, supra note 269, at 1–2); see also In re Div. of Family Servs. v. Smith, 896 A.2d 179, 189–90 (Del. Fam. Ct. 2005) (noting a parent may have made “major positive changes” since the prior termination of parental rights).
\textsuperscript{271} See ASFA § 103(a), 42 U.S.C. § 671(a)(15)(D)(iii).
The Iowa Court of Appeals, faced with a prior involuntary termination of parental rights situation, recognized that the circumstances of the termination were important to its prognostic value and thus to the court’s decision concerning reunification efforts. The court affirmed the trial court’s denial of reasonable efforts, but only after noting the relevant circumstances. The time between the prior termination and the birth of the child currently before the court was three weeks, the mother had been provided with a “myriad of services’ prior to the termination of her parental rights . . . but was unable to respond to them,” and additional services to the mother “offered such a short period of time after a previous termination, would not correct the situation.” The court confirmed that both the present circumstances and those of the prior termination predicted an undue risk to the child before the court if reunification efforts were provided.

The Maine Supreme Judicial Court similarly recognized that the details of the aggravated neglect circumstances were important to the prognostic value of those circumstances. “As horrifying as the conditions in that apartment were, they must be seen in the context. If [these] were first time parents with no resources, and no training, the apartment would have been no less appalling but, perhaps, not the basis for a cease reunification order.”

The relevance of circumstances to the prognostic value of a termination of parental rights is also confirmed by ASFA’s treatment of the CAPTA and TPR circumstances in another of its provisions. Section 103(a)(3) of ASFA seeks to speed adoptions and thus permanency for children by requiring that states initiate terminations of parental rights in certain situations. Petitions are generally required, along with concurrent efforts to place the child up for adoption, when the child has been in foster care for fifteen of the most recent twenty-two months, when a court determines that the child is an abandoned infant, or when
the parent has committed any of the CAPTA acts.\textsuperscript{280} Petitions are not required, however, as a result of the parent having an involuntary termination of parental rights with another child or because the parent has subjected the child before the court to aggravated circumstances.\textsuperscript{281}

That ASFA does not require a petition for the child before the court based on the parent already having an involuntary TPR with another child recognizes how important the circumstances of any prior terminations can be. It also recognizes that the typical CAPTA circumstances, which do require a mandatory termination petition, simply provide less room for a discretionary decision to return the child to the home. With a CAPTA act, the feared harm is very serious and frequently instantaneous with its initial infliction, “change” versus compliance is hard to confirm, and the state’s ability to prevent the harm if the child is returned is slight. A termination of parental rights is a likely outcome for the child before the court.\textsuperscript{282} The prognostic value of a prior TPR, however, without considering past and present details, is not as reliable. Further, because the circumstances will matter, a decision to provide reunification efforts for the child before the court is more likely.

The effect of including prior terminations as a basis for an exception thus emphasizes that states may—and when the circumstances indicate that it is sufficiently safe to do so, should—provide reasonable reunification efforts to the family.\textsuperscript{283}

\begin{itemize}
\item \textsuperscript{280} Id. There are three exceptions. Id. A petition is not required to be filed when:
  \begin{itemize}
  \item (i) at the option of the State, the child is being cared for by a relative;
  \item (ii) a State agency has documented in the case plan (which shall be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the child; or
  \item (iii) the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child’s home, if reasonable efforts of the type described in section 671(a)(15)(B)(ii) of this title are required to be made with respect to the child.
  \end{itemize}
\item \textsuperscript{281} Id.; Martin Guggenheim, Somebody’s Children: Sustaining the Family’s Place in Child Welfare Policy, 113 Harv. L. Rev. 1716, 1731 n.76 (2000) (reviewing Elizabeth Bartholet, Nobody’s Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative (1999)).
\item \textsuperscript{282} Even in a CAPTA situation, however, a termination of parental rights petition does not have to be filed if the child protection agency documents a compelling reason demonstrating that it would not be in the best interest of the child. ASFA § 103(a), 42 U.S.C. § 675(E)(ii) (2006).
\item \textsuperscript{283} See In re LN, 689 N.W.2d 893, 898 (S.D. 2004) (concluding that “a court must necessarily consider whether a less restrictive alternative is appropriate in making the bypass decision. After all, [the South Dakota statute] does not preclude reunification efforts when
Congress’s decision to omit aggravated circumstances from those situations for which a termination of parental rights petition must be filed might easily be because Congress left the definition of the phrase to the states.\textsuperscript{284} It might also suggest, however, that Congress thought the aggravated circumstances exception, like the involuntary TPR exception, would encompass a greater number of situations where reunification efforts would not present an unacceptable risk to the subject-child and should thus be provided. Regardless, scrutiny of ASFA’s provisions emphasizes that it is the predicted fate of the child before the court—not the past or current circumstances in isolation—that matter. The exceptions allow, not require, states to deny reasonable efforts.

III. THE LANGUAGE OF THE AGGRAVATED CIRCUMSTANCES EXCEPTION

The aggravated circumstances exception provides that reasonable efforts are not required when “the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse and sexual abuse).”\textsuperscript{285} The exception, like the Child Abuse and Prevention Act Amendments of 1996 (CAPTA) and prior involuntary termination of parental rights (TPR) provisions, relies on past circumstances to predict future circumstances, specifically harm to the child before the court should reunification efforts be made.\textsuperscript{286} The CAPTA and TPR provisions, however, rely explicitly on distinct end-results for their circumstances and, except for the felony assault provision, must directly involve another child of the parent.\textsuperscript{287} By contrast, the aggravated circumstance exception relies on a nebulous and abstract situation: circumstances that are aggravated.\textsuperscript{288} Additionally, while the circumstances must involve the child before the court, the directness of the child’s involvement is also unclear; that is, the child must be “subjected to” the aggravated circumstances.\textsuperscript{289}

\textsuperscript{284} ASFA §§ 101(a), 103(a), 42 U.S.C. §§ 671(a)(15)(D)(i), 675(5)(E).
\textsuperscript{286} See ASFA § 101(a), 42 U.S.C. §§ 671(a)(15)(D)(i)–(iii).
\textsuperscript{287} See id. §§ 671(a)(15)(D)(ii), (iii).
\textsuperscript{288} See id. §§ 671(a)(15)(D)(i).
\textsuperscript{289} See id.
The few state court opinions that include a pointed effort to sort out the language of the aggravated circumstances exception have generally focused on “subjected the child to” and “aggravated circumstances.” The examples listed in the statute, “abandonment, torture, chronic abuse, and sexual abuse,” have received less attention, presumably because they are merely examples and additionally because most court opinions deal with specific state provisions. Still, since they are tangible examples of an otherwise abstract exception to reasonable efforts, a review is helpful.

A. Abandonment, Torture, Chronic Abuse, and Sexual Abuse

The characteristics of the examples provided by Congress confirm that “aggravated circumstances” must begin with, as do the other exceptions, circumstances that are very serious. They also confirm that Congress meant the aggravated circumstances exception to prevent the same types of harms as the other exceptions—very serious harms that (1) are immediate and thus irreparable or (2) come from foster care stays that are too long.

1. Torture

The plain meaning of torture, “[i]nfliction of severe physical pain as a means of punishment or coercion,” suggests a type of child abuse that can inflict immediate harm. It also suggests a very serious, irreparable harm. For example, Louisiana defines torture in its child abuse statutes as “torment, maiming, mutilation, or ritualistic or malicious acts causing extreme and unjustifiable physical or mental pain or suffering, disfigurement, or injury.” Maryland’s definition is “to cause intense pain to body or mind for purposes of punishment or extraction of information or for sadistic purposes.” Sending a child back to a parent who has tortured a child, even after remedial efforts, would likely present “an unacceptably high risk to the health, safety and welfare of the child.” A “split second” single incident could cause

290 Id.
293 See id.
death or other irreparable injury. Further, keeping the child in foster care until the state is adequately assured that the parents have changed, and not merely complied, would likely deprive the child of the permanency that is critical to protecting the child’s health and safety.

2. Sexual Abuse

Sexual abuse is another type of abuse that can inflict an immediate, very serious, and irreparable harm. Kentucky’s abuse and neglect statute defines sexual abuse as including, but not limited to, “any contacts or interactions in which the parent . . . uses or allows, permits, or encourages the use of the child for the purposes of the sexual stimulation of the perpetrator or another person.” In addition, because of the usually secretive and private nature of sexual abuse and the perception that traditional treatment is ineffective in changing the behavior of the abuser, reunification of a child with a parent who has sexually abused a child could also be perceived as presenting a risk of recurrence without a visible warning that would allow a quick removal of the child. Finally, the foster stay likely required for assuring that the parent has changed, and not merely complied with the reunification plan, would also deprive the child of the permanency essential to the child’s health and safety.

3. Chronic Abuse

Chronic abuse, similar to torture, can include abuse that inflicts very serious harm immediately and irreparably. The modifier that distinguishes this example is not “severe,” “egregious” or even “very serious”; instead, it is “chronic.” The plain meaning of chronic is “of

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298 See Gordon, supra note 9, at 653–54 (noting that “once in foster care, a child will remain there for a long time and experience multiple placements, which in turn cause grave harms”).
301 See Champagne, supra note 299, at 307–08; Stuhff, supra note 299, at 302–03.
302 See Gordon, supra note 9, at 653–54.
long duration; continuing." Oklahoma defines the phrase in its child abuse statute to be “a pattern of physical or sexual abuse which is repeated or continuing.” Beyond “repeated” or “continuing,” chronic also suggests intractable or resistant to change. For example, the Rhode Island Supreme Court, in a case involving a termination of parental rights, explained that “[w]ith respect to the finding of unfitness because of chronic substance abuse, this Court has defined the term chronic as ‘[w]ith reference to diseases, of long duration, or characterized by slowly progressive symptoms; deep seated and obstinate, or threatening a long continuance.’” Providing reunification efforts for a child and parent when the parent has chronically abused the child predicts a long foster stay for the child.

4. Abandonment

What Congress intended by abandonment is more difficult to discern from its plain meaning. In family law, its meaning can range from abandoning a newborn infant at a hospital or elsewhere, to failing to pay child support, to failing to visit or otherwise maintain contact.

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304 American Heritage College Dictionary, supra note 292, at 250.
308 “Abandoned infant[s]” are explicitly listed in ASFA as circumstances requiring the state to file a termination of parental rights petition. ASFA § 103(a)(3), 42 U.S.C. § 675(5)(E). Because section 675(5)(E) includes some (but not all) circumstances covered by section 671(a)(15)(D) (exceptions to reasonable efforts), the difference in phrasing is presumably intentional and “abandonment” in section 671(a)(15)(D)(i) is meant to be more inclusive than “abandoned infant[s].” ASFA leaves the definition of “abandoned infant” to the states. Id. § 675(5)(E).
309 See Young v. Foster, 252 S.E.2d 680, 739 (Ga. Ct. App. 1979) (stating that father’s “nonpayments were intentional and constituted a voluntary abandonment”); In re R.K.B., 572 N.W.2d 600, 602 (Iowa 1998) (discussing legislative intent that termination for nonpayment can occur when nonpayment manifests indifference to the child); Klobnock v. Abbott, 303 N.W.2d 149, 152 (Iowa 1981).
310 See In re Roshawn R., 720 A.2d 1112, 1117 (Conn. App. Ct. 1998) (holding that because of father’s failure to utilize department of correction services to contact his children while incarcerated, the lower court properly found he had abandoned the children); Z.H. v. G.H., 5 S.W.3d 567, 570 (Mo. Ct. App. 1999) (state statute provides that abandonment occurs if, without good cause, the parent leaves the child without parental support for a period of six months or longer and makes no efforts to visit, although able to do so); see also State v. Williams, 130 P.3d 801, 806 n.4 (Or. Ct. App. 2006) (stating that incarceration, without more, does not constitute an aggravated circumstance, and noting that, while incarceration of a parent might seem to be included in abandonment “at first glance,” the state had not made that argument).
In some states, a man’s failure to register on a putative father registry is prima facie evidence that he has abandoned his child.\footnote{311} In addition, the distinction between abandonment and child neglect can sometimes blur; failing to provide basic care and support for a child can constitute either abandonment or neglect.\footnote{312} Abandonment in abuse and neglect law, however, normally requires an “intent to relinquish parental claims to the child.”\footnote{313} As stated by the Kentucky Court of Appeals, “generally, abandonment is demonstrated by facts or circumstances that evince a settled purpose to 
forego all parental duties and relinquish all parental claims to the child.”\footnote{314} The court went on to say that “[n]on-support does not itself constitute abandonment, especially where the child is supported by a volunteer, but it may be an element of abandonment.”\footnote{315} More recently, the Alabama Court of Civil Appeals had to apply Alabama’s statutory definition of abandonment in an aggravated circumstances case.\footnote{316} The statutory definition included “the failure to claim the rights of a parent, or failure to perform the duties of a parent.”\footnote{317} In spite of the language of the statute, the court held that “involuntary, unintentional, and/or justifiable parental conduct” would not support a finding of abandonment.\footnote{318}

\footnote{312} See \textit{In re Monique H.}, 681 N.W.2d 423, 428–29 (Neb. App. Ct. 2004) (holding that the findings did not rise to the level of abandonment contemplated by the reasonable efforts exception in the Nebraska statute). The court maintained that the trial court adjudicated Monique not only on the basis that she is an abandoned child, but also on the basis that she lacks proper parental support and parental care. In family law, the terms “abandoned” and “abandonment” can include many forms of child neglect, and the lines of distinction between the two are not always clear, so that failure to support or care for a child may sometimes be characterized as abandoning a child and sometimes characterized as neglect.
\footnote{313} \textit{Gregory et al.}, \textit{supra} note 223, at 186.
\footnote{315} \textit{Id.}
\footnote{317} \textit{Id.} at 1105 (quoting \textit{ Ala. Code} § 26-18-3(1) (1975)).
\footnote{318} \textit{Id.} at 1103–04. The mother in the case did not have contact with the child protective services, nor did she physically visit the child between November 2005 and April 2006; as such, the juvenile court found that she had “abandoned” her child. \textit{Id.} at 1097. The appellate court concluded that there was not clear and convincing evidence that the mother had “intentionally, voluntarily, and unjustifiably failed to claim the rights of a parent; failed to perform the duties of a parent; or withheld her presence, care, love, protection, maintenance, or the opportunity for the display of filial affection.” \textit{Id.} at 1104.
To the extent that abandonment is separate from traditional abuse, neglect, and failure to care situations, it would likely be a parent who has, without good cause or excuse: left a child, or left a child with someone, and failed to return; failed to maintain contact with the child; or otherwise failed to do what is necessary to keep alive his or her parental claims or parent-child relationship. Certainly such conduct can result in very serious harm or detriment to a child if reunification efforts are made. Because the details of the abandonment can vary greatly, however, the presumption of harm probably depends more on the specific circumstances than does the presumption stemming from torture, sexual abuse, or chronic abuse. Nevertheless, reunification efforts with a parent who has abandoned a child can suggest a likelihood that the child might be very seriously and irreparably harmed, either directly by the parent if returned prematurely, or by a lengthy stay in foster care if made to await the parent’s remediation.

5. Chronic Neglect

In addition to considering the examples listed, it is worth noting that Congress did not include chronic neglect. Its absence highlights the intentional and affirmative nature of the examples provided. Nevertheless, while most specific references are to affirmative acts, there are scattered references to neglect, and child advocates who appeared in Congressional hearings have also referred to circumstances that could

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319 As mentioned, ASFA requires that a termination of parental rights petition be filed when the abandoned child is an “abandoned infant.” ASFA of 1997, Pub. L. No. 105-89, § 103(a), 111 Stat. 2115 (codified as amended at 42 U.S.C. § 675(5)(E) (2006)). Abandoned infants are often sorted out for individual treatment in state abuse and neglect statutes. Arkansas defines “abandoned infant” and “abandonment” as follows:

(1) “Abandoned infant” means a juvenile less than nine (9) months of age whose parent, guardian, or custodian left the child alone or in the possession of another person without identifying information or with an expression of intent by words, actions, or omissions not to return for the infant;
(2) “Abandonment” means the failure of the parent to provide reasonable support and to maintain regular contact with the juvenile through statement or contact when the failure is accompanied by an intention on the part of the parent to permit the condition to continue for an indefinite period in the future and failure to support or maintain regular contact with the juvenile without just cause or an articulated intent to forego parental responsibility.

ARK. CODE ANN. § 9-27-303(1), (2) (West 2008). In addition, many states have “safe haven” laws that apply to the abandonment of infants under appropriate conditions. See, e.g., MONT. CODE ANN. § 40-6-417 (2007).

321 See id.
constitute neglect and chronic neglect.\textsuperscript{322} Especially emphasized were substance addictions; for example, Michigan’s Lieutenant Governor Connie Binsfeld argued that no reasonable efforts should be required in chronic circumstances—when “multiple attempts have been made to rehabilitate the family or when substance abuse has been ongoing and has resulted in previous harm to the children and the addiction has proved to be intractable even with appropriate treatment.”\textsuperscript{323} Similar views were expressed by child advocates Peter Digre and Albert J. Solnit.\textsuperscript{324} Digre argued that reasonable efforts should not be made for “parents with long-term and chronic addictions.”\textsuperscript{325} Solnit noted it was “too late for family preservation” when “the child has already been . . . severely neglected to the degree that it is life-threatening or leads to serious physical impairment.”\textsuperscript{326}

In addition, the Supreme Judicial Court of Maine was quick to recognize neglect and nonaffirmative conduct as a basis for bypassing reasonable efforts when construing the state’s aggravated circumstances exceptions.\textsuperscript{327} In \textit{In re Ashley}, the parent argued that Maine’s aggravated circumstance exception required affirmative conduct.\textsuperscript{328} The statutory definition provided, in part, that the state was not required to use reasonable efforts when the parent had “‘subjected the child to aggravated circumstances including, but not limited to . . . [r]ape, gross sexual misconduct, gross sexual assault, sexual abuse, incest, aggravated assault, kidnapping, promotion of prostitution, abandonment, torture, chronic

\textsuperscript{322} See, e.g., 143 Cong. Rec. H2013 (daily ed. Apr. 30, 1997) (statement of Rep. Pryce) (commenting that the legislation protects children who “through no fault of their own are unable to return to their natural parents” either because of abuse or neglect).

\textsuperscript{323} See \textit{Barriers to Adoption Hearing}, supra note 135, at 33 (statement of Lt. Gov. Binsfeld). Lt. Gov. Binsfeld maintained that it “would be very helpful to the States if [Congress would] define ‘reasonable efforts.’” Id. at 37. Binsfeld, as part of her testimony, shared the recommendations made by Michigan’s Special Commission on Adoption to enable a bypass of reasonable efforts. Id. at 33. She also discussed the harm to children left in foster care while the state provided efforts to rehabilitate parents who had committed egregious crimes against the children or their siblings. See \textit{id.} at 30–34.

\textsuperscript{324} See \textit{id.} at 110 (statement of Digre). Digre was then the Director of the L. A. County Department of Children and Family Services. Id. at 110. Solnit was then a Senior Research Scientist for the Yale University Child Study Center and Commissioner for the Connecticut Department of Mental Health. \textit{Hearing Before the Subcomm. on Human Resources of the H. Comm. on Ways & Means}, 104 Cong. 95 (1997) (statement of Albert J. Solnit, M.D.) [hereinafter \textit{Solnit Hearing}].

\textsuperscript{325} See \textit{Barriers to Adoption Hearing}, supra note 135, at 116 (statement of Digre).

\textsuperscript{326} \textit{Solnit Hearing}, supra note 224, at 97.

\textsuperscript{327} See \textit{In re Ashley}, 762 A.2d 941, 947 (Me. 2000).

\textsuperscript{328} See \textit{id.}
abuse or any other treatment that is heinous or abhorrent to society.”\textsuperscript{329} The father argued his actions were only those of gross neglect.\textsuperscript{330} Moreover, he asserted that because the statutory examples encompassed only affirmative and criminal acts, his actions failed to satisfy the statutory phrase the trial court relied on for its findings of aggravated circumstances: “treatment that is heinous or abhorrent to society.”\textsuperscript{331}

The court disagreed, ruling that both action and inaction qualified as aggravating factors under the statute.\textsuperscript{332} The court emphasized both the use of the phrases “subjected to” and “treatment.”\textsuperscript{333} While acknowledging that “[n]eglect . . . will rarely constitute the heinous or abhorrent treatment envisioned by the Legislature,” the court found that there was “no question . . . that the severe neglect to which the father subjected Ashley and her infant brother” qualified.\textsuperscript{334} The court noted Ashley and her two-month-old brother were “ignored for hours, if not for days, in a shockingly unsanitary environment. They sat in their own excrement, unattended, unfed, and unwashed. They received no human contact for hours on end.”\textsuperscript{335} The two-month-old had been put to bed in his car seat, which was placed in his bassinet.\textsuperscript{336} From approximately 11:00 that evening until 1:15 the following afternoon, no one tended to the baby’s needs.\textsuperscript{337} The mother called around 1:15 p.m. to report her baby had died in his sleep.\textsuperscript{338}

State legislative definitions are also largely consistent with the Maine Supreme Judicial Court’s holding in In re Ashley. Some states, such as Oklahoma and South Dakota, explicitly included chronic neglect as a basis for allowing discretionary bypass of reasonable efforts.\textsuperscript{339}

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\textsuperscript{329} Id. at 946 (quoting Me. Rev. Stat. Ann. tit. 22, § 4002(1-B)(A)(1) (Supp. 2007)).
\textsuperscript{330} Id. at 947.
\textsuperscript{331} Id. In effect, the father argued \textit{ejusdem generis}. See id.; Jellum \& Hrick, supra note 79, at 159 (defining the term \textit{ejusdem generis}).
\textsuperscript{332} See In re Ashley, 762 A.2d at 947.
\textsuperscript{333} See id.
\textsuperscript{334} Id. Similarly, the Oregon Court of Appeals also concluded that aggravated circumstances, as defined by its legislature, was not limited to intentional conduct and included neglect. See State v. Risland, 51 P.3d 697, 705 (Or. Ct. App. 2002). In Risland, however, the court noted that the Oregon legislature had listed two examples of aggravated circumstances that could include nonintentional conduct, “neglect’ resulting in a child’s death or serious physical injury.” Id.
\textsuperscript{335} Ashley, 762 A.2d at 947–48.
\textsuperscript{336} Id. at 944.
\textsuperscript{337} Id.
\textsuperscript{338} Id. at 943–44.
\textsuperscript{339} Okla. Stat. tit. 10, § 7003-4.6 (2007) (allowing bypass when “the parent . . . has inflicted chronic abuse, chronic neglect or torture on the child, a sibling of the child or another child within the household”); S.D. Codified Laws § 26-8A-21.1(3) (2008) (allowing
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More often, however, states have qualified their neglect grounds with specific “aggravating” factors.\footnote{See, e.g., Alaska Stat. § 47.10.086 (2008); Ind. Code § 31-34-21-5.6 (2007); Kan. Stat. Ann. § 38-2202(c) (Supp. 2007); Mont. Code. Ann. § 41-3-423(2)(a) (2007).} For example, Indiana requires criminal neglect, which can be found when a parent “has been convicted of . . . neglect of a dependent,”\footnote{Ind. Code Ann. § 31-34-21-5.6.} while Alaska dictates that a child must have “suffered substantial physical harm” as a result of the neglect.\footnote{Alaska Stat. § 47.10.086.} In addition, Kansas requires “life threatening” neglect,\footnote{Kan. Stat. Ann. § 38-2202(c).} while Montana requires “chronic, severe” neglect.\footnote{Mont. Code. Ann. § 41-3-423(2)(a).} Thus, while including some form of neglect as an aggravating circumstance, states have also recognized the need to include only those circumstances that reflect very serious harms, either because of the very serious and immediate harm that may be inflicted or when the chronic nature of the neglect forecasts a long term foster stay for the child before the court.

B. “[S]ubjected the child to aggravated circumstances”

When faced with the explicit task of applying the aggravated circumstances exception, most courts agree that to be “aggravated,” the situation must reflect conduct or harm that is more than serious. The Oregon Court of Appeals examined the aggravated circumstances phrase in 2002 and concluded that it required “circumstances . . . involving relatively more serious types of harm or detriment to a child.”\footnote{Risland, 51 P.3d at 705.} One year later, New Jersey’s intermediate appellate court similarly examined, along with other factors,\footnote{A.R.G., 824 A.2d at 224–34. The court interpreted New Jersey’s ASFA provisions by looking at the language used, the purpose of the legislation, and the statutory context of the phrase. See id.} the ordinary meaning of the phrase.\footnote{See id. at 227–28. The New Jersey statute at issue excepted aggravated circumstances by providing that no reasonable efforts were required when “[t]he parent has subjected the child to aggravated circumstances of abuse, neglect, cruelty or abandonment.” Id. at 219–20 (quoting N.J. Stat. Ann. § 30:4C-11.3 (West 2008)). The court noted that the New Jersey legislature “has chosen to use the term ‘aggravated circumstances’ as a modifier of ‘abuse, neglect, cruelty or abandonment.’ . . . Stated another way, it appears that the degree, or extent, of the ‘abuse, neglect, cruelty or abandonment’ would seemingly determine whether ‘aggravating circumstances’ are present.” Id. at 227 (citation omitted).} The court considered “any circumstances that increase the severity of
the abuse or neglect, or add to its injurious consequences, [to equate] to ‘aggravated circumstances.’”

That “aggravated” means something worse than the typical, but still serious, abuse or neglect case is fairly apparent. The meaning and impact of the phrases “subjected the child to,” as well as “circumstances,” however, are less apparent. These phrases are not used in the CAPTA and TPR exceptions. Their use thus distinguishes the aggravated circumstances exception and consequently their meaning and impact are important to consider.

With the exception of CAPTA’s felony circumstance, both the CAPTA and TPR provisions rely upon the validity of the presumption that a parent who has caused or allowed “another child” to be harmed will also cause harm to the child before the court should reunification efforts be made. These provisions require no specific evidence concerning the child before the court. The presumed risk to the subject-child is derived solely from a specific, concrete, and very serious harm, either a CAPTA act or an involuntary TPR, which the parent inflicted upon another child. In contrast, the aggravated circumstances exception relies upon the validity of a presumption that a parent who has previously created aggravated circumstances concerning “the child” before the court will harm the same child in the future if reunification efforts are provided. The predicted future harm is thus explicitly derivative only in the sense that a prior circumstance concerning the subject-child is used to predict a future harm to the same child.

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348 Id. at 233. The court focused on whether the circumstances would create an unacceptably high risk to the health, safety and welfare of the child; if so, they are “aggravated,” and thus reasonable efforts may be bypassed. See id. The court concluded that “aggravated circumstances’ embodies the concept that the nature of the abuse or neglect must have been so severe or repetitive that to attempt reunification would jeopardize and compromise the safety of the child, and would place the child in a position of an unreasonable risk to be abused.” Id.

349 See id.


351 See A.R. G., 824 A.2d at 224–34.

352 See id. § 671(a) (15) (D) (i).

353 See id.

354 See id. § 671(a)(15) (D) (ii), (iii).

355 See id.

356 See id.

357 See id. § 671(a)(15)(D) (i).
On the other hand, the aggravated circumstances exception is triggered not only when the child before the court has been directly harmed by aggravated circumstances—when the child has been tortured, for example—but also when the child has been “subjected” to the aggravated circumstance. This language raises the question of whether aggravated circumstances can be derived from a situation involving another child of the parent, and if so, how closely linked to the subject-child those circumstances must be.

The New York Court of Appeals directly faced the first part of this question in 2003 in a termination of parental rights case, *In re Marino S.*, and affirmed that the aggravated circumstances need not be directly inflicted upon the subject-child, but can instead be derived from circumstances involving another child.

The New York Family Court in this case found that Shaina, the eldest of the mother’s three children, was raped by the man who had fathered her two younger siblings and who lived with her mother. The court also found that the mother had “severely abused” Shaina, by knowingly allowing her to be raped and by delaying medical treatment, which endangered her life. When affirming the Family Court’s opinion, the New York Court of Appeals relied upon the severe abuse of Shaina to support its finding of aggravated circumstances concerning the younger children.

New York’s statutory scheme included exceptions to reasonable efforts similar to ASFA. It included an aggravated circumstances exception that used ASFA’s language: reasonable efforts could be bypassed

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358 See, e.g., *In re Custody & Guardianship of Marino S., Jr.*, 693 N.Y.S.2d 822, 831 (Fam. Ct. 1999), aff’d, 741 N.Y.S.2d 207, 213 (App. Div. 2002), aff’d, 795 N.E.2d 21, 30 (N.Y. 2003). Domestic violence directed at an adult in the household could also qualify, so long as the violence is shown to be an aggravated circumstance to which the child has been subjected. See id.

359 *In re Marino*, 795 N.E.2d at 28.

360 Id. at 28–29.

361 *In re Marino*, 693 N.Y.S.2d at 825.

362 Id. at 829.

363 *In re Marino*, 795 N.E.2d at 28.

364 N.Y. Fam. Ct. Act § 1039-b(b) (McKinney Supp. 2009). For example, no reasonable efforts are required under New York law when the parent of the child before the court has murdered another child of the parent. Id. Section 1039b-(b) further provides that if any of the exceptions exist, diligent reunification efforts are not required “unless the court determines that providing reasonable efforts would be in the best interests of the child, not contrary to the health and safety of the child, and would likely result in the reunification of the parent and the child in the foreseeable future.” Id.; see also *In re Marino*, 693 N.Y.S.2d at 828 (using the language of § 1039-b(b) to support the derivative findings of abuse).
when the parent had “subjected the child to aggravated circumstances.”\textsuperscript{365} New York defined aggravated circumstances to mean, among other things, “severe or repeated abuse.”\textsuperscript{366}

The parents focused on the severe abuse provisions.\textsuperscript{367} Two of the three definitions of “severe abuse” encompassed the abuse facts in \textit{Marino}, and both referred only to circumstances directly involving “the child”:

\begin{itemize}
  \item[(i)] \textit{the child} has been found to be an abused child as a result of reckless or intentional acts of the parent committed under circumstances evincing a depraved indifference to human life, which result in serious physical injury to \textit{the child} . . . ; or
  \item[(ii)] \textit{the child} has been found to be an abused child as defined [elsewhere] . . . as a result of such parent’s acts; provided, however, the respondent must have committed or knowingly allowed to be committed a felony sex offense as defined [elsewhere].\textsuperscript{368}
\end{itemize}

The parents argued that the severe abuse, and thus the aggravated circumstances, covered only Shaina, not her siblings.\textsuperscript{369} While the third definition of severe abuse explicitly recognized derivative abuse, deeming the child before the court to be severely abused if the parent had committed murder, manslaughter, assault or aggravated assault of another child of the parent\textsuperscript{370} it did not apply to the facts in \textit{Marino}.\textsuperscript{371}

The Court of Appeals declared: “We refuse to read the absence of specific references to siblings in subparagraphs (i) and (ii)” as preventing derivative findings of abuse.\textsuperscript{372} “It would be unthinkable to interpret the Social Services Law so that a derivative finding can be made when a parent assaults a sibling, but not when the parent rapes a sibling or seriously injures her under circumstances evincing a depraved indif-

\textsuperscript{366} In \textit{re Marino}, 693 N.Y.S.2d at 832 (quoting and construing N.Y. FAM. CT. ACT § 1012(j) (McKinney Supp. 2009) (referencing N.Y. SOC. SERV. LAW § 384-b(8) (McKinney Supp. 2009)).
\textsuperscript{367} In \textit{re Marino}, 795 N.E.2d at 28-30.
\textsuperscript{368} N.Y. SOC. SERV. LAW § 384-b(8) (a)(i)–(ii) (emphasis added).
\textsuperscript{369} In \textit{re Marino}, 795 N.E.2d at 28.
\textsuperscript{370} N.Y. SOC. SERV. LAW § 384-b(8) (a)(iii).
\textsuperscript{371} In \textit{re Marino}, 795 N.E.2d at 29. The court reasoned that “[a]nomalous though it may seem, however, this subparagraph was not triggered in the present case because the conduct at issue was violent rape causing life-threatening injuries, and not homicide or assault.” \textit{Id.} (construing N.Y. SOC. SERV. LAW § 384-b(8) (a)(iii)).
\textsuperscript{372} In \textit{re Marino}, 795 N.E.2d at 29.
ference to her life.”373 Thus, while Shaina was the only direct victim of severe abuse, the court affirmed that the siblings were severely abused and thus subjected to aggravated circumstances.374

Much of the reasoning in Marino supports the use of derivative findings for ASFA’s aggravated circumstances exception.375 In Marino, one definition of severe abuse explicitly recognized derivative abuse and the Court of Appeals relied on this to extend the concept of derivative abuse to the remaining definitions.376 In ASFA, both the CAPTA and TPR exceptions explicitly encompass derivative abuse, suggesting derivative abuse should also be recognized for the aggravated circumstances exception.377 Additionally, the language of ASFA’s aggravated circumstances exception is different than its CAPTA and TPR counterparts in a way that is consistent with recognizing derivative abuse or harm.378 The aggravated circumstances exception requires that the child before the court only be “subjected” to those circumstances.379 Unlike the New York statutory provisions, ASFA does not include any specific definitions for aggravated circumstances requiring “the child” before the court to be a direct victim of the abuse or neglect.380 None of the suggested definitions for aggravated circumstances—“abandonment, torture, chronic abuse, and sexual abuse”—must be directed at the subject-child.381 ASFA also allows an exception to required reasonable efforts for the child before the court if a felony assault resulted in serious bodily injury to either the child or another child of the parent.382 Finally, as each of the three Marino courts noted—the Family Court, the Appellate Division, and the Court of Appeals—ASFA is premised upon and relies upon the validity of derivative harms.383

While the use of derivative harms appears permissible, the phrase “subjected the child to” indicates that the circumstances must, in some

373 Id.
374 See id.
375 See id.
376 See id.
377 ASFA of 1997, Pub. L. No. 105-89, § 101(a), 111 Stat. 2115 (codified as amended at 42 U.S.C. § 671(a)(15)(D)(ii)–(iii) (2006)). Except for the felony circumstance, all of the CAPTA and TPR circumstances rely on the direct abuse of one child of the parent to trigger the presumption that the child before the court will also be abused. Id.
378 Id. § 671(a)(15)(D)(i)–(iii).
379 Id. § 671(a)(15)(D)(i).
380 Id.
381 Id.
383 See supra notes 238–245 and accompanying text.
way, be related to the child before the court.\textsuperscript{384} The New York Court of Appeals \textit{Marino} analysis does not address the degree to which the phrase “subjected to” requires the state to demonstrate that the aggravated circumstances evince harm, or risk of harm, to the child before the court.\textsuperscript{385} But the court implicitly acknowledges there must be some connection.\textsuperscript{386} The decision notes that “courts have consistently sustained derivative findings where a [parent’s] abuse of [one] child is so closely connected with the care of another child as to indicate that the second child is equally at risk” and that “children who are not themselves the direct targets of abuse may, \textit{in accordance with the proof}, suffer damage from witnessing the severe abuse of their siblings.”\textsuperscript{387}

Another New York decision, \textit{In re William S.}, suggests that a lack of connection would require the state to provide reasonable efforts to the child before the court.\textsuperscript{388} The family court in \textit{William S.} emphasized that New York’s statute allowing aggravated circumstances (or any other circumstances) to excuse reasonable efforts is subject to a statutory “unless” provision: the court may require reasonable efforts if it “determines that providing reasonable efforts would be in the best interests of the child, not contrary to the health and safety of the child, and would likely result in the reunification of the parent and the child in the foreseeable future.”\textsuperscript{389} This provision places the ultimate burden of proof on the agency seeking to deny reasonable efforts to show “that reasonable efforts are not in the child’s best interest.”\textsuperscript{390} In \textit{Marino}, noted the \textit{William S.} court, the parents were given “full opportunity” to come forward with evidence to support their contention that reasonable efforts should be provided.\textsuperscript{391} Presumably, if the aggravated circumstances

\textsuperscript{384} ASFA § 101(a), 42 U.S.C. § 671(a) (15) (D) (i).
\textsuperscript{385} \textit{In re Marino}, 795 N.E.2d at 28.
\textsuperscript{386} \textit{See id.} at 28–29.
\textsuperscript{387} \textit{Id.} (emphasis added). One of the children found to have been derivatively abused was in the same bed when her father raped Shaina. \textit{Id.} at 29. The \textit{Marino} trial court similarly noted that children who are not direct targets are likely to be harmed by a parent who has already harmed another in his or her care, and that they are also like to suffer from seeing their sibling mistreated. \textit{In re Marino}, 693 N.Y.S.2d at 831. The trial court also observed that derivative findings were “similar to findings of neglect based upon domestic violence between adults within the child’s home when no physical injury to the child has occurred.” \textit{Id}.
\textsuperscript{388} \textit{In re William S.}, 832 N.Y.S.2d 783, 785 (Fam. Ct. 2007).
\textsuperscript{389} \textit{Id.} (quoting N.Y. Fam. Ct. Act § 1039-b(b) (McKinney Supp. 2009)).
\textsuperscript{391} \textit{Id.} at 785–86 (citing \textit{In re Marino}, 795 N.E.2d at 28).
were not sufficiently connected to the child before the court, New York would require reasonable efforts.

The specific language of the CAPTA and TPR exceptions, however, does not require any connection or proof of harm to the subject-child, nor does the language of the aggravated circumstances exception clearly require child-specific harm to the subject-child. Language in an earlier version of the legislation perhaps came close to a child-specific harm requirement, that is, allowing states to forego reasonable efforts when there are “serious circumstances that endanger a child’s health or safety.” But otherwise, legislative history yields very few specifics on this issue. Two state courts, however, in Oregon and New Jersey, have considered the relevance of specific harm to the child before the court.

The argument before the Oregon Court of Appeals in State v. Risland was limited to whether the specific effects of the circumstances on the child before the court may be considered to establish aggravated circumstances. The court’s opinion, however, provides a basis for arguing that the effects on the child must be considered if relevant to an argument against aggravated circumstances.

The Oregon court relied heavily on the legislature’s use of the word “circumstances” to conclude that the results on the child, both direct and indirect, could be considered when determining if aggravated circumstances existed. The court explained additional effects

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392 ASFA of 1997, Pub. L. No. 105-89, § 101(a), 111 Stat. 2115 (codified as amended at 42 U.S.C. § 671(a)(15)(D)(i)–(iii) (2006)). One could argue that without proof that the child in question would suffer harm, providing reunification efforts would presumably be in the best interest of the child and thus consistent with ASFA’s mandate, that “in determining reasonable efforts to be made . . . the child’s health and safety shall be the paramount concern.” See id. § 671(a)(15)(A). Further, New York does require this. See supra text accompanying notes 388–391.

393 143 Cong. Rec. S12,183 (daily ed. Nov. 8, 1997) (amendment by Sen. Craig to H.R. 867, § 101(a), 105th Cong., providing that reasonable efforts shall not be required “if the State, through legislation, has specified cases in which the State is not required to make reasonable efforts because of serious circumstances that endanger a child’s health or safety”).

394 See A.R.G., 824 A.2d at 234–35; Risland, 51 P.3d at 705–06.;

395 See Risland, 51 P.3d at 705.

396 See id. at 705–06.

397 Id. The Oregon statute considered was different from ASFA in a couple of respects. See OR. REV. STAT. § 419B.340(5), (5)(a)(A) (2007). First, the statute allowed a bypass of reasonable efforts when aggravated “circumstances exist.” Id. (emphasis added). While “subjected to” is included in some of the listed examples of aggravated circumstances—for example, “the parent has subjected any child to intentional starvation or torture”—it is not specifically used with the broader term “aggravated circumstances.” § 419B.340(5)(a)(E). Further, the Oregon court explicitly noted the legislature’s use of “any” child in some of the
must be considered when evaluating whether to terminate reunification efforts, as they may establish the lack of aggravated circumstances:

We caution that, in concluding that the circumstances here are “aggravated” . . . , we do not rely solely on the parents’ actions and conditions. As [the] father observes, the nature and scope of the parents’ problems are not unlike many examples of parental circumstances that would support the court’s dependency jurisdiction yet still require [the child protection agency] to make further reasonable efforts to reunify the family.398

Ultimately, the court ruled that the aggravated circumstances exception applied and specifically found relevant the harm suffered by the child before the court and the failure of extensive remediation efforts directed at the parents.399

The more specific issue of whether a court must consider the effects on the subject-child when the state seeks to excuse reasonable efforts based on aggravated circumstances was raised by a dissenting opinion in a New Jersey Appellate Division case, New Jersey Division of Youth and Family Services v. A.R.G.400 A.R.G. involved three children who were the subject of abuse and neglect complaints filed against their father.401 The trial court had excused the child protection agency from reasonable efforts for all of the children, holding that the middle child had been severely abused and that, given the severity of abuse, the other two children were at risk for abuse.402 The New Jersey Appellate Division, in a split decision, affirmed.403 The New Jersey Supreme Court affirmed in part, but only after “elucidating” the Appellate Division’s standard.404

398 Risland, 51 P.3d at 706.
399 Id. at 705–06.
401 Id. at 216, 221.
402 Id. at 221, 223.
403 Id. at 236.
The discussions in the Appellate Division’s majority and dissenting opinions, as well as the subsequent New Jersey Supreme Court opinion, are instructive. Because New Jersey had not provided a legislative definition of aggravated circumstances, Judge Fall’s majority opinion focused on ASFA, its purpose, and its language to determine the meaning of the phrase. Judge Fall’s opinion concluded that ASFA’s aggravated circumstances exception “embodies the concept that the nature of the abuse or neglect must have been so severe or repetitive that to attempt reunification would jeopardize and compromise the safety of the child, and would place the child in a position of an unreasonable risk to be reabused.” Like the Oregon court in Risland, the opinion also read ASFA’s provision to allow circumstances beyond parental conduct to be considered when assessing the situation for aggravated circumstances, for example, “whether the offer or receipt of services would correct the conditions that led to the abuse or neglect within a reasonable time.” The opinion noted that two of the three children in the case before the court had had been beaten by the father, the middle child “repeatedly” and once “savage[ly].” In addition, all three children had witnessed the father’s abuse of their mother. The majority determined that the “totality of the evidence paints a vivid picture of the children and others in [the father’s] household being sub-

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407 Id. at 224–34. In the opinion, Judge Fall provided an extensive review of how other states dealt with ASFA’s aggravate circumstance exception. Id. at 227–32. The review showed a focus on past or present circumstances or harm: for example, Maine’s definition includes “[r]ape, gross sexual misconduct, gross sexual assault, sexual abuse, incest, aggravated assault, kidnapping, promotion of prostitution, abandonment, torture, chronic abuse or any other treatment that is heinous or abhorrent to society.” Id. at 230–31 (quoting Me. Rev. Stat. Ann. tit. 22, § 4002(1-B)(A)(1) (2003) (current version at tit. 22, § 4002(1-B)(A)(1) (Supp. 2007)) (alteration in original; other alterations and emphasis omitted). Missouri’s definition states: “The parent has subjected the child to a severe act or recurrent acts of physical, emotional or sexual abuse toward the child, including an act of incest” A.R.G., 824 A.2d at 231 (quoting Mo. Rev. Stat. § 211.183(7)(1) (2003) (current version at § 211.183(7)(1)(2004)) (brackets in original; other alterations and emphasis omitted)).
408 A.R.G., 824 A.2d at 233.
409 Id. at 234; Risland, 51 P.3d at 706. The opinion can also be interpreted such that conduct alone may constitute “aggravated circumstances,” if the conduct is “particularly heinous or abhorrent to society.” A.R.G., 824 A.2d at 234.
410 A.R.G. 824 A.2d at 234. The court acknowledged that even the middle child had “suffered no broken bones or prolonged medical treatment.” Id. at 234–35.
411 Id.
jected to a violent and intimidating atmosphere,”\textsuperscript{412} and held it was appropriate to refuse reasonable efforts to reunite the children with their father based on aggravated circumstances.\textsuperscript{413}

Judge Eichen explicitly raised in her dissent the issue of “whether conduct alone is sufficient to establish a case . . . or whether the effect of that conduct must be factored into the equation.”\textsuperscript{414} She argued that other mitigating factors should have been considered in \textit{A.R.G.}, noting that the family “had no prior history of intervention” by the state’s child protection system and that there had been no psychological evaluation of the father to determine if services might remediate the problems that led to the abuse.\textsuperscript{415} One of her “serious reservations” was “if the evidence underpinning the trial court’s decision in this case can be viewed as supporting a conclusion of ‘aggravated circumstances of abuse,’ consider how many other cases alleging child abuse . . . could arguably fit within the [same] definition.”\textsuperscript{416}

The case was reviewed on appeal by the New Jersey Supreme Court.\textsuperscript{417} In response, the court created two categories of aggravated circumstances—one where it is permissible to consider parental conduct alone and one where further inquiry is required.\textsuperscript{418} The proper inquiry should be whether the “abuse was of such a nature that standing alone, it compels the conclusion that reunification should not be required,” for example, “where the parental conduct is particularly heinous or abhorrent to society, involving savage, brutal, or repetitive beatings, torture, or sexual abuse.”\textsuperscript{419} If so, the court’s language suggests a strict liability of sorts: “[T]he acts complained of, by their very nature are, so unnatural or depraved that the fundamental bond that is

\textsuperscript{412} Id. at 235.

\textsuperscript{413} Id.

\textsuperscript{414} Id. at 240 (Eichen, J., dissenting) (emphasis added). Judge Eichen’s dissent first criticized the trial court’s actions and the majority’s affirmance on due process grounds. Id. at 237. She also questioned the sufficiency of the evidence used to excuse reasonable reunification efforts: “[T]here was no medical testimony concerning the full extent and nature of the injury to R.L.G. from A.R.G.’s physical abuse. . . . Nor was there a psychological evaluation of R.L.G., or the other children, which might have afforded some insight into the emotional effects of the abuse on the children.” Id. at 239.

\textsuperscript{415} A.R.G. at 240 (Eichen, J., dissenting).

\textsuperscript{416} Id. at 239–40. The majority’s response to Judge Eichen’s dissent was that the father offered no “proofs or evidence” challenging the claim of aggravated circumstances and that “everything that could have been submitted was fully before the court.” Id. at 236.

\textsuperscript{417} A.R.G. 845 A.2d at 110.

\textsuperscript{418} Id. at 119. Both categories first require, however, that the conduct be “severe or repetitive.” Id. at 118. If not, aggravated circumstances cannot exist and reunification efforts are required. Id. at 118–19.

\textsuperscript{419} Id. at 118–19 (quoting \textit{A.R.G.}, 824 A.2d at 213).
the basis of the reunification notion is deemed to be irremediably undermined.” If these circumstances exist, “the conduct may . . . be said to constitute ‘aggravated circumstances,’” and “the abusive parent’s future remedial efforts would be of no consequence.”

This first category of aggravated circumstances seems to reflect those in the CAPTA criminal acts exception: where a parent has inflicted a very serious harm; where the infliction was somewhat immediate; where the state would have little or no warning before a similar harm was inflicted if the subject-child were reunited with the parent; and where the state will likely remain unsure of change by the parent, even with the parent’s compliance.

For the court’s second category, circumstances aside from parental conduct must be considered, specifically the effect on the child and whether reunification efforts can sufficiently address the problem within a reasonable time. Examples that usually belong in this category are “abandonment, corporal punishment that does not result in permanent injury, [and] serious neglect and mental abuse.” These cases “[require] inquiry beyond the mere conduct of the parent,” to determine if the circumstances have “irremediably undermined the parent-child relationship” and thus “support the conclusion that reuniting the family will place the child at risk.” Thus a court “may consider whether to admit expert testimony about the conduct and its relationship to the parent-child bond,” and “whether the parents’ remedial efforts are sufficient to eliminate an unreasonable risk of re-abuse.” “It is the result of all of [these] inquiries that will determine whether reunification efforts are required.”

420 Id. at 119. A student author refers to this, as used in New York cases, as the “fundamental defect” theory. See May, supra note 244, at 614. One New York court described the situation as reflecting “such an impaired level of parental judgment as to create a substantial risk of harm for any child in [the parents’] care.” Id. (quoting In re Dutchess Co. Dep’t of Soc. Servs., 661 N.Y.S.2d 670, 671 (App. Div. 1997)).
422 Id. at 119.
423 See id.
424 Id.
425 Id.
427 Id.
428 Id. The court first discusses this additional evidence in terms of requirements, that is, that there is “another class of cases . . . that requires inquiry beyond the mere conduct of the parent.” See id. (emphasis added). Later the court discusses this evidence as something the court “may” consider, that is, “[i]n [these] cases, the court may consider whether to admit expert testimony about the conduct and its relationship to the parent-child bond along with an assessment of whether the parents’ remedial efforts are sufficient to elimi-
For New Jersey’s child welfare agency to validly deny reasonable reunification efforts in this second class of cases, a court must have evidence that specifically connects the parent’s conduct or circumstances to a harm or risk of harm to the child before the court.\textsuperscript{429} In effect, the court requires a focus on the subject-child’s future health and safety should reasonable efforts be required.\textsuperscript{430} While the court does not otherwise specify the level of harm or the probability of the risk required, presumably each must be that which is evident from the conduct required in the first class of cases.\textsuperscript{431} Thus the harm must be serious enough to approximate a break of the “fundamental bond that is the basis of the reunification notion,” and it must also establish that reunification efforts will create an unacceptable and very serious risk to the child.\textsuperscript{432}

The New Jersey Supreme Court’s treatment of its second category of cases is generally consistent with ASFA’s requirement at the outset of its clarification of reasonable efforts—that “in determining reasonable efforts to be made . . . , the child’s health and safety shall be the paramount concern.”\textsuperscript{433} In the first category, the exception applies without regard to any child-specific circumstances or harm concerning the child before the court.\textsuperscript{434} Because the New Jersey Supreme Court speaks of whether the exception applies, however, a court could still exercise the discretion, in either category, to provide reunification efforts if any evidence is introduced to suggest the presumption stemming from the aggravated circumstances is not valid.\textsuperscript{435} Indeed, ASFA’s mandate that the child’s health and safety is paramount, and its explicit directive that the child’s health and safety must be paramount when decisions about reasonable efforts are made, requires that the court consider not only circum-

\textsuperscript{429} See id.
\textsuperscript{430} See id.
\textsuperscript{431} See A.R.G., 845 A.2d at 119.
\textsuperscript{432} See id. at 118–19. Once the inquiry goes beyond the parental conduct and looks at other factors, the inquiry becomes whether reasonable efforts should be denied, in addition to whether reasonable efforts may be denied. See id.
\textsuperscript{434} See A.R.G., 845 A.2d at 118–19.
\textsuperscript{435} See id. at 119.
cumstances that make the case for an exception, but also circumstances that make a case against a denial of reunification efforts.\textsuperscript{436}

IV. Recommendations

As stated at the outset, I have no tidy solution for the individuals who must ultimately make such difficult decisions about the lives of children. I do, however, offer an analytical approach for determining whether to deny reunification efforts. To approve a denial of reasonable efforts, a court (or other decision-maker) must not only require that the circumstances qualify under one of the ASFA exceptions,\textsuperscript{437} but also be satisfied that if reunification efforts are attempted, the child is likely to be very seriously harmed. To reach this point, the court must first find that a very serious harm has been created or caused by the parent of the child before the court. When determining the seriousness of this harm, any relevant factors should be considered, including derivative circumstances. There must, however, be a nexus between the harm the parent has already created and the harm predicted to the subject-child should reunification efforts be attempted. Finally, the predicted harm must be of sufficient magnitude to justify denying reasonable efforts.

A. Require a Very Serious Harm at the Outset

Both the CAPTA and the TPR exceptions apply to parents who have attempted to inflict, have inflicted, or have allowed to be inflicted very serious or severe harms upon their children.\textsuperscript{438} A court should be required to find a similar harm for the aggravated circumstances exception to apply.

The CAPTA and prior involuntary TPR exceptions have an advantage of encompassing only distinct and concrete situations or harms.\textsuperscript{439} The aggravated circumstances exception, however, must function as the catch-all, as the safety net for children affected by circumstances that make reunification efforts dangerous to their health and safety.\textsuperscript{440} An attempt to list the many aggravated circumstances that could justify the

\textsuperscript{436} \textit{Cf. In re William S.}, 832 N.Y.S.2d at 786 (noting a child’s health and safety shall be the paramount concern when considering a request to deny reasonable efforts).


\textsuperscript{438} See id. § 671(a)(15)(D)(ii), (iii).

\textsuperscript{439} See id.

\textsuperscript{440} See id. § 671(a)(15)(D)(i).
denial of reunification efforts has the advantage of definitiveness, but it risks leaving out unanticipated circumstances or circumstances that are difficult to describe with sufficient specificity.

Even Congress, while providing its examples of aggravated circumstances (abandonment, torture, chronic abuse, or sexual abuse), cautioned that the exception was not to be limited to those situations.\textsuperscript{441} Further, as the case law has made apparent, circumstances that might not qualify as “aggravated” in some situations—new parents who are overwhelmed, for example—should perhaps qualify in other situations.\textsuperscript{442} Thus instead of defining aggravated circumstances with an exhaustive list, a better approach is to define it by focusing on the level of harm required for circumstances to be aggravated.

The courts have provided some good guidance here, having agreed that something more than serious is required.\textsuperscript{443} While adjectives in abuse and neglect law must be read as relative, definitions always help. “Serious” encompasses “[g] rave,” “[n] ot trifling,” “[b] eing of such import as to cause anxiety.”\textsuperscript{444} Severe [abuse] is generally considered beyond serious [abuse], and includes “[u] nsparing or harsh” [language], “causing sharp discomfort or distress; extremely violent or intense.”\textsuperscript{445} Requiring a severe harm would limit the applicability of the exception and thus provide some relative clarity. But such a high threshold would fail to capture what the New Jersey Supreme Court in \textit{New Jersey Division of Youth and Family Services v. A.R.G.} identified as “another class of cases” where the health and safety of a child may require that reasonable efforts be denied.\textsuperscript{446} These situations, “which may or may not have irredeemably undermined the parent-child relationship and may or may not support the conclusion that reuniting the family will place the child at risk,” require a court to probe further to determine if the child will be at undue risk with reunification efforts.\textsuperscript{447}

\textsuperscript{441} See id. This wisdom was seemingly borne out by the severe circumstances of neglect in Maine’s \textit{In re Ashley} case, where the two-month old infant died after being untended for “hours on end.” \textit{In re Ashley}, 762 A.2d 941, 943–944, 948 (Me. 2000).
\textsuperscript{442} Id. at 948.
\textsuperscript{444} \textit{American Heritage College Dictionary}, supra note 292, at 1245.
\textsuperscript{445} Id. at 1248.
\textsuperscript{446} A.R.G., 845 A.2d at 119.
\textsuperscript{447} Id. The New Jersey Supreme Court’s language in \textit{A.R.G.} recognizes that there may be two levels of aggravated circumstances, although the qualitative harm or detriment in its second level is not clear. \textit{See id.} Still, the court recognizes that the “aggravated” characteristic of some circumstances will be apparent, but for others further inquiry will be needed to determine if they meet the level of “aggravated.” \textit{Id.} The first level, the court concludes, is “[where] the acts complained of, by their very nature are, so unnatural or
Ultimately, while the harmful circumstances for aggravated circumstances should be significant and therefore exceed serious, they should not be limited to the severe and “heinous” circumstances identified by A.R.G.\textsuperscript{448} Circumstances less dire, but still very serious, are a better compromise for a threshold harm that can preserve the reasonable efforts requirement, but also provide states with sufficient power to protect the health and safety of their children.

B. Consider all Relevant Circumstances

Congress intended for child protection agencies and courts to consider all relevant circumstances when determining if situations fit the aggravated circumstances exception. This intent is apparent from the language of the exception—aggravated circumstances.\textsuperscript{449} This reading is also consistent with ASFA's central policy aim, protecting the health and safety of the child.\textsuperscript{450} As courts have noted, “circumstances” should include the effect on the child, any neglect circumstances, and any derivative circumstances.\textsuperscript{451}

If the effect on the child, as opposed to the conduct of the parent, is what qualifies a circumstance as aggravated, the court ought to be able to consider the effect circumstances. As the Oregon Court of Appeals in \textit{Risland} emphasized, “circumstances” includes “the total complex of essential attributes and attendant adjuncts,” and not only the “aggravated actions and conditions of a parent.”\textsuperscript{452} The same is true of ASFA's exception.

In addition, the circumstances need not involve an affirmative act. The severe neglect circumstances in \textit{In re Ashley}, the case in which the Maine Supreme Judicial Court affirmed a finding of aggravated circ-

\textsuperscript{448} Id.


\textsuperscript{450} See supra Part II(A).

\textsuperscript{451} See supra Part I(B).

\textsuperscript{452} State v. Risland, 51 P.3d 697, 705 (Or. Ct. App. 2002).
cumstances, demonstrate that non-affirmative conduct can cause very serious harms.\footnote{In re Ashley, 762 A.2d at 947–48; see supra Part III(A)(5).}

Finally, the court should also consider derivative circumstances when determining if aggravated circumstances exist. It is fair to read the plain language of the exception—“subjected the child to aggravated circumstances”—as encompassing derivative harms.\footnote{See ASFA § 101(a), 42 U.S.C. § 671(a)(15)(D)(i).} In addition, the premise of the CAPTA and TPR exceptions in ASFA is derivative harms.\footnote{See id. § 671(a)(15)(D)(ii), (iii).} Conventional abuse and neglect cases have also long relied on derivative harms.\footnote{See, e.g., In re Parental Rights of GP, 679 P.2d 976, 1007–08 (Wyo. 1984).} Recognizing derivative harms is consistent with protecting the health and safety of children. The court should certainly consider the very serious abuse of another child of the parent as possible aggravated circumstances.

Allowing courts to consider any circumstances that contribute to the showing of the harm required for aggravated circumstances, along with setting the threshold of harm at “very serious,” may appear to qualify too many situations as aggravated. But these qualifications only constitute the aggravated circumstances. They do not by themselves, nor should they, justify the denial of reunification efforts. To deny reasonable efforts, the decision-maker must also be satisfied that the harm triggering the exception—the aggravated circumstance—is connected to the harm forecast to the subject-child and that the forecast harm is sufficient to justify the denial. Further, these requirements should apply to all reasonable efforts exceptions, not just aggravated circumstances.

\section*{C. Identify the Nexus Between the Triggering Circumstances and the Anticipated Harm to the Child Before the Court}

For reasonable efforts to be denied, the decision-maker should be required to articulate with some specificity the link between the triggering circumstances (whether CAPTA, TPR, or aggravated) and the threat to the future health and safety of the child before the court should reunification efforts be attempted.

While a threshold showing of a “very serious” harm will allow broad latitude for protecting the health and safety of children from harmful reasonable efforts, the threshold has two related weaknesses. First, while the phrase “very serious” is a bit more concrete than “aggravated circumstances,” a common and firm understanding of what it
constitutes will be difficult to attain. Second, even apart from its vague-
ness, the broad applicability of the phrase risks inviting abuse if not re-
strained. In other words, once the exception is triggered, its applicabil-
ity is restrained only by discretion. The language of the exception offers
no additional guidance on when a state should exercise this discretion
to deny reunification efforts.

State courts have consistently recognized the difference between
the applicability of ASFA’s exceptions and the subsequent exercise of
the discretion to deny efforts. Along these same lines, Iowa legisla-
tively restricts the applicability of its aggravated circumstances excep-
tion by requiring evidence that the abuse or neglect “posed a signifi-
cant risk to the life of the child or constituted imminent danger to the
child.” Each of the ASFA exceptions, however, not just the aggravated
circumstances exception, should be subjected to explicit restrictions
concerning the denial of reunification efforts to parents. Without some
restriction, these life-altering decisions will be too susceptible to incon-
sistencies or worse.

Accordingly, the decision-maker must first be satisfied that the
triggering circumstances for any exception are connected to the child
and the decision before the court; the circumstances should thus fore-
cast a threat to the future health and safety of the child should reunifi-
cation efforts be attempted.

When the circumstances are directed at the child before the court,
this connection is usually self-evident. Derivative circumstances differ,
however, and must be connected explicitly. Some Florida courts have
referred to this when discussing termination of parental rights based
on the abuse of a sibling as finding a “nexus between the abuse and the
prospective abuse.” In typical derivative “risk of abuse or neglect”
cases, two significant factors help establish or refute this nexus. The
first of these is a given—the control and physical proximity that comes

457 E.g., State ex rel. Children, Youth & Families Dep’t v. Amy B., 61 P.3d 845, 849 (N.M.
Ct. App. 2002); see also supra notes 205–209 and accompanying text.
458 Iowa Code § 232.116(1)(i) (incorporated by reference in Iowa Code § 232.57(2)(b)
(Supp. 2008)).
459 In re G.D., 870 So. 2d 235, 238 (Fla. Dist. Ct. App. 2004). Similarly, in a District of
Columbia removal case, the court ruled there can be “no per se rule allowing a child to be
adjudicated neglected (and thus to be removed from a home) simply because a different
child within that home has been abused.” In re Kya. B., 857 A.2d 465, 472 (D.C. 2004).
Instead, the court ruled, there must be “an individualized finding” for each child, justifying
that child’s removal from the home. Id. at 473; see also In re Arthur H., 819 N.E.2d 734,
753 (Ill. 2004) (noting “there here is no per se rule that the neglect of one child conclu-
sively establishes the neglect of another child in the same household”).
from the parent-child relationship. The second significant factor is proximity in time, that is, how recent the circumstance was that triggered the exception. A third important factor will also be relevant to nexus and that is any parental change or failure to change since the triggering event.

Some Florida case law recognizes nexus is usually established “when the parent has a mental or emotional condition that will continue, such as mental illness, drug addiction, or pedophilia, and which will make it highly probable that in the future the parent will abuse or neglect another child.” A number of other factors can be relevant also, including the nature of the harm; the conduct or circumstances that resulted in the harm; the age, sex, health, abilities, and disabilities of the children; and the health, abilities, and disabilities of the parents.

In addition, the essentials of the CAPTA criminal acts circumstances will usually satisfy a nexus requirement. Most of the time, a parent who has murdered, committed voluntary manslaughter, or committed a felony assault resulting in serious bodily injury to one of his or her own children, has demonstrated he or she is a parent with dangerous propensities who presents an undue risk to his or her other children. The nexus of control and physical proximity of the parent to the child is inherent in the anticipated reunion of parent and child if reunification efforts are attempted. Proximity of time, often relevant, is usually not a factor in these cases. A parent guilty of the murder of one of his or her children, for example, suggests a parent whose “judgment and impulse control are so defective” that passage of time is unlikely to ease the state’s legitimate concern that the parent will harm other children in his or her care. Even in some CAPTA-like circumstances, though, there can be exceptions. If the murder was a shaken baby case that occurred twenty years ago, for example, and the child before the court is twelve years old and the current removal was for educational neglect, the nexus is not apparent. In these circumstances, the health and safety needs of the twelve-year-old might require reasonable efforts.

463 See id.
For a prior TPR exception, the nexus between the prior termination and the anticipated harm to the subject-child requires more than the fact of the prior termination of parental rights and the parent’s control of or physical access to the child. In a termination of parental rights case, the Florida Supreme Court identified various factors that might be relevant: whether the conduct that led to the TPR involved “egregious abuse or neglect”; “[t]he amount of time that has passed since the prior involuntary termination”; and “evidence of any change in circumstances since the prior involuntary termination.” The court noted a “very recent involuntary termination will tend to indicate a greater current risk,” and that “positive life changes can overcome a negative history.” Certainly circumstances of the prior TPR, of the child before the court, and of the parent then and now are likely to be relevant when assessing whether the TPR sufficiently predicts harm to the child before the court if reunification efforts are ordered.

Connecting the triggering harm with the predicted harm to the child before the court is one step. The predicted harm must also be sufficiently detrimental to the child before a denial of reasonable efforts is justified.

D. Articulate Anticipated Harm to the Child

To justify the denial of reunification efforts, the state should also be required to establish a probable and substantial likelihood that the child will suffer one of the major harms ASFA sought to prevent—either a return to a dangerous home or a stay in foster care that is too long for the health and safety of the child. These requirements will force states to consider whether the parents are able and likely to remediate the concerns within a reasonable time. If the parents are likely to fix the problem, the child is unlikely to suffer the anticipated harm.

466 See ASFA § 101(a), 42 U.S.C. § 671(a) (15) (D) (iii).
467 Fla. Dep’t of Children & Families v. F.L., 880 So. 2d 602, 610 (Fla. 2004).
468 Id.; see also In re Div. of Family Servs. v. Smith, 896 A.2d 179, 190 (Del. Fam. Ct. 2005) (noting mother had not made any significant changes in her parenting skills since her prior terminations of parental rights); Kathleen Haggard, Note, Treating Prior Terminations of Parental Rights as Grounds for Present Terminations, 73 WASH. L. REV. 1051, 1051 (1998) (arguing that a prior termination of parental rights should provide grounds for terminating the parent’s rights to the child before the court “if the State find the parent’s continuing behavior puts the child at risk for abuse or neglect”).
469 See supra Part II(A).
470 This requirement is in line with ASFA’s provisions concerning mandatory termination of parental rights petitions. As noted, ASFA requires mandatory petitions in several circumstances, for example, when one of the CAPTA criminal acts exceptions exists or when a child
If the identified threat to the child’s health or safety is a CAPTA-like harm, that is, an instantaneous infliction of a very serious harm, reunification efforts are less likely to be successful, in large part because the risk that something very serious and irreparable might happen is just too great. Circumstances may matter, however, including the passage of time since the triggering event. If the parent appears ready to comply with a reunification plan, the court must still consider whether the current concern about the parent will linger, despite compliance with the plan. Further, the court also must consider whether the parent can complete the reunification plan within a reasonable time. Thus the court must be cognizant of not only the harm that may result if the child is returned to the home before it is safe, but also the harm that will accrue from an extended stay in foster care. Either can cause a very serious and irreparable harm to the child and either should suffice for a denial of reunification efforts. Allowing reunification efforts in CAPTA-like circumstances will often, and probably most often, create a substantial likelihood of one or the other of these two harms.

If the identified threat is one that results from ongoing circumstances or actions such as chronic abuse or neglect, the success of reunification efforts may be more plausible and the risk to the child, if he or she is returned to the home, not as stark and irreparable. If the parents relapse, the child can often be removed again before a significant and irreparable harm occurs. (This observation is not meant to dismiss the harm that comes from removing the child again. It simply recognizes the importance of preserving the parent-child relationship for the child’s long-term health and safety.) That the problem is chronic and that the parents may lapse is not sufficient for predicting a substantial likelihood of one of the two harms ASFA was meant to address. However, if there is a substantial likelihood that the chronic nature of the parents’ problems will ultimately prevail, or a substantial likelihood that the parents will not recover within a reasonable time, this predicts a

has been in foster care for fifteen of the most recent twenty-two months. ASFA § 103(a), 42 U.S.C. § 675(5)(E). One exception to this requirement, however, is when an agency has “documented in the case plan . . . a compelling reason for determining that filing such a petition would not be in the best interests of the child.” Id. § 675(5)(E)(ii). New York has a similar provision affecting the aggravated circumstances exception. N.Y. Fam. Ct. Act § 1039-b(b) (McKinney Supp. 2009) When there are aggravated circumstances, reasonable efforts are not required “unless the court determines that providing reasonable efforts would be in the best interests of the child, not contrary to the health and safety of the child, and would likely result in the reunification of the parent and the child in the foreseeable future. The court shall state such findings in its order.” Id. Both ultimately look to the future of the child and the child’s health and safety. See ASFA § 103(a), 42 U.S.C. §§ 675(5) (E)(ii), 1039-b(b).
long and uncertain stay in foster care. The court does not need to determine that the situation is so bad that the family can never be fixed. The court does need to find, however, that it is substantially unlikely that the problem can be fixed within a reasonable time. If so, reunification efforts should not be provided.

The key to both of these situations is “reasonable time.” ASFA has established a maximum default “reasonable time” framework by requiring a permanency plan within twelve months after the child enters foster care and requiring a mandatory termination of parental rights petition if the child has been in foster care for fifteen of the most recent twenty-two months.\textsuperscript{471} The circumstances of individual cases may, however, require longer or shorter times. States may also wish to establish specific or presumptive reasonable times based on the child’s age, similar to what some states have done when defining the duty to provide reasonable reunification efforts.\textsuperscript{472} If the court finds it substantially likely that the concerns will not be successfully remediated within the reasonable time and that the concerns present a very serious health or safety threat to the subject-child, however, denying reasonable efforts is appropriate.

A final caution is important. Courts often assess the likelihood of parents’ successfully remediating a future threat to the subject-child’s health and safety by relying, in whole or part, on the failure of the parents’ prior efforts to remediate their problems. While these are circumstances appropriate to consider, the court must also consider if the state provided the parents with reasonable reunification efforts. To use the parent’s failure to respond to prior efforts as a basis for concluding that successful remediation is unlikely in the future requires that the state demonstrate the reasonableness of the state’s prior assistance.\textsuperscript{473}

\textbf{Conclusion}

The purpose of ASFA’s aggravated circumstances exception is to protect children from the harms of a lengthy, uncertain status in the dependency system. It is also intended to safeguard these children from being returned to unsafe homes. The vague statutory language of the aggravated circumstances exception necessitates a thorough method of

\textsuperscript{471} See ASFA § 103(a), 42 U.S.C. § 675(5)(C), (E).

\textsuperscript{472} For example, California provides that reunification efforts for a child age three or older “shall not exceed a period of 12 months from the date the child entered foster care.” CAL. WELF. & INST. CODE § 361.5(a)(1) (2008). For a child under three, services “shall not exceed a period of six months from the date the child entered foster care.” \textit{Id.} § 361.5(a)(2).

\textsuperscript{473} For a discussion supporting this concern, see Bean, \textit{supra} note 31, at 342–67. 
analysis for courts to apply in determining whether to deny reasonable efforts to reunite abused or neglected children with their parents. The analysis delineated in this Article presents an approach that will encourage consistency within the judicial process in accordance with the purpose of the exception.
IN THE NAME OF EFFICIENCY: HOW THE MASSACHUSETTS DISTRICT COURTS ARE LOBBYING AWAY THE CONSTITUTIONAL RIGHTS OF INDIGENT DEFENDANTS

RAISA LITMANOVICH*

Abstract: This Note explores the current practice of lobby conferences in Massachusetts district courts. At these proceedings, attorneys meet with the judge in chambers, without the defendant and off the record. The attorneys and the judge make one last attempt to settle the case before proceeding to trial. Court officials rely on the lack of record in lobby conferences to foster the type of candid discussion between the attorneys and the judge they believe to be necessary for efficient disposition of cases. As this Note examines the reasons why lobby conferences have a unique role in district courts, it also highlights how the lack of record makes it nearly impossible for indigent criminal defendants to hold their attorneys accountable for anything that happens at these proceedings. This Note argues that mandating recording of lobby conferences will be circumvented by the courts. Instead, appellate courts must recognize the inherent conflict of interest and change how they treat ineffective assistance of counsel claims that arise in the context of lobby conferences.

Introduction

Because criminal law governs the most serious sanctions that a society can impose on its members, inequity in its administration has especially corrosive consequences. Perceptions of race and class disparities in the criminal justice system are at the core of the race and class division in our society. . . . [and have been exploited] to make the hard choices of the criminal justice system easier.1

As incarceration rates rapidly stretch the criminal justice system to capacity, the state of indigent defense in Massachusetts has reached a

crisis point.\(^2\) The state-funded Committee for Public Counsel Services (CPCS) coordinates representation of indigent defendants in Massachusetts.\(^3\) However, CPCS’s staff of 110 full-time attorneys has been far from sufficient to meet the needs of indigent defendants across the state.\(^4\) Court appointed private counsel make up more than ninety percent of criminal and civil representation in Massachusetts.\(^5\) Nevertheless, Massachusetts has been consistently reluctant to fund indigent defense to its full capacity.\(^6\)

In the summer of 2004, indigent defense gained state-wide attention when lawyers refused to take additional cases in a protest over inadequate pay, and the Massachusetts Supreme Judicial Court ordered the release of prisoners who were held without counsel.\(^7\) The crisis of


For the first time in history more than one in every 100 adults in America are in jail or prison. . . .

. . . .

A close examination of the most recent U.S. Department of Justice data (2006) found that while one in 30 men between the ages of 20 and 34 is behind bars, the figure is one in nine for black males in that age group.

Press Release, Pew Ctr. on the States, Pew Report Finds More than One in 100 Adults Are Behind Bars (Feb. 28, 2008), available at http://www.pewcenteronthestates.org/news_room_detail.aspx?id=35912. Massachusetts’s prison population has grown by three percent in the last two years, making it the highest in the Northeast. See Pew Ctr. on the States, supra, app. 29. For every dollar that Massachusetts spent on higher education, it spent ninety eight cents on corrections. See id. app. 31. This represents a huge burden not only on the courts’ resources but also on the state. See id.


\(^4\) See id.

\(^5\) See id.

\(^6\) See id.

\(^7\) See Lavallee v. Justices in Hampden Super. Ct., 812 N.E.2d 895, 912 (Mass. 2004); Scally, supra note 2, at 24. On May 3 and 4, 2004, no private attorneys showed up in Hampden County District Court to take on new cases, and at least nineteen indigent defendants were arraigned without counsel. See Lavallee, 812 N.E.2d. at 901. On July 8, 2004, the situation did not get any better, when “fifty-eight indigent defendants with cases pending in Hampden County were without counsel to represent them; thirty-one were held in custody.” See id. at 912 n.10. On appeal, the Supreme Judicial Court (SJC) held that the defendants were being deprived their right to counsel under Article 12 of the Massachusetts Declaration of Rights. See id. at 901. The SJC ordered the release of prisoners in Hampden County who were being held for more than seven days without counsel and a dismissal of all the charges if an attorney was not appointed within 45 days. See id. at 912. Hampden, however, was not the only county encountering problems recruiting attorneys to represent
representation of indigent defendants was due, in part, to Massachusetts’s failure to increase the pay scale for appointed counsel since 1986. In addition, some defense counsel faced a long lag time before payment. For example, some waited eight months for services rendered in the previous fiscal year. As the shortage of qualified attorneys to represent indigent defendants continues, the number of court filings has increased annually. In the 2008 fiscal year, 828,637 cases were filed in Massachusetts District Court alone—an increase of 5.7% from the year before. Each year CPCS assigns about 200,000 new criminal and civil cases for representation.

The large caseload and shortage of counsel creates an incentive for the system to resolve cases as quickly as possible. As a result, plea bargaining has become “a way of life.” In Massachusetts’s three largest counties, about eighty percent of criminal cases are settled without a trial. Even though plea bargaining plays a dominant role in the disposition of criminal cases, it is “an area [of the law] with minimal court

indigent defendants; both Superior and District Courts in Suffolk and Middlesex counties were having similar problems. See Kathleen Burge, Public Defenders Protest Pay Lack: Vote to Refuse New Court Cases, BOSTON GLOBE, Aug. 16, 2003, at B4; Scally, supra note 2, at 24.

8 See SPANGENBERG GROUP, supra note 3, at 1. Even though the state legislature approved a $7.50 pay increase just days after the Hampden incident, the pay for appointed counsel in Massachusetts still remains one of the lowest in the country. See id. at 5.


10 See id.

11 Mass. Dist. Court Dep’t, Summary of Filings—Fiscal Years 1997 through 2008, available at http://www.mass.gov/courts/courtsandjudges/courts/districtcourt/allstats2008.pdf (compiling the number of Massachusetts District Court filings from fiscal year 1996 through 2006). The number of filings does not necessarily correlate to the number of indigent defendants passing through the system. See id. However, it does indicate the increasing stress on the court’s resources. See id.

12 See id.

13 See SPANGENBERG GROUP, supra note 3, at 1.


15 See Gary V. Murray, Plea Deals Keep Courts Functioning, WORCESTER TELEGRAM & GAZETTE, Feb. 25, 2001, at A1, available at 2001 WLNR 11481277. Plea bargaining is a process by which “[t]he defendant voluntarily admits responsibility for the crime by entering a guilty plea, and, in turn, the prosecution agrees to [recommend to the judge] to reduce the number or severity of criminal charges pursued against the defendant or, alternatively, recommends that the judge impose a less-than-maximum sentence.” Christopher E. Smith, Plea Bargaining, in THE U.S. LEGAL SYSTEM 514, 515 (Timothy L. Hall ed., 2004). By entering a guilty plea, the defendant admits responsibility for the crime and knowingly and voluntarily waives his Sixth Amendment right to a jury trial. See id.

16 See Murray, supra note 15.
supervision or legal protection.”

This is especially true at the district court level, where “the volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result.”

This Note focuses specifically on the current practice in Massachusetts of plea bargaining in lobby conferences. These plea discussions usually take place with a judge behind closed doors, outside of a defendant’s presence, and off the record. Court officials believe the informal atmosphere facilitates settlement. It is the criminal defendant, however, who pays the price for this efficiency. Specifically, the lack of

18 Argersinger v. Hamlin, 407 U.S. 25, 34 (1972). For example,

[the great majority of plea hearings in the Massachusetts district courts consist simply of a hurried recitation of a police report. On occasion, a defendant, usually represented by counsel, will agree with the prosecutor to waive the reading of the report and admit to the face of the Complaint, but a judge is not bound by this agreement and can insist on hearing evidence.

19 Even though this Note specifically focuses on plea bargaining in lobby conferences, a number of other articles have been written over the years critiquing the practice of plea bargaining as a way to relieve court congestion. See, e.g., Albert W. Alschuler, The Defense Attorney’s Role in Plea Bargaining, 84 Yale L.J. 1179, 1179 (1975) [hereinafter Alschuler, Defense Attorney’s Role]. In particular, Professor Alschuler points out that plea bargaining makes the outcome of the case depend not on whether the defendant is actually responsible for the crime, but on “tactical decision[s] irrelevant to any proper objective of criminal proceeding.” See Albert W. Alschuler, Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System, 50 U. Chi. L. Rev. 931, 932 (1983) [hereinafter Alschuler, Alternatives to Plea Bargaining]. Alschuler also discusses the effect plea bargaining has on the attorneys involved. See id. at 933. He argues that:

Plea bargaining leads lawyers to view themselves as judges and administrators rather than advocates; it subjects them to serious financial and other temptations to disregard their clients’ interests; and it diminishes the confidence in attorney-client relationships that can give dignity and purpose to the legal profession and that is essential to the defendant’s sense of fair treatment.

See id.
21 See, e.g., Murphy, supra note 14, at 54.
22 See Commonwealth v. Fossa, 666 N.E.2d 158, 161 (Mass. App. Ct. 1996). Justice Laurence of the Massachusetts Appeals Court has acknowledged that lobby conferences come at a price: “We take judicial notice of the judges’ legitimate concern over the court calendar and the need to move cases along. However, ‘concern for the avoidance of a congested [court] calendar must not come at the expense of justice.’” Id. (alteration in original) (quoting Monahan v. Washburn, 507 N.E.2d 1045, 1047 (Mass. 1987)).
a record makes it nearly impossible for indigent defendants to successfully litigate a claim for ineffective assistance of counsel, a procedural safeguard guaranteed to them under the Sixth Amendment.\textsuperscript{23}

Indigent defendants make up the majority of the cases that plead out.\textsuperscript{24} The defendants’ lack of economic resources renders them dependent on appointed counsel for representation and more vulnerable to incompetence.\textsuperscript{25} At the same time, the large caseloads, low pay, and lack of record create financial incentives for attorneys to resolve cases as quickly as possible and gives little incentive for other system participants to hold them accountable.\textsuperscript{26} This lack of accountability, combined with a justice system that relies on self-interested parties “lobbying” cases in secrecy, eviscerates indigent defendants’ right to counsel under the Sixth Amendment.\textsuperscript{27} In effect, the current practice of plea bargaining in lobby conferences sacrifices the interest of indigent defendants in the name of efficiency.\textsuperscript{28}

This Note does not advocate doing away with lobby conferences. It acknowledges the entrenched practice of lobby conferences in district courts and instead argues that the current test for ineffective assistance of counsel should reflect the increased burden the current practice places on indigent defendants. Part I of this Note will explore the roots of lobby conferences in the United States and, more specifically, in

\begin{footnotes}

See id. at 1034 ("Poor people account for more than 80% of individuals prosecuted. These criminal defendants plead guilty approximately 90% of the time.").

See Cole, supra note 1, at 76; Alschuler, Defense Attorney’s Role, supra note 19, at 1203–04. Justice Marshall, in his dissenting opinion in Strickland, noted that:

\textit{It is an unfortunate but undeniable fact that a person of means, by selecting a lawyer and paying him enough to ensure he prepares thoroughly, usually can obtain better representation than that available to an indigent defendant, who must rely on appointed counsel, who, in turn, has limited time and resources to devote to a given case.}


See infra notes 59–63, 82–87 and accompanying text (discussing how the current system of plea bargaining creates financial incentives for attorneys and administrative incentives for judges to plea cases as quickly as possible).

See Gaumond, 2002 WL 732152, at *4 n.2; Backus & Marcus, supra note 23, at 1088–89. The term “lobbying cases” comes from the Gaumond decision and refers to plea bargaining in lobby conferences. See id.

See Jeffrey Levinson, Note, Don’t Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel, 38 Am. Crim. L. Rev. 147, 163 (2001); Murphy, supra note 14, at 54. Levinson argues that although the Strickland test “may cheat defendants out of procedural fairness, it can be viewed as a necessary evil in the name of judicial economy.” Levinson, supra, at 163.}
\end{footnotes}
Massachusetts. Part II will discuss the current use of lobby conferences to facilitate plea bargaining to the exclusion of the criminal defendant. Part III will trace the rise of the Sixth Amendment “right to counsel revolution” and its recent application to plea bargaining. Part IV will analyze how the current use of lobby conferences in Massachusetts violates the Sixth Amendment right to counsel by undermining a criminal defendant’s ability to hold appointed counsel accountable. Finally, Part V will propose a revised approach to ineffective assistance of counsel claims. The proposal seeks to address the increased burden placed on indigent defendants by the practice of plea bargaining in unrecorded lobby conferences.

I. LOBBYING CASES

The practice of holding unrecorded lobby conferences to relieve congestion in the courts is long-standing. Lobby conferences date back to the fixed session terms of nineteenth century English courts. As court case loads increased, English judges began hearing “subsidiary or collateral” issues of procedure in their chambers when court was not in session to expedite the resolution of cases. As a result, the terms “chamber conference” and “lobby conference” signified any place where the judge heard motions and issued orders when court was not in session. Historically, courts held these lobby conferences off the record. By facilitating candid exchanges between attorneys and judges, court officials viewed the informal nature of off the record lobby conferences as necessary to facilitate plea bargains to help settle cases more quickly and efficiently. Today the practice is institutionalized in the Massachusetts criminal justice system.

Even though the debate over recording lobby conferences began over thirty years ago, district courts in Massachusetts currently do not have a court rule mandating that lobby conferences be recorded. As

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29 See Von Schmidt v. Widber, 34 P. 109, 110 (Cal. 1893). The English courts had a fixed term of ninety-one days when the court could be in session. See id.
30 Id.
31 See id.
32 See id.
33 See Murphy, supra note 14, at 54.
34 See id.
early as 1974, Chief Justice Flaschner advised judges against holding lobby conferences off the record. More recent cases have also reiterated the stance of the Massachusetts appellate courts, recommending that lobby conferences be put on the record. Nevertheless, in Massachusetts district courts, the issue of whether lobby conferences should be held on the record is left solely to the discretion of the individual judges. Furthermore, individual attorneys are responsible for supplementing the record after an unrecorded lobby conference. Thus, even if an issue is raised during a lobby conference, a defendant is prevented from raising the issue on appeal unless the defense attorney raised it on the record.

In recent years, however, Massachusetts Superior Court judges began holding lobby conferences on the record or in open court. This shift was partly due to a highly publicized lawsuit involving a Massachusetts 211(A)(1) statute that “all courtroom proceedings . . . shall be recorded electronically.” Mass. Dist. Ct. Spec. R. 211(A)(1). Rule 9 of the District Court Supplemental Rules of Criminal Procedure extends Rule 211 to criminal cases in the District Court. Mass. Dist. Supp. R. Crim. P. 9. Given that recording in Massachusetts district courts is only mandated in the courtroom, there is no rule that explicitly guides the recording of out of court criminal proceedings, such as lobby conferences.

See Berg, supra note 35, at 60. Judge Flaschner was also critical of bench conferences that were held off the record, calling them the “older rough justice model of a District Court” that “deteriorated from legal impropriety to making a mockery out of the judicial process.” Id. at 54–55.

See Murphy v. Boston Herald, Inc., 865 N.E.2d 746, 758 n.15 (Mass. 2007) (“If there was ever a case that demonstrates the need for lobby conferences, where cases or other court matters are discussed, to be recorded, this is the case. This litigation, with all its unfortunate consequences for those involved, might not have occurred if the critical lobby conference . . . had been transcribed.”); Commonwealth v. Fanelli, 590 N.E.2d 186, 189 (Mass. 1992) (“If a lobby conference is held, the better practice is to record it, and provide a copy of the recording to the defendant on request, so that the defendant may know what was said.”); Commonwealth v. Rosenfield, 478 N.E.2d 165, 167 n.1 (Mass. App. Ct. 1985) (“We fail to see what purpose an unrecorded bench conference could have served in a criminal case without a jury.”).

See Murphy, 865 N.E.2d at 758 n.15 (leaving whether to record lobby conferences to the discretion of individual judges).


See, e.g., Zedros v. Kenneth Hudson, Inc., 418 N.E.2d 1279, 1280–81 (Mass. App. Ct. 1981) (refusing to consider error in an unrecorded closing argument because counsel did not request that a record be made). This may raise other plausible arguments against holding lobby conferences off the record, including the right to fair trial and meaningful appellate review. However, this Note will only address the Sixth Amendment right to counsel during the plea bargaining process.

sets Superior Court Judge and statements he allegedly made during an off the record lobby conference. Many judges feared that the lack of record left them vulnerable if an attorney misconstrued their words and alleged misconduct, such as coercion to take a plea.

Nevertheless, unrecorded lobby conferences maintain a stronghold in Massachusetts district courts as an essential tool to facilitate expeditious settlement. District courts occupy a unique position in the Commonwealth as the “major point of access,” handling “the lion’s share of legal business.” Even though Massachusetts district courts have long been courts of record, it was not until the 1970s that the court began to preserve testimony on the record. The congestion and informality that define district courts are commonly stated reasons for

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42 See Murphy, 865 N.E.2d at 749–51. Massachusetts Superior Court Judge Murphy sued the Boston Herald for defamation after an exchange that occurred during an off the record lobby conference. Id. The Boston Herald published a series of articles claiming that Judge Murphy was lenient on crime, “letting four accused rapists return to the streets in the past week, [having] a pro-defendant stance and [having] heartlessly demeaned victims.” Id. 749–50. The reporter then quoted statements allegedly made by Judge Murphy during an unrecorded lobby conference when prosecutors confronted the judge about lenient sentencing. See id. at 750. The lack of record allowed the reporter to take the Judge’s words out of context and, as the jury found, materially change the meaning conveyed by the statements. See id. at 754–58.

43 See id. at 749–50.

44 Murphy, supra note 14, at 54. Gaumond is an example of one judge’s comparison of lobby conferences to a process akin to an assembly line:

A lobby conference is often requested in many criminal cases . . . where the parties disagree as to what sentence should be imposed in the event the defendant pleads guilty. The purpose of such a lobby conference then is to determine what sentence the judge will give upon a plea. . . . Resorting to the oft used analogy of making sausage, the process of plea negotiation in a lobby conference may be messy and even unappealing, but the defendant is eager to engage in the process because he seeks to know the flavor of the end result. In short, the defendant is seeking as much information as possible fore [sic] making an important decision.

Gaumond, 2002 WL 732152, at *2.

45 Susan S. Silbey, Making Sense of the Lower Courts, 6 Just. Sys. J. 13, 13 (1981). The 1920s brought reform to Massachusetts district courts, which relieved some of the congestion experienced by the Superior Court. See Berg, supra note 35, at 26–28. The reform included increasing the jurisdictional limit for civil cases and granting sole jurisdiction over all motor vehicle tort cases to the district courts. See id.

46 See Commonwealth v. Leach, 141 N.E. 301, 304 (Mass. 1923) (“The district courts of this commonwealth are courts of record and of superior and general jurisdiction with reference to all matters within their jurisdiction. In this particular, judges of district courts stand on the same footing as judges of the superior court.”); Berg, supra note 35, at 58–59. Up until the 1970s, the Superior Court reviewed criminal and juvenile appeals on a de novo basis. See Berg, supra note 35, at 64. The courts rationalized that there was no need to preserve testimony because it was not being used in re-trials. See id.
maintaining lobby conferences off the record. The most relied upon policy arguments in favor of the current practice are from the perspective of court administration.\textsuperscript{48} The voices of criminal defendants, on the other hand, have been missing from this debate.\textsuperscript{49}

\section*{II. Back-Room Dealing and the Indigent Defendant}

To echo language used in \textit{Commonwealth v. Gaumond}, a plea agreement negotiated in a lobby conference between the judge and the lawyers may be regarded by the public, the defendant, and the victim as a “back room deal.”\textsuperscript{50} The potential for abuse stems from the self-interest of the parties involved and the lack of accountability in these secret proceedings.\textsuperscript{51}

The criminal justice system presumes that the defendant’s rights are represented merely because he has counsel.\textsuperscript{52} Even when a criminal defendant is acting \textit{pro se}, the Massachusetts courts have found no prejudice when the defendant was excluded from the proceeding because he was deemed to be represented by standby counsel.\textsuperscript{53} The

\begin{itemize}
  \item \textsuperscript{47} See Murphy, \textit{supra} note 14, at 54.
  \item \textsuperscript{48} See id.
  \item \textsuperscript{49} See, e.g., Agnes, \textit{supra} note 41, at 308 (discussing the policy behind lobby conferences solely from judge’s perspective).
  \item \textsuperscript{50} See 2002 WL 732152, at *4 n.2. Even though \textit{Gaumond} involved a sidebar discussion between the judge and the parties on the record, the judge goes on to state that lobby conferences are in essence “back room deals” that do not involve the defendant, the victim, or the public. No matter how fair a judge is in the lobby conference . . . it is usually only the judge and the lawyers participating. Any plea agreement negotiated in such a private setting is likely to be misunderstood by the public, the defendant, or the victim.
  \item \textsuperscript{51} See \textit{id}.
  \item \textsuperscript{52} Anne Bowen Poulin, \textit{Strengthening the Criminal Defendant’s Right to Counsel}, 28 CARDOZO L. REV. 1213, 1228 (2006) (“Courts often conclude that defendant’s absence does not violate the defendant’s right because they assume that counsel will protect the defendant’s interests in the hearing. But the defendant depends on counsel to raise the issue of the defendant’s absence as well as all other issues important to the defense.”).
  \item \textsuperscript{53} See United States v. Bullard, 37 F.3d 765, 767 (1st Cir. 1994). Defendant, acting \textit{pro se}, was allegedly excluded from a lobby conference regarding the disqualification of a juror. \textit{See id}. The defendant was also excluded from the subsequent questioning of the juror. \textit{See id}. Instead the judge permitted standby counsel to represent defendant’s interests at these proceedings. \textit{See id}. The reviewing court found no prejudice because standby counsel was present. \textit{See id}. The court also refused to find error because the record was incomplete and did not clearly indicate that the defendant was absent. \textit{See id}. Thus, in denying the defendant’s appeal, the reviewing court presumed that the defendant’s interests were being represented by the presence of counsel. \textit{See id}.
\end{itemize}
court’s presumption in favor of defense counsel does not account for any of the incentives the attorney may have to act in self-interest. As a result, the current practice of relying on the defense attorney to supplement the record after the fact is entirely inadequate to safeguard the rights of the criminal defendant.

A. The Judge

Judges are under administrative pressures “to move cases along and discourage trials.” The Administrative Office of the Trial Courts (AOTC) imposes time standards on every case. The performance of each judge is measured against these standards. Therefore, a district court judge must try to move his or her docket along expeditiously. There is tremendous incentive for the judge to appoint counsel that will help to dispose of cases quickly. The practice of unrecorded lobby conferences allows the judge to negotiate the disposition of cases with only the attorneys present. In Massachusetts, the current practice was best articulated in a recent letter to the editor from current Superior Court Judge Murphy:

[T]here are hundreds of real lobby conferences conducted by judges of all departments of the Trial Court every single day. . . .

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54 See id.
55 See id.
57 See Berg, supra note 35, at 115. In 1980, the District Court Committee on Caseflow Management issued Standards of Judicial Practice, Caseflow Management, which assigned trial dates for disposition of cases, caseload limits, and limited the number of continuances for each case. Id. The AOTC is responsible for administration of all the Trial Courts in Massachusetts. The Administrative Office of the Trial Court, http://www.mass.gov/courts/admin/aotc.html (last visited Apr. 9, 2009).
59 See id.
60 See Cole, supra note 1, at 89. Cole argues that an experienced attorney can make a judge’s life difficult by “expend[ing] considerable time and resources” filing motions, developing evidence, and challenging errors. See id. This provides incentive to the judge to appoint a less qualified attorney to an indigent defendant in the interest of expediting the case. See id.
61 Murphy, supra note 14, at 54.
[T]he lobby gives the interested parties the ability to cut to the chase and discuss the real strengths and weaknesses of the case, as well as the considerations involved in an appropriate sentencing.

... 

[T]here are many times when a judge, in the course of a relaxed brainstorming session with counsel, will conjure up a settlement modality that has not even been considered by the parties, and which will settle a three-week case in one morning.

There are times when, although a global settlement may not be possible, the court may persuade counsel to waive some legal theory in the interests of efficiency.62

Even though Judge Murphy was recently involved in a lawsuit that arose during an unrecorded lobby conference, he maintains a steadfast commitment to the practice.63 But it is clear from Judge Murphy’s own words that, to the exclusion of the defendant, the judge and the attorney strike deals “in the interests of efficiency.”64

B. The Attorney

In addition to building a rapport with the judge, defense attorneys—appointed counsel in particular—may have financial incentive to cut a deal.65 Professor Alschuler outlines two ways for private defense counsel to reach financial success.66 In the first option, the attorney’s reputation as a great trial lawyer brings in wealthy clients to whom he is able to devote a lot of his time.67 However, building up one’s practice can take a matter of years and can be difficult.68 The second option, which seems more realistic for a greater number of attorneys, is to take on more cases for less pay.69 The concern with this second approach is that it creates financial incentive for an attorney to plea bargain for a

62 Id.
63 See Murphy v. Boston Herald, Inc., 865 N.E.2d 746, 749–51 (Mass. 2007); Murphy, supra note 14, at 54.
64 See Murphy, supra note 14, at 54.
65 See Alschuler, Defense Attorney’s Role, supra note 19, at 1182.
66 See id.
67 See id.
68 See id.
69 See id.
"quick buck." Professor Alschuler points out that the second option has become so common that it has earned some lawyers a negative label by members of their own criminal bar as "wholesalers" or "cop out lawyers." Furthermore, if an attorney is able to collect a fixed fee in advance from a client, he has even more incentive to dispose of the case as quickly as possible.

In Massachusetts, the low pay for appointed counsel can create similar financial incentives for attorneys to plea bargain. Massachusetts representation of indigent defendants depends on a hybrid system of 110 full-time CPCS attorneys and 2400 private court appointed attorneys. Even though the full-time CPCS attorneys are salaried, the majority of the cases are handled by private counsel on an hourly basis. The hourly rate is set by the CPCS and approved by the Massachusetts legislature. Even with the recent pay increase, commentators routinely criticize Massachusetts public officials for maintaining some of the lowest paid appointed counsel in the country. As a result, as Professor Alschuler points out, the low pay provides defense counsel with an incentive to take on more cases than they can try on the assumption that most of them will settle during plea negotiations.

In light of the current shortage of appointed counsel in Massachusetts, attorneys that represent indigent defendants often take on large caseloads. If an attorney is forced to sacrifice time or resources because of their large caseload, the sacrifice often comes at the expense of the indigent defendant, not a paying client. As a result, a defense attorney has an extraordinary amount of incentive to foster the rapid turnover of cases through plea bargaining, while at the same time pre-

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70 See Alschuler, Defense Attorney’s Role, supra note 19, at 1182. This is not to say that most defense attorneys only care about profit. See id. Rather, this Note argues that the current system is designed in a way that encourages this type of abuse. Lobby conferences, in particular, foster this type of abuse because they take place in front of the judge, without the defendant and off the record.
71 See id. at 1182–84.
72 See id. at 1200.
73 See Spangenberg Group, supra note 3, at 2; Alschuler, Defense Attorney’s Role, supra note 19, at 1182.
74 See Spangenberg Group, supra note 3, at 1.
75 See id. at 1, 2.
76 See id. at 2.
78 See Alschuler, Defense Attorney’s Role, supra note 19, at 1182.
79 See Spangenberg Group, supra note 3, at 1; Alschuler, Defense Attorney’s Role, supra note 19, at 1182.
80 See Alschuler, Defense Attorney’s Role, supra note 19, at 1182, 1203.
serving personal relationships with other system participants. In addition, given that lobby conferences happen behind closed doors without any record of the proceeding, the defense attorney “is not subject to review by the people who pay for it or by anyone else.” This current practice of plea bargaining gives little incentive for any system participant, other than the defendant, to hold appointed counsel accountable. As the only one with an incentive to hold defense counsel accountable, an indigent defendant becomes the only one with the burden.

C. The Absent Defendant

In the current framework, the potential for abuse in lobby conferences is exacerbated by the fact that the law considers the defendant’s role in the process subservient to his attorney’s primary role and so the defendant is often left out of the proceeding. In Jones v. Barnes, the Court held that the defendant has the “ultimate authority to make certain fundamental decisions regarding the case.” This includes whether to plead guilty and whether to accept a plea agreement. However in reality, “over 90 percent of criminal defendants plead guilty, generally without any significant time expended on their case. In recent studies, between half and four-fifths of counsel entered pleas without interviewing any prosecution witnesses, and four-fifths did so without filing any defense motions.” Another study in a survey of about 700 public defenders found that 46.7% somewhat agreed or strongly agreed that they should secure their client’s consent before seeking plea agreements from the prosecutor; the remainder somewhat disagreed or strongly disagreed.

81 See id. at 1198.
82 Id.
83 See id.
84 See id.
87 Id.
89 See Uphoff & Wood, supra note 85, at 32, 41. Although the survey focused on defense attorneys in the public defender’s office, the study is relevant to this discussion because it reflects the quality of representation indigent defendants receive in this country. Id.
Likewise, the current practice of lobby conferences fosters this lawyer-centered model where the lawyer—as a detached expert—is perceived to be in a better position to make strategic decisions. Under this model, the defendant is perceived to be a hindrance to the candid exchange between skilled professionals and is thus excluded from the lobby conference. This model is even more problematic with indigent defendants who do not choose their lawyers and have no guarantee of a “meaningful” relationship with appointed counsel. As a result, the current framework compromises the voice of the indigent defendant in the name of efficiency.

III. The Rise of the Sixth Amendment Right to Counsel

There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.” The Sixth Amendment right to counsel attaches at the time judicial proceedings are initiated and extends to subsequent plea negotiations. The Supreme Court in later cases expanded the constitutional right to state courts, as well as to felony and misdemeanor offenses. In 1963 the Supreme Court in Gideon v. Wainwright...
right expanded the right to counsel beyond capital cases to all indigent criminal defendants and recognized that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided.”

In 1970, the Supreme Court clarified in *McMann v. Richardson* that the right to counsel is a right to “effective assistance of competent counsel.” The Court held that an attorney must meet minimum standards of competence to ensure effective assistance of counsel. *Strickland v. Washington* set up a two-prong test that a criminal defendant must meet to hold his lawyer accountable for ineffective assistance of counsel. Under the two-prong test the defendant must show: (1) his attorney’s deficient representation, and (2) that the deficiency prejudiced his defense. In reviewing counsel’s performance the court takes the totality of circumstances into consideration but with a “strong presumption” that the attorney’s conduct was adequate. The court in *Strickland* went on to point out that the test was in no way meant to “improve the quality of legal representation,” but was meant to provide a procedural safeguard for the Sixth Amendment by ensuring that the procedure the court followed is fair and just.

In 1985, the Supreme Court for the first time applied the *Strickland* test to challenges of guilty pleas based on ineffective assistance of coun-

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98 See 372 U.S. at 344. Even though the Supreme Court first recognized an indigent defendant’s right to appointed counsel in *Powell v. Alabama*, it was not until *Gideon v. Wainwright* that the right was expanded beyond capital cases to all criminal defendants. See *Gideon*, 372 U.S. at 344; *Powell*, 287 U.S. at 71. The Court in *Gideon* went on to proclaim that “lawyers in criminal courts are necessities, not luxuries.” 372 U.S. at 344.


100 See id.


102 See id.

103 See *id.* at 690 (“[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.”). The reasonableness of the lawyer’s conduct must be assessed in light of the facts as they were known to the attorney at the time. See *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000). Furthermore, as long as the lawyer’s conduct may be attributed to “sound trial strategy” the court will avoid second guessing it. See *Darden v. Wainwright*, 477 U.S. 168, 186 (1986).

104 *Strickland*, 466 U.S. at 689.
In the context of plea bargaining, the fairness of the trial becomes irrelevant; the fairness of the plea process is the sole focus of the test. The Court held that a guilty plea must be “a voluntary and intelligent choice,” and it may be challenged for ineffective assistance of counsel if an attorney did not provide “reasonably competent advice.” To meet the Strickland test, the defendant must overcome the presumption that the attorney’s conduct was proper. In order to meet the first prong of the test the defendant must show that the attorney’s representation fell below an objective standard of reasonableness. This merely amounts to the minimum standards of competence set out in McMann. The second prong is deemed satisfied if “there is a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.” Under Strickland, a “reasonable probability is a probability sufficient to undermine confidence in the outcome.” The defendant can also meet the prejudice prong of the test if he can show that “he would have accepted the plea but for counsel’s advice, and that had he done so he would have received a lesser sentence.”

The defendant must not merely allege that he would have plead differently, but actually support it with objective facts on the record to allow the court to meaningfully assess the claim. Hill v. Lockhart illustrates how difficult it is for a defendant to meet the prejudice prong without a complete record. Even though the defendant was able to show that his attorney improperly advised him as to when he would be eligible for parole, the Court held that the defendant did not satisfy “the kind of prejudice necessary” because he did not allege any “special circumstances that might support the conclusion that he placed par-

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105 See Hill v. Lockhart, 474 U.S. 52, 58 (1985). In Lockhart the defendant appealed his conviction, claiming the guilty plea was involuntary. See id. at 54. The defendant argued that he plead guilty in large part relying on his attorney’s erroneous advice about his parole eligibility. See id. at 55. The defendant was told by his attorney that he would be eligible for parole after serving one third of his prison sentence, even though state law mandated one half before being eligible for parole. See id.

106 See Wanatee v. Ault, 259 F.3d 700, 703 (8th Cir. 2001).

107 See Lockhart, 474 U.S. at 56; McMann, 397 U.S. at 770–71.

108 See Strickland, 466 U.S. at 690.

109 See Lockhart, 474 U.S. at 57.

110 See id. at 58–59.

111 Id. at 59; see also Strickland, 466 U.S. at 694.

112 466 U.S. at 694.

113 See Wanatee, 259 F.3d at 704.


115 See 474 U.S. at 60.
ticular emphasis on his parole eligibility in deciding whether or not to plead guilty.”

The Court reasoned that defendant’s mistaken belief that he would be eligible for early parole did not alter his decision about whether or not to go to trial.

In his concurring opinion, Justice White argued that failure to inform the defendant of relevant law pertaining to his case satisfied the first prong of the Strickland test. Even though he criticized the majority opinion, Justice White still emphasized the importance of the lack of a complete court record to the Strickland analysis. Justice White noted that had the record stated that the defense counsel was aware of the defendant’s prior conviction, which would make him ineligible for early release, the defendant would have been entitled to a hearing for ineffective assistance of counsel. Subsequently, the Strickland test has proven to be a tough hurdle for defendants to overcome even in egregious cases, with the prejudice prong posing the biggest challenge. Despite this, the test remains a crucial tool for defendants to hold their attorneys accountable to ensure fairness in the plea bargaining process. Given that the majority of criminal cases are resolved without

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116 See id. (internal quotations omitted).

117 See id. The court reasoned:

Indeed, petitioner’s mistaken belief that he would become eligible for parole after serving one-third of his sentence would seem to have affected not only his calculation of the time he likely would serve if sentenced pursuant to the proposed plea agreement, but also his calculation of the time he likely would serve if he went to trial and were convicted.

Id.

118 See id. at 62 (White, J., concurring).

119 See id. at 62–63 (concurring with the majority because the record failed to show that the attorney knew of defendant’s prior conviction).

120 See Lockhart, 474 U.S. at 63.

121 Backus & Marcus, supra note 23, at 1088–89 & n.304; see, e.g., People v. Garrison, 765 P.2d 419, 440–41 (Cal. 1989) (holding that defendant was not denied effective assistance of counsel where defense counsel was arrested driving to court with 0.27 blood-alcohol content); People v. Tippins, 570 N.Y.S.2d 581, 582 (App. Div. 1991) (holding that defendant was not denied effective assistance of counsel where the defense attorney slept through a portion of the trial); People v. Badia, 552 N.Y.S.2d 439, 440 (App. Div. 1990) (holding that defendant was not denied effective assistance of counsel where the defense attorney admitted to using heroin and cocaine during trial); see also Vivian Berger, The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases, 18 N.Y.U. REV. L. & SOC. CHANGE 245, 245–249 (1991) (summarizing additional cases).

122 See Alschuler, Defense Attorney’s Role, supra note 19, at 1179; cf. e.g., Williams v. Taylor, 529 U.S. 362, 390 (2000) (holding that defendant received ineffective assistance of counsel where defense attorney “failed to investigate and to present substantial mitigating evidence” at sentencing).
trial, analyzing *Strickland* in the context of plea negotiations provides a more realistic understanding of how the test is used today.123

IV. ENFORCING THE INDIGENT DEFENDANT’S SIXTH AMENDMENT RIGHT TO COUNSEL

In *Strickland v. Washington*, the Supreme Court held that the new standard was meant to safeguard criminal defendants’ Sixth Amendment right to a fair trial.124 Justice O’Connor articulated that “the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.”125 In 2000, the Supreme Court again reaffirmed that procedural rights are the underpinning of the constitutional protection in *Strickland*.126

The current practice in Massachusetts of plea bargaining in lobby conferences violates the policy of procedural fairness articulated by Justice O’Connor in *Strickland*.127 In Massachusetts district courts, plea bargaining takes place behind closed doors in the judge’s chambers, without the defendant and without any record of the proceeding.128 There are no uniform standards for the plea bargaining process in order to accommodate the variety of cases and proceedings before the court.129 This lack of standardization, when combined with the lack of record at lobby conferences, renders the standard under *Strickland* extraordinarily difficult for the defendant to meet.130 If a criminal defendant wants to file a claim for ineffective assistance of counsel, the defendant must meet both prongs of the *Strickland* test.131 Even though a defendant may be able to identify particular problems in the attorney’s representation, the prejudice prong of the test is the biggest hurdle for

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125 Id. at 696.
126 See *Williams v. Taylor*, 529 U.S. 362, 390 (2000). In *Williams*, the trial court found that the attorney’s failure to introduce defendant’s violent childhood and psychological records at sentencing was not a tactical decision, but was due to attorney’s erroneous belief that state law prohibited such evidence. See id. at 395. The Court concluded that the prejudice prong of the *Strickland* test was met because there was a reasonable probability that the sentencing proceeding would have had a different outcome had counsel explained the significance of all the evidence available at the time. See id. at 398–99. The Court, in finding ineffective assistance of counsel, relied solely on the post-conviction record. See id.
127 See *Strickland*, 466 U.S. at 689; Backus & Marcus, *supra* note 23, at 1088–89.
129 White, *supra* note 92, at 373.
130 See *Cole*, *supra* note 1, at 78; Backus & Marcus, *supra* note 23, at 1088–89.
131 See *Strickland*, 466 U.S. at 687.
defendants to overcome.\textsuperscript{132} This is because the court largely relies on the record to determine whether the second prong of the test has been met.\textsuperscript{133}

Justice Marshall, in his dissenting opinion in \textit{Strickland}, specifically critiqued the Court’s reliance on the record to prove the prejudice prong.\textsuperscript{134} He noted “the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.”\textsuperscript{135} As a result, the burden of supplementing the record falls on the defendant.\textsuperscript{136} By filing the ineffective assistance of counsel claim, the defendant is already put at a disadvantage because of the need to secure other counsel or risk proceeding without one.\textsuperscript{137} The practical problems of supplementing the record after the fact may create gaps that will further hinder the defendant’s ability to satisfy the prejudice prong.\textsuperscript{138} The defendant may also be facing a real possibility that the parties present at the lobby conference may no longer be able to recall the proceeding in detail.\textsuperscript{139} The defense attorney, along with other system players present at the lobby conference, may have incentive to refrain from revealing the misconduct in order to avoid being professionally disciplined, or to safeguard a rapport with the judge.\textsuperscript{140} As a result, the defendant must rely on an incomplete record to satisfy what is already a demanding test.\textsuperscript{141}

Lobby conferences violate the policy of procedural fairness articulated by Justice O’Connor in \textit{Strickland} because they undermine the policy of equity that has shaped the Sixth Amendment right to counsel jurisprudence.\textsuperscript{142} \textit{Strickland} is part of a long line of cases that make up

\begin{itemize}
\item \textsuperscript{132} See Backus & Marcus, \textit{supra} note 23, at 1089.
\item \textsuperscript{133} See id.
\item \textsuperscript{134} See \textit{Strickland}, 466 U.S. at 710 (Marshall, J., dissenting).
\item \textsuperscript{135} Id.
\item \textsuperscript{136} See Vivian O. Berger, \textit{The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?}, 86 \textit{Colum. L. Rev.} 9, 70 (1986).
\item \textsuperscript{137} See id. at 70 n.309.
\item \textsuperscript{138} See \textit{Strickland}, 466 U.S. at 710 n.4 (Marshall J., dissenting) (“When defense counsel fails to take certain actions, not because he is ‘compelled’ to do so, but because he is incompetent, it is often equally difficult to ascertain the prejudice consequent upon his omissions.”).
\item \textsuperscript{139} See Berger, \textit{supra} note 136, at 70 n.309.
\item \textsuperscript{140} See id.; see also, e.g., Evitts v. Lucey, 469 U.S. 387, 390 n.3 (1985). The United States District Court for the District of Kentucky found ineffective assistance of counsel and referred the defendant’s attorney to the Board of Governors of the Kentucky State Bar Association for disciplinary proceeding. See \textit{Evitts}, 469 U.S. at 390 n.3.
\item \textsuperscript{141} See \textit{Strickland}, 466 U.S. at 710 (Marshall, J., dissenting).
\end{itemize}
the “right to counsel revolution.” The right to counsel was included in the Bill of Rights to create a level playing field and protect against the power of the state. It was also meant to “breathe life into the promise” of the other Sixth Amendment guarantees, such as the right to trial by jury, the right to a speedy and public trial, the right to confront and compel witnesses, and the right to notice of charges.

Equity was the bedrock of the right to counsel revolution. From the beginning, the Court saw the right to counsel as a necessity to ensure the fundamental fairness of the criminal process against the actions of the state. In *Powell v. Alabama*, the Supreme Court upheld the right to counsel specifically to address the “tremendous advantage” of the prosecution over the lay person. The Court recognized the imbalance of power between the prosecutor, who had the resources of the state, and a criminal defendant, who most often did not have the knowledge or the skills to negotiate the complexity of the legal system.

*Powell* held that the court has an obligation to safeguard these rights and appoint counsel for an indigent defendant, even when the defendant failed to request one. Thus, according to *Powell*, the responsibility for ensuring the equitable balance of powers rests with the court, not the criminal defendant.

The lack of record at lobby conferences means that the appellate court is no longer able to hold attorneys accountable, and the fate of the criminal defendant rests entirely on the integrity of his counsel.

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143 See DeSimone, supra note 142, at 1479, 1482–83.
145 See Metzger, supra note 144, at 1640 & n.25 (quoting Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 139 (1997)).
146 See id. at 1640, 1642.
147 See id. at 1642. The colonists, for example, instituted a comparable guarantee to the Sixth Amendment right to counsel. See id. at 1639–40. Many of the colonies rationalized the guarantee as a necessity to protect against prosecutorial privilege, governmental overreaching and to give “a fighting chance against the prosecution.” Id. at 1639. The guarantee meant to empower the ordinary citizen against what was seen as the “tremendous advantage” of the prosecution. Id. at 1640.
148 See id. at 1642. *Powell* held that an indigent defendant’s right to counsel was violated when the court appointed counsel in a capital case on the morning of the trial. See 287 U.S. at 53–56. The court reasoned that the last minute appointment did not allow the attorney enough time to adequately prepare for the trial. See id. at 58–59.
149 See Metzger, supra note 144, at 1642.
150 287 U.S. at 73.
151 See id.; Metzger, supra note 144, at 1642–43.
152 See Alschuler, *Defense Attorney’s Role*, supra note 19, at 1195, 1198; Backus & Marcus, supra note 23, 1088–89.
At the same time, the defendant’s ability to hold his attorney accountable rests at the discretion of the individual trial judge’s willingness to record these lobby conferences.\textsuperscript{153} Because lobby conferences are held for the purpose of settling cases as efficiently as possible, the primary focus is not equity.\textsuperscript{154} Thus, the current framework in Massachusetts hinders a defendant from asserting an ineffective assistance of counsel claim and erodes this “essential barrier against arbitrary or unjust deprivation of human rights.”\textsuperscript{155}

V. Procedural Solution to Safeguard the Indigent Defendant’s Sixth Amendment Right to Counsel

The practice of lobbying cases to relieve court congestion undermines the defendant’s ability to take advantage of a procedural safeguard guaranteed by the Sixth Amendment.\textsuperscript{156} Lobby conferences rob the defendant of the right to relief where there is ineffective assistance of counsel and deprive the court of an important tool of equity.\textsuperscript{157} As a remedy, Massachusetts should adopt a categorical presumption of prejudice in assessing the defendant’s ineffective assistance of counsel claim arising in the context of lobby conferences. This approach serves the policy of equity that has long defined the “right to counsel revolution” by remedying the increased burden lobbying cases places on the defendant.\textsuperscript{158} In addition, this approach is consistent with the approach articulated by Justice Brennan in the context of conflict of interest cases but avoids the pitfalls of a blanket rule that mandates recording of lobby conferences.\textsuperscript{159}

A. Pitfalls of Mandating the Recording of Lobby Conferences

In an attempt to resolve the conflict between efficiency and the increased burden on the criminal defendant, many states mandate the

\textsuperscript{154} See Levinson, supra note 28, at 163; Murphy, supra note 14, at 54.
\textsuperscript{155} Johnson v. Zerbst, 304 U.S. 458, 462 (1938). Johnson marked a shift where the Court no longer engaged in case by case analysis and extended the right to counsel to all indigent defendants in federal courts. See Metzger, supra note 144, at 1644.
\textsuperscript{156} See Strickland v. Washington, 466 U.S. 668, 689 (1984); Murphy, supra note 14, at 54.
\textsuperscript{157} See Backus & Marcus, supra note 23, at 1088–89; Metzger, supra note 144, at 1642.
\textsuperscript{158} See Powell v. Alabama, 287 U.S. 45, 66–68 (1932); Metzger, supra note 144, at 1640–41.
\textsuperscript{159} See Cuyler v. Sullivan, 446 U.S. 335, 353–54 (1980) (Brennan, J., concurring); see also, e.g., People v. Freeman, 882 P.2d 249, 283 (Cal. 1994).
recording of lobby conferences in criminal proceedings. The approaches taken by different states vary in the amount of discretion a judge has in deciding whether to record lobby conferences. Even though the language and strictness of these rules vary, the result remains the same: these policies have failed to create a more complete record. This is because judges are still the ones interpreting and applying these rules. Across these jurisdictions, judges conclude that failure to follow the rules is harmless error. The few times that the courts found that failure to record lobby conferences was not a harm-

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160 See, e.g., Tenn. Code Ann. § 40–14–307 (West 2007); State v. Hammons, 737 S.W.2d 549, 551 (Tenn. Crim. App. 1987). The Hammons court recognized that the state of Tennessee specifically mandates that every criminal proceeding, whether or not it is held in open court, must have a court reporter present to preserve the record for appellate review. Hammons, 737 S.W.2d at 551. In accordance with this rule, the Tennessee Court of Appeals opinion stated:

The holding of off-the-record bench conferences impairs the ability of this Court to afford the parties a full and complete review of the issues. Such conferences create a void in the record, and prevent this Court from determining why the trial court may have ruled in a certain manner. For this reason trial judges should not conduct off-the-record bench conferences.

See id. Nevertheless, the reviewing court did not find that the trial court abused its discretion in conducting the proceedings off the record. See id. at 552. Even though the reviewing court acknowledged that the record did not provide much information about what was discussed at these proceedings, the court concluded that “it takes very little imagination to perceive the reason why” the trial court did not accept the plea agreement which formed the basis for defendant’s appeal. See id. 551–52. In the end, even though there was a clear violation of the state statute, the reviewing court failed to find a violation of defendant’s procedural rights. See id.

161 See Hammons, 737 S.W.2d at 551–52. Compare Jones v. Dist. Court of Second Judicial Dist., 780 P.2d 526, 528–29 (Colo. 1989) (concluding that the court has an affirmative duty to ensure that all proceedings are recorded), with Atkins v. State, 558 S.E.2d 755, 759 (Ga. Ct. App. 2002) (concluding that the defendant has the burden to supplement the record after the fact).

162 See, e.g., State v. Pittman, 420 S.E.2d 437, 441 (N.C. 1992) (finding harmless error because seven unrecorded bench conferences did not result in any “significant ruling”).

163 See Cal. Penal Code § 190.9(a)(1) (West 2008) (“In any case in which a death sentence may be imposed, all proceedings conducted in the superior court, including all conferences and proceedings, whether in open court, in conference in the courtroom, or in chambers, shall be conducted on the record with a court reporter present.”); Freeman, 882 P.2d at 283. Even though the reviewing court stressed that all proceedings must be on the record, they applied an abuse of discretion standard of review. See Freeman, 882 P.2d at 284. Given the high standard of review, the court found no abuse of discretion by the trial court in conducting proceedings off the record. See id.

164 See, e.g., Freeman, 882 P.2d at 283; Pittman, 420 S.E.2d at 441. For example in Freeman, the reviewing court’s rationale was self-defeating. See 882 P.2d at 283–84. The court found harmless error, reasoning that the defendant could settle the record when the parties returned to open court and on the record. See id. However, in practice, the trial judge maintained the final discretion in deciding what went on the record. See id.
less error occurred when a defendant proved a clear Constitutional violation in addition to the lack of record.\textsuperscript{165} For example, in \textit{Sudler v. State}, the Delaware Supreme Court held that the lack of record prejudiced the defendant, but only in the context of his right to a trial by jury.\textsuperscript{166} Even in jurisdictions that mandate the recording of lobby conferences, the policy of efficiency may outweigh the criminal defendant’s interests in recorded lobby conferences.\textsuperscript{167} Similarly, in Massachusetts, judges would most likely circumvent a rule mandating the recording of lobby conferences and would continue to deny indigent defendants effective relief.\textsuperscript{168}

In \textit{Douglas v. California}, decided on the same day as \textit{Gideon v. Wainright}, the Supreme Court extended the right to counsel to appellate cases.\textsuperscript{169} In that decision the Court stressed equal protection to the “rich and poor alike.”\textsuperscript{170} The Court stated that “where the record is unclear or the errors are hidden, [an indigent defendant] has only the right to a meaningless ritual, while the rich man has a meaningful appeal.”\textsuperscript{171} In this landmark opinion, the Court for the first time recognized what may be seen as discrimination based on poverty.\textsuperscript{172}

However, when only the rich are able to take advantage of these procedural safeguards, the courts are discriminating against indigent defendants.\textsuperscript{173} Adopting a rule that judges will circumvent only perpetuates discrimination against indigent defendants by denying them

\textsuperscript{165} See, e.g., Sudler v. State, 611 A.2d 945, 947 (Del. 1992). In \textit{Sudler}, after holding at least five unrecorded bench conferences, the trial judge dismissed five jurors after the criminal trial had already begun and without the required finding of necessity on the record. \textit{See id.} at 947–48. The court reversed the conviction because the trial judge reduced the panel of jurors below the constitutionally mandated number without a record of any preliminary findings. \textit{See id.} at 948. Even after such a blatant constitutional violation, the reviewing court stepped in only after the trial court was unable to reconstruct the record on remand. \textit{See id.} at 946. The court held that failure to record the five sidebar conferences hampered effective appellate review. \textit{See id.} at 947. The court reasoned that, “[i]t is inappropriate to recreate sidebar conferences \textit{ex post facto}, particularly after the trial judge has taken irrevocable steps, related to or resulting from sidebar conferences, that effectively violated a fundamental right of the defendant.” \textit{See id.}

\textsuperscript{166} \textit{See id.} at 946–47.

\textsuperscript{167} \textit{See, e.g., Freeman}, 882 P.2d at 283.


\textsuperscript{169} \textit{See id.}

\textsuperscript{170} \textit{See id.} at 356.

\textsuperscript{171} \textit{Id.} at 358.

\textsuperscript{172} \textit{See id.}

\textsuperscript{173} \textit{See Cole}, supra note 1, at 69 (“Every day our system offers opportunities and privileges to those who can afford them while denying them to those who cannot. Any public good that is available at a price effectively discriminates against the poor . . . .”).
constitutionally guaranteed relief.\textsuperscript{174} A defendant with means, who is not satisfied with the representation, will be able to seek different counsel.\textsuperscript{175} An indigent defendant, on the other hand, does not have the financial means to pick initial counsel or seek a replacement if the current one proves to be ineffective.\textsuperscript{176} In a system where defense counsel is seen as the “equalizer’ in the [plea] bargaining process,” failure to do his or her job leaves only the procedural safeguard to protect the substantive rights of the defendant in the adversarial system.\textsuperscript{177} The current practice of plea bargaining jeopardizes this procedural safeguard because any gaps in the record increase the likelihood that an indigent defendant will not be able to meet the prejudice prong of the ineffective assistance of counsel claim.\textsuperscript{178}

B. Benefits of a Categorical Presumption

Resolving the current conflict will require a solution that recognizes the entrenched practice of lobby conferences in Massachusetts district courts, as well as balance the increased burden the current practice places on an indigent defendant.\textsuperscript{179} The Supreme Court, in laying out the test for ineffective assistance of counsel, recognized that the prejudice prong of the test may be satisfied without the case-by-case analysis.\textsuperscript{180} The Court proposed that a categorical presumption of the prejudice prong may be deemed satisfied when violations are easy for government to identify and correct:

In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel’s assistance. . . . Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that

\begin{footnotesize}
\textsuperscript{174} See id.
\textsuperscript{175} See id. at 76 (describing how wealthy people can afford to be discriminating when choosing counsel).
\textsuperscript{176} See id.
\textsuperscript{177} See Alschuler, Defense Attorney’s Role, supra note 19, at 1179; see also Strickland, 466 U.S. at 687.
\textsuperscript{178} See Backus & Marcus, supra note 23, at 1088–89 (noting that the appellate court will review the trial record to assess whether the prejudice prong of the ineffective assistance of counsel claim has been met).
\textsuperscript{179} See id.; Murphy, supra note 14, at 54.
\textsuperscript{180} See Strickland, 466 U.S. at 692.
\end{footnotesize}
reason and because the prosecution is directly responsible, easy for the government to prevent.\textsuperscript{181}

The lack of record at lobby conferences acts as a “constructive denial of the assistance of counsel” because both the prosecution and the judge are aware of it and it is within their power to prevent.\textsuperscript{182}

In addition to being easy to identify and correct, placing the burden for holding off the record lobby conferences on the prosecution and the court is consistent with the Sixth Amendment’s policy of equity.\textsuperscript{183} The Supreme Court has recognized that “the Sixth Amendment does more than require the States to appoint counsel for indigent defendants. . . . [Holding] a criminal trial itself implicates the State.”\textsuperscript{184} Procedural fairness requires that both the courts and the prosecution share the burden of perpetuating a practice that undermines a criminal defendant’s right to counsel, especially one that is within their power to correct.\textsuperscript{185}

Adopting a categorical approach, which presumes the satisfaction of the prejudice prong, should be limited to instances where the court holds lobby conferences off the record and the defendant alleges that ineffective assistance arose out of these proceedings. With the prejudicial prong under \textit{Strickland} presumed satisfied, an indigent defendant no longer has the burden of supplementing the record and is left to prove the performance prong of the \textit{Strickland} test.\textsuperscript{186} The Court in \textit{Strickland} wanted to make sure that the rule would allow for variation in tactical decisions that an attorney may adopt.\textsuperscript{187} The rule would not

\begin{quote}
Prosecutors and judges must also bear some responsibility in maintaining . . . standards within the criminal justice system . . . .

In appointing counsel, monitoring pretrial activities and evaluation counsel’s preparedness, observing courtroom performance and participating in plea bargaining negotiations, the judge must be cognizant that “[i]t is the judge, not counsel, who has the ultimate responsibility for the conduct of a fair and lawful trial.”
\end{quote}

\textit{Id.} (quoting Lakeside v. Oregon, 435 U.S. 333, 341–42 (1978)); see also Glasser v. United States, 315 U.S. 60, 71 (1942) (“Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . . The trial court should protect the right of an accused to have the assistance of counsel.”).

\textsuperscript{181} See id.
\textsuperscript{182} See id.
\textsuperscript{183} See Powell, 287 U.S. at 66–68; Metzger, supra note 144, at 1640–41.
\textsuperscript{184} See Cuyler, 446 U.S. at 344.
\textsuperscript{185} See Backus & Marcus, supra note 23, at 1084–86. The authors explain that:

\begin{quote}
Prosecutors and judges must also bear some responsibility in maintaining . . . standards within the criminal justice system . . . .

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\textsuperscript{186} See Strickland, 466 U.S. at 687.
\textsuperscript{187} See id. at 688–89.
affect this part of the test because the presumption that the attorney’s conduct was adequate is part of the performance prong of the test. The reviewing court, in adopting the rule that lobby conferences are per se prejudicial to criminal defendants, would still require the defendant to overcome the presumption that the attorney’s conduct was adequate. This approach will guarantee that “fair process [is] an essential element of an adversary system.”

C. Justice Brennan’s Approach

There are quite a number of cases where the Court has held that a showing of prejudice is presumed satisfied. These include where defendant was deprived counsel by the court, when counsel was absent during a critical stage of trial, where the attorney was not licensed to practice law, where counsel was absent during a critical stage of trial, where the attorney was not licensed to practice law, where counsel was implicated in defendant’s crime, where counsel’s performance was extremely egregious, and where counsel had a conflict of interest. These categories define a continuum of cases where the Court has found that the prejudice prong of the Strickland test satisfied.

The conflicts of interest that arise in lobby conferences are analogous to those that arise in the context of multiple representation cases. Justice Brennan, in his concurring opinion in Cuyler v. Sullivan,

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188 See id. at 689.
189 See id. at 687.
190 See Metzger, supra note 144, at 1642. Justice Marshall’s dissenting opinion in Strickland proposed a more extreme version of this approach. See 466 U.S. at 710–12 (Marshall, J., dissenting). He stated that if the defendant is able to satisfy the performance prong of the test, then a defendant should not have to prove the prejudice prong. Id. Justice Marshall reasoned that if the attorney’s conduct fell below standards prescribed by the Constitution then the defendant should not have the added burden of proving that the attorney’s deficiency affected his case. Id. In those instances, Justice Marshall believed that the prejudice of the case may be presumed. See id.
192 Kirchmeier, supra note 191, at 441–44.
193 Id. at 463. Kirchmeier proposes that ineffective assistance of counsel cases can be put on a continuum from the most to least egregious. See id. Kirchmeier argues that conflict of interest cases fall somewhere in the middle of the continuum and have a lower burden of proof. See id. at 464.
194 See Cuyler, 446 U.S. at 343. In Cuyler, the defense attorney represented several co-defendants charged for the same crime. See id. at 337–38. The defendant alleged ineffective assistance of counsel based on defense counsel’s conflict of interest. See id. The majority held that the defendant had the burden of objecting to the multiple representations to raise the issue on appeal. See id. at 346–47. Only once such an objection was brought to the court did the court have a duty to consider whether a conflict of interest existed. See id.
argued that if a court identifies a conflict of interest, it then has an affirmative duty to step in and apply a rebuttable presumption to the \textit{Strickland} test.\textsuperscript{195} The conflict of interest in \textit{Cuyler} involved multiple representation, where defendants were charged with the same crime and represented by a single attorney.\textsuperscript{196} Justice Brennan quoted the majority’s holding that a “possible conflict inheres in almost every instance of multiple representation” to conclude that upon discovery of joint representation the court has an affirmative duty to ensure that the defendant actually waived his constitutional right to counsel and understands the potential dangers of such waiver.\textsuperscript{197} As in earlier right-to-counsel cases, a court must presume that a defendant may not be aware of their rights or how to raise them.\textsuperscript{198} Justice Brennan argued that only when the record indicates that the defendant made a knowing and intelligent choice should the defendant have the burden of showing that the conflict affected the adequacy of representation.\textsuperscript{199} Otherwise, Justice Brennan advocated for a presumption that the prejudice prong of the \textit{Strickland} test is satisfied.\textsuperscript{200} The government, however, is still able to rebut the presumption by showing that the possibility of conflict did not actually affect the defendant’s representation.\textsuperscript{201}

Justice Brennan’s approach in \textit{Cuyler} recognizes the difficulty of proving the prejudice prong when there is a conflict of interest.\textsuperscript{202} The Supreme Court, in the context of multiple representations, has concluded that assessing the impact of conflict of interest in plea negotiations is almost impossible.\textsuperscript{203} Plea negotiations are often informal discussions between the defense counsel and the prosecution.\textsuperscript{204} A defendant often may not understand what is appropriate under the

\textsuperscript{195} See \textit{Cuyler}, 446 U.S. at 351 (Brennan, J., concurring).
\textsuperscript{196} See \textit{id.} at 337 (majority opinion).
\textsuperscript{197} See \textit{id.} at 352 (Brennan, J., concurring) (quoting the majority).
\textsuperscript{198} See \textit{id.; Powell}, 287 U.S. at 69.
\textsuperscript{199} See \textit{Cuyler}, 446 U.S. at 353 (Brennan, J., concurring).
\textsuperscript{200} See \textit{id.} Several lower courts have applied the Court’s reasoning in \textit{Cuyler} to a variety of conflict of interest cases other than multiple representations. See Kirchmeier, \textit{supra} note 191, at 453.
\textsuperscript{201} See \textit{Cuyler}, 446 U.S. at 353–54 (Brennan, J., concurring).
\textsuperscript{202} See \textit{id}.
circumstances. Only a careful review of the record after the fact by an attorney who can understand the legal complexities may reveal the consequences of the counsel’s errors.

Likewise, plea negotiations in lobby conferences present an inherent conflict of interest for the parties involved. The plea discussions are not merely between counsel, but take place off the record with the judge who will be trying the case if the settlement negotiations are not successful. Thus, a similar solution as the one articulated by Justice Brennan should be adopted in the context of lobby conferences. In Massachusetts, if the court identifies that an unrecorded lobby conference was held, it should make sure that the defendant properly waived his constitutional right when agreeing to an off the record lobby conference. Unless a proper waiver is made on the record, the court must recognize a categorical presumption of prejudice for ineffective assistance of counsel claims. This would be a rebuttable presumption that the prosecution can overcome by showing the defendant has not been prejudiced in the lobby conference.

**Conclusion**

Given the ever increasing stress on the courts’ resources, Massachusetts district courts lobby cases in the name of efficiency. In a system stretched to capacity where defense counsel already have financial incentive to resolve cases as quickly as possible, the lack of record in these proceedings makes the ineffective assistance of counsel claim nothing more than a meaningless ritual for indigent defendants. By robbing indigent defendants of a procedural safeguard to hold their attorneys accountable, lobby conferences undermine the policy of procedural fairness and equity that has defined the right to counsel jurisprudence.

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205 See *Powell*, 287 U.S. at 69.
206 See id.
207 See *Holloway*, 435 U.S. at 490–91; *Backus & Marcus*, *supra* note 23, at 1088–89.
208 See *Gaumond*, 2002 WL 732152, at *4 n.2.
209 Massachusetts adopted a version of Justice Brennan’s approach in *Cuyler* in conflict of interest cases. See *Commonwealth v. Allison*, 751 N.E.2d 868, 888 (Mass. 2001). Under Article 12 of the Massachusetts Declaration of Rights, the courts presume the prejudice prong of the *Strickland* test satisfied if the defendant shows an actual conflict of interest, “detailing the precise character of the alleged conflict of interest.” See *Commonwealth v. Davis*, 384 N.E.2d 181, 186 (Mass. 1978). However, unlike Justice Brennan’s approach in *Cuyler*, the presumption of prejudice for the purposes of Article 12 analysis is not rebuttable. See *Cuyler*, 446 U.S. at 353 (Brennan J., concurring); *Davis* 384 N.E.2d at 186.
210 Cf. *Cuyler*, 446 U.S. at 353 (Brennan J., concurring).
211 Cf. id.
Adopting a rebuttable presumption of prejudice in the context of lobby conferences will allow the district courts to maintain a practice they have been unwilling to abandon while, at the same time, meaningfully assess the ineffective assistance of counsel claims. By allocating the burden of plea bargaining in lobby conferences among all the parties, the categorical approach reinvigorates the policy of equity under the Sixth Amendment.
OFFSETTING JUSTICE: PROTECTING FEDERALLY-EXEMPT BENEFITS FROM GARNISHMENT AND BANK SET-OFFS

Arianna Tunsky-Brashich*

Abstract: For the millions of Americans who rely on direct deposit for receipt of their monthly federal benefits, section 207 of the Social Security Act provides a necessary protection against creditors. This federal law protects federal benefits from garnishment, attachment and other legal processes, but the courts, federal agencies, consumer groups and other stakeholders are in disagreement over its scope. This Note serves as a comprehensive review of the exemption, discussing its policy and history as well as case law that highlights the difficulty of applying its provisions to modern day banking practices. This Note concludes by advocating legislative and administrative actions to protect recipients of federal benefits payments.

Introduction

In September 2007, seventy-year old Waverly Taliaferro testified before the Senate Finance Committee about how he and his wife had their bank account frozen as a result of mounting credit-card debt.1 At the time that it was frozen, the account held forty-seven dollars remaining from the social security payment that had been directly deposited the month before.2 Mr. Taliaferro only learned of the freeze when he went to the grocery store to do his shopping.3 On the day that his next monthly social security check should have been deposited, he was unable to access any of the funds in his bank account.4 Even with the help

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2 Hearings, supra note 1, at 1.

3 Id.

4 Id.
of a legal services attorney, it took twenty-three days for the bank to un-
freeze the account.\textsuperscript{5} During this period, Mr. Taliaferro and his wife
were forced to sell keepsakes and survive on brown rice; he lost forty
pounds and she lost three dress sizes.\textsuperscript{6} When the account was finally
unfrozen, rather than give Mr. Taliaferro an apology, the bank charged
him forty-five dollars for applying the freeze.\textsuperscript{7} Since this incident, Mr.
Taliaferro has received his social security payment by check and has
suffered a “loss of dignity” as he has been forced to use a neighborhood
check cashing store.\textsuperscript{8} Although Mr. Taliaferro tried to open up a new
account with a different bank, that account, too, was frozen just days
after he opened it.\textsuperscript{9}

The Senate Finance Committee held the hearings—collectively
entitled “Frozen Out”—to examine the policies and procedures that
banks, like the ones used by Mr. Taliaferro, follow when they receive
state court orders to freeze assets.\textsuperscript{10} Representatives of the Federal De-
posit Insurance Corporation (FDIC), Office of the Comptroller of the
Currency (OCC), Office of Thrift Supervision (OTS), and the National
Consumer Law Center (NCLS) were among the federal agencies and
consumer groups that testified.\textsuperscript{11} Their statements addressed the gravity
and complexity of a problem that has been exacerbated in recent
years as more and more individuals receiving federal benefits have
them directly deposited in bank accounts.\textsuperscript{12} Under federal law, Social

\begin{itemize}
\item \textsuperscript{5} Id. at 2.
\item \textsuperscript{6} \textit{Hearings}, supra note 1, at 2 (statement of Taliaferro).
\item \textsuperscript{7} Id.
\item \textsuperscript{8} Id.
\item \textsuperscript{9} Id. The bank advertised it would not freeze accounts that contained only direct de-
posit social security payments, and gave him a $100 signing bonus for opening the ac-
count. Id. However, because the account still had $25.25 left over from the signing bo-
nus—and therefore did not contain solely direct deposit social security payments—the
bank could legally freeze the account and all of Mr. Taliaferro’s funds. Id. at 3.
\item \textsuperscript{10} See id. (all statements). Senator Max Baucus, Chairman of the Senate Finance Com-
mittee, chastised the banks and the federal banking regulatory agencies in his opening
statement for not honoring an ancient rule set forth in the Book of Leviticus; rather than
treating beneficiaries fairly and according to the law, he accused banks of “keeping Social
Security beneficiaries’ payments far longer than all night, far longer than until morning.”
See id. at 1 (statement of Sen. Max Baucus). He went on to express disappointment with
the federal banking regulatory agencies and the draft comment they issued that refused to
recognize that the federal law protecting social security benefits preempted state law. Id. at
2.
\item \textsuperscript{11} See \textit{Hearings}, supra note 1 (all statements).
\item \textsuperscript{12} See id. at 1–12 (statement of Sara A. Kelsey, Gen. Counsel, Fed. Deposit Ins. Co.), 1–9
(statement of Margot Saunders, Counsel, Nat’l Consumer Law Ctr.), and 1–12 (statement
of Julie L. Williams, First Senior Deputy Comptroller & Chief Counsel, Office of the
Comptroller of the Currency).
\end{itemize}
Security Benefits, Supplementary Security Income Benefits, Veterans’ Benefits, Federal Civil Service Retirement Benefits, and Federal Railroad Retirement Benefits are supposed to be protected from garnishment and attachment that would freeze bank accounts.\textsuperscript{13} However, banks, federal agencies, consumer groups, and other stakeholders are in disagreement over the extent of relevant federal law, which agency should regulate, and whether the banks should take the initiative to make sure that the accounting systems and processes that they use for managing accounts with directly deposited social security benefits protect those exempt assets.\textsuperscript{14}

Creditors obtain garnishment and attachment orders in state court that direct banks to freeze accounts.\textsuperscript{15} Once the banks freeze the assets to prevent withdrawals, they will also freeze subsequent deposits, including those originating from the U.S. Department of the Treasury.\textsuperscript{16} Furthermore, banks will assess fees for overdrafts while accounts are frozen and for complying with state court orders against frozen accounts and deduct them from the account.\textsuperscript{17} In order to unfreeze the account, beneficiaries must go to the courthouse with supporting social security and account documentation and fill out a form stating that the funds are exempt.\textsuperscript{18} If a creditor agrees to release the funds, it will send a notice to the bank of its decision.\textsuperscript{19} However, if it disagrees, and chooses not to release the funds, usually the debtor’s only recourse is to request a hearing.\textsuperscript{20} The majority of banks do not review the source of deposited funds in the account they have been ordered to freeze.\textsuperscript{21} Even if it is marked as an account into which federal benefits are directly deposited or electronic transfers from the Treasury Department

\begin{footnotesize}


\textsuperscript{14} See \textit{Hearings, supra} note 1, at 1–12 (statement of Kelsey), 1–9 (statement of Saunders) and 1–12 (statement of Williams).

\textsuperscript{15} See \textit{id.} at 2 (statement of Kelsey) and 2 (statement of Williams).

\textsuperscript{16} See \textit{id.} at 2, 6 (statement of Kelsey), 4 (statement of Saunders) and 2 (statement of Williams).

\textsuperscript{17} See \textit{Nat’l Consumer Law Ctr., Consumer Banking and Payments Law} 47 (Supp. 2007).

\textsuperscript{18} See \textit{Hearings, supra} note 1, at 4 (statement of Saunders).

\textsuperscript{19} \textit{Id.}

\textsuperscript{20} See \textit{id.} at 2 (statement of Kelsey) and 4 (statement of Saunders).

\textsuperscript{21} See \textit{id.} at 4 (statement of Saunders).

\end{footnotesize}
are readily apparent, banks more often than not choose to freeze the exempt assets.\footnote{22 See id.}

State and federal case law do little to clarify how banks should handle such garnishment and attachment orders.\footnote{23 See Hearings, supra note 1, at 3 (statement of Kelsey).} Banks take a “damned if we do, damned if we don’t” attitude; if they don’t freeze the funds, they claim they will be liable under state law to the creditor, and if they do freeze the funds, they claim they can be threatened with suit by the account holder.\footnote{24 See id. at 3–5; cf. id. at 6 (statement of Saunders) (arguing that in most states, banks are required to attach only non-exempt funds and that banks would not be exposed to liability if they refused to honor a freeze on exempt assets).} Accordingly, many financial institutions choose to comply with state garnishment orders and, if it comes to it, let the courts determine entitlement to the funds that the beneficiaries claim are federally-exempt.\footnote{25 See id. at 4–5 (statement of Kelsey).}

The testimony at the September 2007 hearings combined with a recent one billion dollar judgment against Bank of America highlight just how serious this problem is becoming, especially as baby boomers hit retirement age and more elderly individuals rely on federal benefits as their primary source of income.\footnote{26 See Miller v. Bank of Am., No. CGC-99–301917, 2004 WL 3153009, at *32–35 (Cal. App. Dep’t Super. Ct. Dec. 30, 2004), rev’d, 51 Cal. Rptr. 3d 223 (Cal. App. 2006), cert. granted, 154 P.3d 997 (Cal. 2007); Hearings, supra note 1, at 1 (statement of Saunders) (stating that bank freezing of exempt funds “has become one of the most alarming and frequent reasons for emergency requests for assistance to legal services lawyers all over the nation”) and 4–6 (statement of Johnson M. Tyler, SSI Unit Dir., S. Brooklyn Legal Servs.). Mr. Tyler testified that he is seeing a dramatic increase in the number of federal beneficiaries having their accounts frozen. Id. at 4–6 (statement of Tyler). According to Mr. Tyler, about 750,000 New Yorkers have no source of income other than their monthly social security or Supplementary Security Insurance checks. Id. at 4.} At stake are potentially billions of dollars over an issue that raises questions of federal preemption, congressional intent, and conflicting business and consumer interests.\footnote{27 See, e.g., Miller, 2004 WL 3153009, at *32–35; Hearings, supra note 1, at 9–11 (statement of Kelsey) (suggesting that possible solutions include legislative action and the promulgation of regulations by the Social Security Administration), 12 (statement of Saunders) (arguing that federal banking agencies have the statutory authority and must regulate to protect affected consumers), and 1 (statement of Williams) (“[A] solution will require involvement by and actions by multiple agencies . . . . The issues presented include unclear and undefined provisions of Federal Law, state laws and judicial processes that may unintentionally produce results conflicting with Federal public policy objectives, and questionable practices by debt collectors. The issues presented also implicate important Federal policy objectives affecting how Federal benefits payments are made . . . .”); B of A Ordered to Pay Millions for Fees for Tapping Direct Deposit Accounts, BNA, Mar. 27, 2007 (noting that damages for the the plaintiff-class were estimated at over 1.3 billion dollars).}
This Note will serve as a comprehensive review of the current, growing problem—focusing on the social security exemption—and will suggest concrete and realistic legislative and administrative changes.

Part I of this Note will review the policy and history behind the federal benefits exemption and the requirement that federal payments be electronically deposited. Part II will briefly discuss the involuntary payments that banks garnish or set-off from a patron’s bank account. Part III will look at conflicting case law through analysis of the divide between Ninth and Tenth Circuit decisions. This section will also review the pending litigation and legal questions at issue in *Miller v. Bank of America*. Finally, Part IV will suggest legislative and administrative actions that must be taken to protect recipients of federal benefits payments.

I. **The Social Security Act Exemption**

In 1935, Congress passed the Social Security Act as a mechanism to protect Americans from the devastating consequences of unemployment and old-age.28 Prior to the passage of the Act, there were only piecemeal approaches to social insurance, such as almshouses and the post-Civil War pension system.29 However, these were entirely inadequate in the face of economic insecurity that ravaged the country in the wake of the Great Depression.30 Grim realities of the Depression shifted popular support and elite attitudes and forced an understanding that the consequences of economic insecurity necessitated comprehensive government action.31 President Franklin Delano Roosevelt, addressing Congress in 1934, proclaimed that it was the federal government’s duty to provide assistance to the country’s neediest citizens.32

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30 See W. Andrew Achenbaum, *Social Security: Visions and Revisions* 16–18 (1986). As banks collapsed, families saw their savings wiped out. *Id.* at 17. Many companies were unable to provide their pension obligations; close to fifty plans covering over 100,000 employees were abandoned between 1929 and 1932. *Id.* Other companies seized money that was tied up in pension funds and applied it to other expenses. *See id.*

31 *See id.* at 13.

32 President Roosevelt, Message to Congress (June 8, 1934), available at http://www.socialsecurity.gov/history/fdrstmts.html#message1.
Roosevelt, “the security of the home, the security of livelihood, and the security of social insurance . . . constitute a right which belongs to every individual and every family willing to work.”\textsuperscript{33} These sentiments were embodied in the Act which provided a comprehensive national response to the plight of the elderly, disabled workers, retirees in need of medical care, and war survivors.\textsuperscript{34}

A. Protecting Basic Subsistence Needs from Creditors

Social security eligibility provides a level of financial stability that is becoming more important as average national savings per person dwindles and an economic recession, which began in 2007, forces families to use their retirement savings for basic necessities.\textsuperscript{35} There are three kinds of social security benefits: Old Age and Survivors Insurance (OASI), Social Security Disability Insurance (SSDI) and Supplemental Security Insurance (SSI).\textsuperscript{36} OASI provides benefits to retired workers and their survivors, SSDI provides benefits for disabled individuals under the retirement age and is calculated based on the individual’s work history and payroll taxes, and SSI is a means-tested program that provides benefits for those who are over the age of 65, blind, or disabled and fit a definition of having low-incomes and few assets.\textsuperscript{37}

\textsuperscript{33} Id.


\textsuperscript{35} See Catherine Rampell, Layoffs Spread to More Sectors of the Economy, N.Y. TIMES, Jan. 27, 2009, at A1 (discussing how massive layoffs are forcing many to use their retirement savings prematurely); Mary Williams Walsh & Tara Siegel Bernard, In Need of Cash, More Companies Suspend 401(k) Match, N.Y. TIMES, Dec. 21, 2008, at A1 (discussing how employers are suspending matching 401(k) contributions as revenues decline because of the recession); Editorial, The Thrift Imperative, N.Y. Times, May 5, 2005, at A34 (discussing how, from 2002 through 2004, the national savings rate was lower than at any time since the Great Depression). The most popular private sector retirement plans are 401(k) retirement plans that are tax-qualified deferred compensation plans. IRS, Tax Topics: 401(k) Plans, http://www.irs.gov/taxtopics/tc424.html (last visited Apr. 2, 2009). The economic recession that began in 2007 caused the value of many investments to drop and prompted many employers to suspend matching contributions; this highlights the unreliable nature of 401(k) plans. See Susan Cornwall, Interview: U.S. Lawmakers to Mull Reforms for Shrunken 401(k)s, REUTERS, Jan. 22, 2009; Burton Frierson, U.S. Economy Faces Heavy Blow from Stocks Funk, REUTERS, Nov. 26, 2008; Walsh & Bernard, supra.


In Title II of the 1935 Act, Congress included a provision against assignment of federal old-age benefits that, at its core, has remained largely unchanged.\textsuperscript{38}

The right of any person to any future payment under this title shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.\textsuperscript{39}

This section—which at the time was numbered section 208 but was later changed to section 207—is not treated in the voluminous legislative history of the 1935 Act.\textsuperscript{40}

In 1983, Congress amended the Social Security Act.\textsuperscript{41} Although most of the amendments were directed towards managing the financing problems faced by the Old-Age, Survivors and Disability Insurance Program (OASDI), there were several minor technical provisions included in the amendments as well.\textsuperscript{42} One of these provisions added subsection (b) to section 207, making it clear that the protections of the assignment provision are not superseded by any other law, including bankruptcy law, unless that law \textit{explicitly} references section 207.\textsuperscript{43}

1959, the full retirement age is 67. Social Security Administration, Retirement Benefits by Year of Birth, \url{http://www.ssa.gov/retire2/agereduction.htm} (last visited Mar. 26, 2009). However, individuals can apply for benefits as early as age 62, although these benefits are reduced a fraction of a percent for each month before full retirement age. \textit{Id.} An individual’s work history and social security taxes are used to calculate eligibility for retirement benefits. \textit{See Soc. Security Admin., How You Earn Credits 1–5} (2008), available at \url{http://www.ssa.gov/pubs/10072.pdf}. Each quarter worked in a year is considered one credit, so long as you earn above the minimum amount for that year. \textit{See id.} at 1, 3. The number of credits needed to retire depends on the person’s age. \textit{See id.} at 3. For example, anyone born in 1929 or later must have worked for a minimum of ten years (or forty credits). \textit{See id.} at 3.


\textsuperscript{39} Id.


\textsuperscript{43} Social Security Act Amendments of 1983, Pub. L. No. 98-21, § 335, 97 Stat. 65, 130. Section 208 of the 1935 Act had been renumbered section 207 by the time of the 1983 Amendments. The addition reads: “[n]o other provision of law, enacted before, on, or after the date of the enactment of this section, may be construed to limit, supersede, or
tory of the Amendments suggests that this revision was made in reaction to the Bankruptcy Reform Act of 1978.\footnote{44} According to a report of the Committee on Ways and Means of the U.S. House of Representatives, some bankruptcy courts were treating social security benefits as income in Chapter 13 bankruptcy cases and were ordering the Social Security Administration (SSA) to send all or a portion of the debtor’s monthly benefit check to the bankruptcy trustee.\footnote{45} The 1983 Amendment thus clarified that Congress considered assignment through bankruptcy proceedings to be unlawful.\footnote{46}

The minimal legislative history of section 207 makes it difficult to discern its scope and purpose. However, given its inclusion in the 1935 Act and the goals of the federal insurance program, courts have interpreted that the purpose of section 207 is to insure that beneficiaries are able to meet basic subsistence needs, despite debts that may be owed to creditors.\footnote{47} In her testimony at the Senate Finance Committee hearings, counsel for the NCLS, cited that the five principle justifications for general exemptions that are commonly put forth by the courts are: 1) to provide the debtor with subsistence funds; 2) to protect the debtor’s dignity; 3) to provide the debtor with the possibility of a fresh start; 4) to protect the debtor’s family; and 5) and “to spread the debtor’s burden from society to his creditors.”\footnote{48} Courts are sensitive to the remedial and humanitarian ends to which exemptions are directed and interpret them liberally across circuits.\footnote{49} For example, in Depart-

\footnote{44}H.R. Rep. No. 98-25, pt. 1, at 82.
\footnote{45}Id.
\footnote{46}Id. This suggested provision in the House bill was not amended by the Senate and the conference agreement thus followed the House bill. H.R. Rep. No. 98–47, at 153 (1983).
\footnote{47}See\textit{ In re Neavear}, 674 F.2d 1202, 1205 (7th Cir. 1982); \textit{Dep’t of Health and Rehabilitative Servs., Fla. v. Davis}, 616 F.2d 828, 831 (5th Cir. 1980). When interpreting statutory construction, courts look at the language of the statute, as well as congressional intent and legislative history. See\textit{ Watt v. Alaska}, 451 U.S. 259, 265–67 (1981).
\footnote{48}\textit{Hearings, supra} note 1, at 3 (statement of Saunders) (citing \textit{In re Johnson}, 880 F.2d 78, 83 (8th Cir. 1989); \textit{N. Side Bank v. Gentile}, 385 N.W.2d. 133, 138–39 (1986) (stating that the Wisconsin article on exemptions was “a humane provision intended to protect persons from sudden calamity, destitution and misery”); see \textit{Alan N. Resnich, Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy}, 31\textit{ Rutgers L. Rev.} 615, 621 (1978); \textit{William T. Vukowich, Debtors Exemption Rights}, 62\textit{ Geo. L.J.} 779, 784–88 (1974).
\footnote{49}\textit{See Hearings, supra} note 1, at 3 (statement of Saunders); see, \textit{e.g.}, \textit{Brown & Bartlett v. United States}, 330 F.2d 692, 696 (6th Cir. 1964) (stating that the circuit favors an interpretation of the Social Security Act that gives effect to its “beneficent” purposes); \textit{Schroeder v. Hobby}, 222 F.2d 713, 715 (10th Cir. 1955) (“The Social Security Act is to be liberally con-
In 1996, Congress passed the Debt Collection Improvement Act (EFT 99), requiring that most federal government payments be electronically transmitted by the start of 1999.55 One of the alleged benefits of this policy as it applies to beneficiaries is that it encourages low-

B. Favoring Electronic Payments

In 1996, Congress passed the Debt Collection Improvement Act (EFT 99), requiring that most federal government payments be electronically transmitted by the start of 1999.55 One of the alleged benefits of this policy as it applies to beneficiaries is that it encourages low-

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50 616 F.2d at 831.
51 Id.
53 See id.
54 See, e.g., Marcus v. Califano, 615 F.2d 23, 29 (2d Cir. 1979) (“The Social Security Act is a remedial statute which must be ‘liberally applied’; its intent is inclusion rather than exclusion.”); Pleasant v. Richardson, 450 F.2d 749, 753 (5th Cir. 1971) (stating that the Social Security Act should be interpreted “in such a manner that its overriding purpose will be achieved, even if the words used leave room for a contrary interpretation”) (quoting Haberman v. Finch, 418 F.2d 664, 666 (2d Cir. 1969)); Conklin v. Celebrezze, 319 F.2d 569, 571 (7th Cir. 1963) (stating that the Social Security Act must be liberally interpreted in order to accomplish its moral purpose); Ewing v. Risher, 176 F.2d 641, 644 (10th Cir. 1949) (stating that a liberal interpretation of the Act should be indulged); Sweeney v. Sec’y of Health, Ed. & Welfare, 379 F. Supp. 1098, 1100 (E.D.N.Y. 1974) (finding that liberal construction of the Social Security Act means that ambiguities should be construed in favor of the plaintiff).
income individuals and the elderly to utilize established banks.\textsuperscript{56} Banks and Automatic Teller Machines (ATMs) are thought to be safe, simple, and accessible for the old-aged and disadvantaged, limiting theft and the opportunities for check-cashing stores to take advantage of these individuals.\textsuperscript{57} However, the major impetus behind EFT 99 was the estimated cost-savings to the federal government.\textsuperscript{58} Sponsors of the bill estimated that the move to mandatory direct deposit could save the federal government almost $195 million each year.\textsuperscript{59} Such savings would be possible because an electronic transfer costs less than two cents to make while government checks can be stolen, forged, or counterfeited.\textsuperscript{60} Although recipients of federal benefits can still receive their checks by mail, the Treasury Department and the federal reserve banks have been pushing hard for this transition and developed a marketing campaign to encourage payees to opt-in to direct deposit.\textsuperscript{61}

The Treasury Department also rolled out Electronic Transfer Accounts (ETAs) in partnership with participating banks and other federally insured financial institutions.\textsuperscript{62} ETAs are advertised as a low-cost and convenient way to receive benefits.\textsuperscript{63} The marketing efforts of the federal government appear to be having their intended effect; in fiscal


\textsuperscript{57} See Dugas, \textit{supra} note 56; Jaffe, \textit{supra} note 56. Check cashing stores are used by individuals who do not have bank accounts, such as poorer immigrants and those with poor credit. See Wyatt Buchanan, \textit{Bank Accounts Put in Reach of Poor, Immigrants}, S.F. Chron., Dec. 4, 2007, at A1. These stores are notorious for charging high fees in exchange for cashing checks. See id. Individuals cashing checks worth $100 to $200 can be charged upward of $30 to $40. See id.


\textsuperscript{59} See id.

\textsuperscript{60} See Jaffe, \textit{supra} note 56. Two cents is far less than the cost of cutting a check and of using the postal system. \textit{Id.} Each year, an estimated sixty-five million dollars are lost because of theft, forgery, and counterfeiting of government checks. \textit{Id.}


\textsuperscript{63} See id. Beneficiaries can remove funds up to four times a month from ETAs and are only charged a maximum of three dollars per month. \textit{Id.}
year 2009, 85.7% of social security recipients and 60.8% of SSI recipients are receiving their monthly benefits payments electronically.\textsuperscript{64}

As testimony at a Congressional Hearing in June 2008 illustrated, however, there were serious oversights made in the implementation of EFT \textsuperscript{99}.\textsuperscript{65} Current law permits non-bank financial service providers (FSPs), such as check cashing companies and payday lenders, to open accounts at established banks for social security recipients and to have benefits checks directly deposited.\textsuperscript{66} The social security recipients, however, do not have control over these funds.\textsuperscript{67} Once the funds are deposited in the accounts, the bank, less a transaction fee, makes the funds available to the non-bank FSP.\textsuperscript{68} The non-bank FSP then deducts additional fees before making the funds available to the beneficiary.\textsuperscript{69} According to testimony of the Inspector General of the SSA, this practice is inconsistent with section 207 and other policies that prohibit assignment-like practices.\textsuperscript{70}

\textbf{II. Debt Collection Procedures}

Bank customers are subject to involuntary payments when the banks “set-off” funds from accounts to cover overdrafts and bank fees.\textsuperscript{71} Account garnishment—when a third party obtains a court order direct-
ing the bank to freeze the funds—is another mechanism through which creditors can force involuntary payments from bank accounts. 72

A. Garnishment

The U.S. Supreme Court has held that garnishment is allowed to enforce post-judgment debts, but not prejudgment garnishment procedures. 73 Even if a creditor obtains a court order before it garnishes a bank account, the debtor is still entitled to due process, although some courts have held that the notice requirement may be satisfied at the same time, or immediately following, the garnishment. 74 To satisfy due process, the notice that garnishment has occurred must list major federal exemptions—such as social security and veterans' benefits—and procedures the debtor can use to contest the order. 75 However, even though notice given to the debtor is required by state law, it is not uniform. 76 According to counsel for OCC, Arizona, Florida, Illinois, and New York have model notices; these list specific exemptions the debtor should be aware of and the procedure for requesting a hearing so that debtors can assert the affirmative defense their exemption provides. 77

In addition, the Federal Consumer Protection Act protects a portion of an individual’s earnings from garnishment. 78 This safeguard is

72 Id. at 113. A debtor’s wages can also be subject to garnishment. U.S. Dep’t of Labor, Employment Law Guide: Wage Garnishment (2007), available at http://www.dol.gov/compliance/guide/garnish.htm (last visited Mar. 26, 2009). A sheriff or other official presents the debtor’s employer with an order that the employer take out a specified amount from the debtor’s paycheck each week until the debt is paid off. Id.

73 See Sniadach v. Family Fin. Corp., 395 U.S. 337, 337–42 (1969). In Sniadach, the petitioner alleged that a Wisconsin statute giving the creditor ten days from service on the garnishee in which to serve summons and complaint on the debtor violated the procedural due process requirements of the Fourteenth Amendment. See id. at 338. Noting the enormous leverage that creditors had on wage earners, the court held that notice and prior hearing were required prior to an in rem seizure of wages. See id. at 341, 342.

74 Nat’l Consumer Law Ctr., supra note 61, at 113.

75 Id. at 113–14.

76 See Hearings, supra note 1, at 2–3 (statement of Williams).

77 See id. at 3. State laws differ on who must provide notice of a debtor’s rights to the debtor. See id. In most states, either the court or a creditor must provide notice. Id. In a minority of states, the bank that has been served with a court order must notify the debtor that their funds have been levied by a creditor. See id.

78 See Consumer Credit Protection Act, 15 U.S.C. §§ 1671–1677 (2000). Congress found that the ability of a creditor to garnish a debtor’s earnings would lead to predatory lending that would interfere with interstate commerce by diverting money towards high interest rates and related fees. See id. § 1671(a)(1). With some limitations, the Act limits the amount of a debtor’s wages that can be garnished to the lesser of twenty-five percent of the debtor’s weekly disposable income or thirty times the federal minimum hourly wage. See id. § 1673(a)(1), (2); In re Kokoszka, 479 F.2d 990, 996–97 (2nd Cir. 1973) (noting that
lost once earnings are deposited in the consumer’s bank account, although many states’ laws either protect certain exemptions after deposit or provide that a minimum amount of money be exempt regardless of its origins. 79 Most of these state protections must be asserted by the debtor as affirmative defenses. 80 However, Pennsylvania and California have taken the initiative to make exceptions to their debt collections procedures where federally-exempt funds are affected. 81 In Pennsylvania, when a debtor uses direct deposit to receive their monthly benefits, state regulations prevent banks from attaching any exempt funds on deposit. 82 California takes a different approach and limits that a minimum amount in each account into which exempt benefits are directly deposited may not be attached. 83

Unlike the examples of California and Pennsylvania, most states require the debtor to go to court and demand the release of the exempt property. 84 Since indigent debtors generally do not have access to legal services or attorneys that are willing to work on small consumer debt cases, an account freeze is the equivalent of losing all of the assets in their account. 85 Additional problems arise when the exempt funds are commingled with nonexempt funds, as happened to Mr. Taliferro. 86 However, most courts hold that exempt funds should be protected if there is commingling—even when deposited into accounts with non-exempt funds—so long as the funds are traceable. 87

Congressional intent was to ensure that debtors could take home enough pay so that they could meet basic needs and avoid bankruptcy).

79 See Usery v. First Nat’l Bank, 586 F.2d 107, 107–08 (9th Cir. 1978) (holding that banks do not have an affirmative duty to determine a debtor’s right to an exemption and to calculate its amount under the Act). The Consumer Credit Protection Act allows states to make their own laws more restrictive, reflecting Congressional intent to maximize the protection of debtors. 15 U.S.C. § 1677(1).

80 Hearings, supra note 1, at 3 (statement of Williams).

81 Id.

82 Id.

83 Id. at 3–4. In California, a debtor must go to court and request an exemption for funds in the account in excess of the statutory minimum. See id. at 4. California law specifies the minimum as $2425 for individual accounts and $3650 for joint accounts. Id. at 3–4.

84 See NAT’L CONSUMER LAW CTR., supra note 61, at 115.

85 See Hearings, supra note 1, at 4 (statement of Saunders) (“The effect of a freezing of exempt funds is thus—generally—a full taking of these funds, because rarely does the recipient have the wherewithal to pursue the process of claiming the exemptions.”).

86 See Hearings, supra note 1, at 2–3 (statement of Taliferro). Commingling of funds occurs when the debtor’s account contains both exempt and nonexempt funds. See id. at 4 (statement of Saunders).

87 See id. at 4 (statement of Saunders) However, other courts reason that exempt funds lose their special status when they are commingled with nonexempt funds. See Cotton States Mut. Ins. Co. v. Citizens & S. Nat’l Bank, 308 S.E.2d 199, 203 (Ga. Ct. App. 1983)
There are some banks that look at accounts to determine if the funds in them are exempt, a process that is made easier by the fact that accounts into which federal benefits are deposited are either marked by the computer programs of most financial institutions or clearly have funds deposited into them from the Treasury Department.\(^\text{88}\) Despite what appear to be easy measures, the majority of banks ignore any signs that there are exempt funds, choosing instead to freeze the account.\(^\text{89}\) These banks argue that it is too costly and time consuming to check the account.\(^\text{90}\) This has been further confused and aided by the SSA’s interpretation of garnishment procedures as the agency implies that the exemption is merely a defense.\(^\text{91}\)

**B. Bank Set-Offs**

State statutes and common law generally allow banks to set-off customer funds without first notifying the customer.\(^\text{92}\) A “set-off” refers to a fee that a bank debits from a customer’s account for debts that the customer owes to the bank, such as late-fees and overdrafts.\(^\text{93}\) Unless a statute provides otherwise, banks are not required to notify customers of this practice either in the documents that the customer signs when opening the account or the transaction documents creating the customer obligation giving right to the set-off.\(^\text{94}\)

Some banks even require that the account holder release them of any claims that might arise from the bank exercising its right to a set-off.\(^\text{95}\) These fees that the bank applies are expensive and dispropor-

\(^{88}\) See Hearings, supra note 1, at 4–5 (statement of Saunders).

\(^{89}\) See id. at 4.

\(^{90}\) See Nat’l Consumer Law Ctr., supra note 61, at 116; Hearings, supra note 1, at 4–5 (statement of Saunders).

\(^{91}\) See Hearings, supra note 1, at 4 (statement of Kelsey).

\(^{92}\) See Nat’l Consumer Law Ctr., supra note 61, at 116.

\(^{93}\) See id.

\(^{94}\) See id.

\(^{95}\) See Park View Federal Savings Bank, Deposit Account Agreement, https://www.parkviewfederal.com/deposit.asp (last visited Mar. 26, 2009). The Park View Federal Savings Bank based in Ohio is an example of one bank that has tried to limit its liability in this manner. Id. The relevant portion of the Deposit Account Agreement reads:
tionate to what should be considered equitable. When accounts are frozen, banks will normally charge a fee, anywhere from $100 to $150, that is taken from the assets in the accounts. If an account is frozen, checks, electronic transfers for utilities and rent, and ATM debits that have been drawn on the account will be returned for insufficient funds. Each time these are returned, the account is charged anywhere from $25 to $30 as a penalty or Not Sufficient Funds (NSF) fee. In her testimony before the Senate Finance Committee, counsel for the NCLS advocated that these fees assessed against beneficiaries be limited to the actual cost of the expense incurred. The organization argued that it was contrary to public policy to ask taxpayers to subsidize recipients so that they could avoid destitution, only to have banks charge onerous fees and profit at taxpayers’ expense.

C. Changes in Debt Collection Practices Exacerbate the Problem

Technology and the proliferation of a market for consumer debt have exacerbated garnishment and set-off of exempt funds by making the collection process less individualized and subject to a higher rate of error. Collection agencies purchase debts for pennies on the dollar and pursue debtors relentlessly. They often misrepresent the size of

RIGHT OF SET-OFF—Each signer agrees that we may (without prior notice and when permitted by law) set off the funds in this account against any due and payable debt owed to us now or in the future, by any signers having the right of withdrawal, to the extent of such persons’ or legal entities right to withdraw. If the debt arises from a note, “any due and payable debt” includes the total amount of which we are entitled to demand payment under the terms of the note at any time we set off, including any balance the due date for which we properly accelerate under the note. This right of set-off does not apply to this account if: (a) it is an Individual Retirement Account or other tax-deferred retirement account, or (b) the debt is created by a consumer credit transaction under a credit card plan, or (c) the debtor’s right of withdrawal arises only in a representative capacity. The Bank will not be liable for the dishonor of any check when the dishonor occurs because we set off a debt against this account. The signers agree to hold the Bank harmless from any claim arising as a result of the Bank exercising its right of set-off.

Id.

96 See Nat’l Consumer Law Ctr., supra note 17, at 47.
97 Id.
98 Id.
99 See Hearings, supra note 1, at 7 (statement of Saunders).
100 See id.
101 See Hearings, supra note 1, at 4 (statement of Williams).
the debt, contact friends and relatives of the debtor, make threatening
phone calls, and neglect to investigate claims by the debtor that the
debt is no longer valid.103

Many of these agencies inundate small claims courts with collection
actions that have incorrect names or addresses for the debtor.104 Often
debtors will not receive action of the notice against them or will not
recognize the debt as theirs and will fail to show up in court, result-
ing in default judgments.105 Once a judgment has been obtained, debt
collectors send out mass e-mails to banks demanding that any funds of
the debtor be seized in satisfaction of the judgment.106 Demands will be
sent to financial institutions even if the collection agency does not have
knowledge that the debtor has an account with that bank, or that the
funds in the account aren’t exempt under state or federal law.107 Even
if a debtor can prove that the seized funds are exempt, debt collectors
can obtain another court order levying against the same account de-
spite not having a reasonable basis for believing that the status of the
funds in the account has changed.108 According to the FDIC, this “can
present significant consumer hardships, and [it is] particularly daunt-
ing for elderly and disabled recipients of federal benefits payments.109

III. HOW EXEMPT ARE EXEMPT FUNDS?: JUDICIAL INTERPRETATION
OF SECTION 207

The Senate Finance Committee held the “Frozen-Out” hearings in
response to the increased scrutiny that banks are coming under as
more and more federal beneficiaries—those who are most at risk for

103 Id. Judith Guillet’s experience is representative. See id. Guillet, a retired nurse on
full disability who has never owned a car, received a credit card bill for $2300 that had
charges from gas stations on it. Id. Even though she was able to convince the bank that the
charges were false, because the bank turned the debt over to a collection agency, her bank
account was frozen after the collection agency received a court order. Id.
104 See Hearings, supra note 1, at 4 (statement of Williams).
105 Id.
106 Id.
107 Id. In his testimony at the hearing, Mr. Tyler explained how creditors in New York
can issue information subpoenas with restraining notices on local banks without going to
court. See id. at 5 (statement of Tyler). Debt collection firms can easily serve every bank in
the state to locate a debtor’s account. Id. These firms serve banks with CD-ROM disks con-
taining the names and social security numbers of thousands of judgment debtors. Id.
108 Id. at 5. Because technology has lowered the costs associated with issuing restraints,
creditors repeatedly try to freeze the account in the hope that the debtor’s circumstances
have changed (that is, that the debtor has returned to work or commingled his account). Id.
at 6.
109 See Hearings, supra note 1, at 5 (statement of Williams).
being easily taken advantage of—find themselves forced to pay disproportionate penalties from funds that Congress intended to make exempt. The tension between the opinions of the Ninth and Tenth Circuits discussed below highlight a rift in case law as courts interpret social security legislation against a modernized, electronic marketplace. The conflicting decisions of the Ninth and Tenth Circuits will be persuasive in Miller v. Bank of America, a pending case that, regardless of its outcome, promises to spur Congress to legislate and the SSA to regulate on the issue.

A. A Circuit Split on Whether Set-Offs Are “Other Legal Processes”

The Tenth Circuit held in Tom v. First American Credit Union that a bank’s equitable right of set-off was encompassed by section 207’s “other legal processes,” and that the bank violated the Social Security Act when it seized the contents of a plaintiff’s account. In 1989, the Tom plaintiff opened an account with First American Credit Union and signed a credit plan agreement. The agreement authorized the bank to seize the funds in her account without prior notice if she failed to make payment when due. In 1994, the bank notified plaintiff that it was planning to deduct $2379.20 from her account for past due loan payments that the plaintiff and her late husband had accrued. Over the plaintiff’s objections, the bank seized the $1769 from her account.

In its analysis, the court relied on Philpott v. Essex County Welfare Board in which the Supreme Court held that a state welfare board could not collect a beneficiary’s social security benefits as reimbursement for the welfare benefits that it had extended to that resident. The Philpott

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110 See id. at 1–2 (statement of Baucus) and 1 (statement of Sen. Chuck Grassley, S. Fin. Comm.)
111 See Ana I. Torres-Davis & Ryan McNew, Banks Seizing Social Security Benefits: Read the Fine Print on Account Agreement, AARP National Legal Training Project 1 (on file with author).
112 See Tom v. First Am. Credit Union, 151 F.3d 1289, 1291–94 (10th Cir. 1998).
113 Id. at 1290.
114 Id. at 1290–91.
115 Id. at 1291.
116 Id. These funds consisted entirely of social security and Civil Service Retirement funds. Id.
117 See 409 U.S. 413, 414–17 (1973). At issue in Philpott was a New Jersey law that required, as a condition of receiving welfare from the state, that potential beneficiaries execute an agreement promising to pay back the welfare board should the recipient subsequently acquire sufficient real or personal property. Id. at 414–15. Wilkes, whose account was being held in trust by plaintiff Philpott, was awarded retroactive social security benefits. Id. at 415. The welfare board sued to reach the $1864.20 in retroactive payments. Id.
court noted that section 207 imposed a broad bar against the use of any legal process to reach social security benefits, and that this bar applied to all claimants, even a state.\textsuperscript{118}

The court in \textit{Tom} refused to distinguish the legal process at issue in \textit{Philpott} from the bank set-off, stating it could see no reason why Congress would “choose to protect Social Security beneficiaries from creditors who utilized the judicial system, a system that is built upon principles of fairness and protection of the rights of litigants, yet, on the other hand, leave such beneficiaries exposed to creditors who devised their own extra-judicial methods of collecting debts.”\textsuperscript{119} According to the court, the agreements signed by the plaintiffs in both cases were contracts of adhesion designed to enable creditors to attach social security payments.\textsuperscript{120} Construing “other legal processes” to apply only to judicial processes, and not set-offs, ran counter to the intent of the Social Security Act.\textsuperscript{121} Because the Supreme Court refused to carve out an exception to section 207 that would enable a state to defray the costs of supporting its indigent residents, the court could not reason how the private interest of a bank trying to recover on bad-debt was any more tolerable.\textsuperscript{122} The court concluded that set-off fell into the category of “other legal processes” for purposes of section 207, and that the bank violated federal law when it seized plaintiff’s assets.\textsuperscript{123}

The first major Ninth Circuit opinion to look at what constituted a legal process within the definition of section 207 came in \textit{Crawford v. Gould}.\textsuperscript{124} The question on appeal was whether section 207 preempted the state practice of psychiatric hospitals using social security benefits to offset the costs of patient care.\textsuperscript{125} The plaintiffs in the case were patients that had been involuntarily committed at state psychiatric hospitals in California.\textsuperscript{126} At the time, it was state practice for the hospitals to maintain hospital trust accounts for patients into which assets prior to admission and those acquired after admission were held.\textsuperscript{127} Soon after

\begin{footnotesize}
\textsuperscript{118} Id. at 417.
\textsuperscript{119} See \textit{Tom}, 151 F.3d at 1292.
\textsuperscript{120} Id.
\textsuperscript{121} See \textit{id.}
\textsuperscript{122} See \textit{id.} In addition to relying on \textit{Philpott} in support of this reading, the court also cited \textit{Bennett v. Arkansas}, in which the Supreme Court rejected Arkansas’s argument that section 207 should allow the state to recover federal funds from prisoners to help offset the cost of imprisonment. See \textit{id.}; Bennett v. Arkansas, 485 U.S. 395, 397–98 (1988).
\textsuperscript{123} See 42 U.S.C. § 407(a) (2000); \textit{Tom}, 151 F.3d at 1293.
\textsuperscript{124} \textit{Crawford v. Gould}, 56 F.3d 1162, 1163–68 (9th Cir. 1995).
\textsuperscript{125} Id. at 1163.
\textsuperscript{126} Id.
\textsuperscript{127} Id. at 1163–64.
\end{footnotesize}
admission to the hospital, patients were required to sign an “Authorization for Deposit and Withdrawal,” that allegedly allowed the hospitals to deposit their assets into a fund.\(^{128}\) State and government benefits, including social security payments, were then deposited into these accounts while these patients were institutionalized.\(^{129}\) Even if the patients never gave authorization, California psychiatric hospitals still followed the deposit and withdrawal procedures, although they provided the non-consenting patients with a “Notice of Informed Withdrawal.”\(^{130}\) As soon as the patients’ personal assets in the funds exceeded $500, the hospitals applied the excess as reimbursement for patient care and maintenance.\(^{131}\)

The *Crawford* court relied on the Ninth Circuit’s opinion in *Brinkman v. Rahm*, in which the court held that the procedures at issue were inconsistent with section 207 and were therefore preempted by it.\(^{132}\) In *Brinkman*, patients were involuntarily committed to Washington state mental institutions and were liable to the hospitals for the cost of their care.\(^{133}\) The *Crawford* court compared the process in Washington with that in California and found that the similarity of the procedures required the court to conclude that California’s process also was inconsistent with section 207, and therefore preempted by it.\(^{134}\) Although California urged the court that “other legal processes” as set forth in section 207 should apply only to judicial processes, the court refused this interpretation, citing a Second Circuit opinion on a similar set of facts.\(^{135}\) In that opinion, the court indicated that section 207 applied

\(^{128}\) *Id.*

\(^{129}\) *Crawford*, 56 F.3d at 1164.

\(^{130}\) *Id.* This “Notice of Informed Withdrawal” informed patients of the amount that the hospitals would be withdrawing from their trust accounts. *Id.* Both this notice and the Authorization for Deposit and Withdrawal advise patients that they have the right to appeal the withdrawals from their hospital accounts. *Id.*

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

\(^{132}\) *Id.*; *Brickman v. Rahm*, 878 F.2d 263, 265 (9th Cir. 1989). The Ninth Circuit applied *Bennett* to arrive at its holding. See *Brickman*, 878 F.2d at 265.

\(^{133}\) See *Brickman*, 878 F.2d at 264.

\(^{134}\) *Crawford*, 56 F.3d at 1166.

\(^{135}\) See *id.* The *Crawford* court distinguished the California process from one that was in place in New York. See *id.* In New York, the State Office of Mental Health deducted the cost of care from institutionalized mental patients’ accounts, including accounts containing social security benefits. See *Fetterusso v. New York*, 898 F.2d 322, 328 (2nd Cir. 1990). While the court in *Fetterusso* stated it had no basis for concluding that the patients did not voluntarily agree to use their social security benefits to pay care and treatment costs, the plaintiffs in *Crawford* did not consent to apply social security benefits to the cost of their care. See *Crawford*, 56 F.3d at 1166; *Fetterusso*, 898 F.2d at 328.
not only to formal judicial proceedings, but also to express or implied threats or sanctions.\textsuperscript{136}

However, in 2002, in \textit{Lopez v. Washington Mutual Bank} the usually plaintiff-friendly Ninth Circuit reversed course and issued an opinion that eroded the protections it had established in \textit{Crawford}.\textsuperscript{137} The American Association of Retired Persons criticized the holding in \textit{Lopez} as devastating social security beneficiaries and providing sweeping concessions for the banking industry.\textsuperscript{138} The issue in \textit{Lopez} was whether a bank could collect on overdrafts and overdraft fees without contravening the meaning of section 207.\textsuperscript{139} The plaintiffs received directly deposited social security funds into their Washington Mutual accounts.\textsuperscript{140} Prior to opening their accounts, plaintiffs executed account agreements.\textsuperscript{141} These agreements had provisions for overdraft fees that allowed the bank to set-off any overdrafts and penalties against their accounts, and read that notice only be provided after the set-offs were made.\textsuperscript{142} All plaintiffs had overdrawn on their accounts and the bank used their social security payments to satisfy their debts.\textsuperscript{143}

The \textit{Lopez} court acknowledged that it had broadly construed the phrase “other legal processes” in \textit{Crawford}, but it refused to allow that holding to control the “free market banking” arrangement it said was at issue.\textsuperscript{144} According to the court, by voluntarily opening an account, signing an agreement that outlined the terms and agreements of the bank’s overdraft policies, and then establishing direct deposit for their benefits, the plaintiffs consented to the bank using each deposit after an overdraft to be treated as a voluntary payment applied against the amount due.\textsuperscript{145} The court distinguished the two cases based on the voluntary nature of the relationship in \textit{Lopez}.\textsuperscript{146} The plaintiffs could choose to remove their assets from the bank’s reach by closing their accounts or changing their direct deposit instructions.\textsuperscript{147}

\begin{thebibliography}{99}
\bibitem{136} See \textit{Crawford}, 56 F.3d at 1166.
\bibitem{137} See \textit{Lopez v. Wash. Mut. Bank}, 302 F.3d 900, 900–08 (9th Cir. 2002).
\bibitem{138} See \textit{Torres-Davis \\& McNew, supra} note 111, at 5.
\bibitem{139} See \textit{Lopez}, 302 F.2d at 900.
\bibitem{140} \textit{Id.} at 902.
\bibitem{141} \textit{Id.}
\bibitem{142} \textit{Id.}
\bibitem{143} \textit{Id.} at 903.
\bibitem{144} See \textit{Lopez}, 302 F.3d at 903–04.
\bibitem{145} See \textit{id.} at 904.
\bibitem{146} \textit{See id.} The court noted that the plaintiffs in \textit{Crawford} were involuntarily committed, incompetent to handle their personal affairs, and were required by state law to deposit all of their liquid assets into funds administered by the hospitals. \textit{See id.}
\bibitem{147} \textit{See id.}
\end{thebibliography}
determined that it “is sufficient and ‘meaningful’ consent for the recipient to have executed the account agreement which notified him of the bank’s standard practice of using deposits to cure overdrafts and then to have provided the bank with a deposit to apply in such a fashion.”

The *Lopez* court accepted the bank’s argument that the relationships that beneficiaries maintain with banks are similar to the relationships they maintain with other everyday creditors such as grocers and landlords. Precluding beneficiaries from using their direct deposits to satisfy payments of overdrafts would discourage banks from dealing with these individuals and would run contrary to the intent of Congress in encouraging electronic payments of benefits.

The court in *Lopez* relied on voluntary consent to legitimize the seizing of federally-exempt benefits. However, the bank agreements did not have provisions explicitly stating that overdrafts and related fees would be taken from the plaintiff’s government benefits. This logic leads to the conclusion that beneficiaries who use direct deposit at financial institutions have voluntarily waived their rights under section 207. In essence, they have consented to have their benefits seized should the bank maintaining their deposits determine that the individual owes overdraft fees or NSF fees to the bank. It is unreasonable to maintain that Congress intended for the elderly and disabled, some of society’s neediest and most susceptible to fraud and usury, to be able to waive their rights to statutorily-exempt funds.

**B. Miller v. Bank of America**

In March 2007, the California Supreme Court granted review in *Miller v. Bank of America*, a case emblematic of the controversy surrounding the extent of section 207’s protections. Although the case was brought in state court and involved mostly state law claims, the questions of law implicated are fundamentally similar to those in *Lopez* and

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148 See id. at 905. The court noted that its holding in *Lopez* would create a tension with the Tenth Circuit in *Tom* and attempted to distinguish the two cases on the facts. See id. at 906. In *Tom*, the social security deposits were used to satisfy separate debts unrelated to the plaintiff’s deposit account whereas here the court found that the depositor consensually arranged for an automatic payment of debts owed to the bank. See id.

149 See *Lopez*, 302 F.3d at 905.

150 See id.

151 See Torres-Davis & McNew, supra note 111, at 5.

152 See id.

153 See *Lopez*, 302 F.3d at 906.

The case concerned a class of over one million Bank of America customers that maintained checking or savings accounts with the bank into which social security or other government benefits were directly deposited. The facts and supporting testimony given in the case by plaintiffs’ experts illustrates the demographics that are most often injured by current banking practices. Banks know their customers and have tailored account practices so that patrons living paycheck-to-paycheck or whose livelihood solely consists of government benefits are more likely to overdraw their accounts and provide profitable fees for the banks.

1. Background

The plaintiff representing the class, Paul Miller, had been a bank customer since 1978 and began receiving SSI benefits after a head injury in a physical assault in 1989 left him with a permanent mental disability. In 1994, Mr. Miller agreed to have his monthly benefit checks, generally $670.40, electronically deposited into his account after the bank’s staff assured him that his funds would be safe, secure, and accessible. However, in 1998 the bank erroneously credited his account $1799.83 and Mr. Miller, thinking that the money was a retroactive adjustment on his monthly payments, spent the funds. Without giving Mr. Miller prior notice, the bank reversed the credit and because there were insufficient funds in his account to repay the bank, the bank seized his monthly social security deposit and applied it against the outstanding balance.

During trial, counsel for the plaintiff presented the testimony of an expert in social security demographics to illustrate just how necessary federal and state benefits are to recipients’ daily existence. The

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156 See Miller, 2004 WL 3153009, at *1.

157 See id. at *5–6.

158 See id. at *7–10.

159 Id. at *2.

160 See id.

161 See Miller, 2004 WL 3153009, at *3.

162 See id. at *4.

163 Id. at *5–6. In California, approximately one in eight residents receives social security benefits, representing a total payout by the government of approximately $3.6 billion each month. Id. at *5. Out of the 4.3 million individuals that receive social security benefits
expert’s testimony also explained that beneficiaries using direct deposit are a significant source of profit for banks.\textsuperscript{164} Eighty-six percent of those receiving social security benefits in California have the funds directly deposited into their accounts.\textsuperscript{165} Each month, the bank receives $800 million in funds transferred into the 1,079,414 California Bank of America accounts into which benefits are directly deposited\textsuperscript{166} The expert also testified that over fifty percent of class members had a disability and had difficulty understanding quantitative information in printed material.\textsuperscript{167} This suggested to the trial court that most class members had difficulty understanding the terms of their account agreements and their monthly bank statements.\textsuperscript{168} Even though customers who receive direct deposit benefits are some of society’s neediest, they are a significant source of profit for the bank each month, a reality that the bank has tailored its practices to exploit.\textsuperscript{169} The class members’ checking accounts contribute some $92 million of profit annually to Bank of America, and every month the bank collects $3 to $4 million in penalties from their accounts.\textsuperscript{170} The practice that the bank follows to collect on overdrafts includes a fee for each debit to an overdrawn account, not to exceed $160 per day.\textsuperscript{171} The overdrafts and their resultant fees are assessed against any assets that are later deposited into the account, regardless of their source.\textsuperscript{172} The bank also processes checks, ATM withdrawals, and other debits from largest to smallest so that accounts will be overdrawn more quickly and will incur the maximum penalties allowed.\textsuperscript{173}

in California, 1.1 million receive SSI, those benefits that are reserved for the extremely low-income elderly, blind, or disabled. \textit{Id.}

\textsuperscript{164} See \textit{id.} at *5–6.

\textsuperscript{165} \textit{Id.} at *6. Sixty-nine percent of those receiving SSI have those funds directly deposited into their bank accounts. \textit{See id.}

\textsuperscript{166} \textit{Miller, 2004 WL 3153009, at *6.}

\textsuperscript{167} \textit{Id.}

\textsuperscript{168} \textit{See id.}

\textsuperscript{169} \textit{See id. at *8–10.}

\textsuperscript{170} \textit{See id. at *10–11.} Plaintiff’s expert estimated that between August 1994 and December 2003, Bank of America collected $284,385,741 in NSF fees from class members. \textit{Id.} at *11.

\textsuperscript{171} \textit{Miller, 2004 WL 3153009, at *8.} When Bank of America chooses to overdraw an account, it creates a debit in favor of the bank. \textit{See id.} The bank will then try to recover the funds by seizing any incoming deposits regardless of their source. \textit{See id.}

\textsuperscript{172} \textit{Id.}

\textsuperscript{173} \textit{See id.} This is because the larger debits are more likely to overdraw an account, thereby rendering the smaller debits more likely to trigger additional NSF fees. \textit{Id.}
2. The Court of Appeals Reverses the Superior Court and Finds Benefits Are Not Protected

The Superior Court held for the plaintiff class, finding that there was sufficient evidence to show that Bank of America violated state law. The court ordered a temporary injunction and allowed a jury award of $284,384,741 in restitution and $1000 in damages for each of the estimated 1.3 million class members. Although this case arose in the Ninth Circuit, because it was brought in state court, the Superior Court determined that *Lopez* did not require a finding of federal pre-emption. The judge also noted that the Ninth and Tenth Circuits were at odds on the issue of whether the seizure of electronically deposited federal benefits was in violation of section 207. Because the *Lopez* court based its holding on voluntary consent, the Superior Court judge made a finding that there was insufficient evidence of an actual agreement between the class members and the bank. In none of the banks’ marketing materials did it state that it would set-off government benefits, nor did it explain that under federal law these benefits are exempt from “other legal processes.”

On appeal, the California Court of Appeals considered only the question of whether a bank acts illegally if it uses electronically deposited benefits to satisfy overdrafts and related debits owed to the bank when balancing a checking account. The Superior Court relied heavily on the California case, *Kruger v. Wells Fargo Bank*, and held that this case could be extended to prohibit a bank from clearing overdrafts and debiting NSF fees from a deposit account into which government benefits are directly deposited. In *Kruger*, the Supreme Court of California found that a bank could not use a customer’s checking account, into which only government benefits were deposited, to satisfy mature debts owed to that same bank due to the customer’s debt on her credit card. Although the statutory exemption at issue did not directly apply to the bank’s right of set-off, the Superior Court in *Miller* court felt

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174 Id.
175 *Consumer Protection: Court Reaffirms $1 Billion Jury Verdict Against BOA over Social Security Funds*, BNA, Oct. 18, 2004. Attorneys’ fees to plaintiffs and pre-judgment interest, estimated at $88,313,386, were also awarded. Id.
176 See *Miller*, 2004 WL 3153009, at *29.
177 See id. at *29–30.
178 See id. at *31.
179 See id. at *8.
180 See *Miller*, 51 Cal. Rptr. 3d at 225.
181 See id. at 229.
that public policy required it to extend the right of exemption to the set-off at issue.\textsuperscript{183}

The Court of Appeals, however, found that the bank set-off in \textit{Miller} was not sufficiently like that in \textit{Kruger} because the account being debited was the same on which the debt was incurred.\textsuperscript{184} The practice used by Bank of America, although it implicated the legislative preferences at issue in \textit{Kruger}, did not “present the same risk of circumventing the exemptions of public benefit funds from attachment and execution” as were at issue in \textit{Kruger}.\textsuperscript{185} The court relied on \textit{Lopez} to illustrate that a bank could use customer funds regardless of their source for internal balancing of the account.\textsuperscript{186} An analysis of legislative history in California showed that legislation was passed one year after \textit{Kruger} to impose notice requirements and other conditions on a bank’s right to set-off independent debts.\textsuperscript{187} The court reasoned that the different treatment for overdrafts and bank charges indicated the “Legislature’s view that internal account balancing is different from the practice of setting-off separate debt against a deposit account, does not implicate the same considerations, and does not warrant the same legal treatment.”\textsuperscript{188} The court refused to extend \textit{Kruger}, stating that the task of regulating the banking industry in which so many stakeholders and their practices were implicated was for the legislature, not the court.\textsuperscript{189}

\textsuperscript{183} See \textit{Miller}, 51 Cal. Rptr. 3d at 229–30.
\textsuperscript{184} See id. at 230–32.
\textsuperscript{185} See id. at 230–31. The court acknowledged that the practice used by Bank of America imposed a hardship on low-income clients, but that the propriety and legality of the practice were not issues raised on appeal. See id.
\textsuperscript{186} See id. at 231–32. The court highlighted the reasoning that distinguished \textit{Lopez} from \textit{Tom} on the basis that the “loan obligation [in \textit{Tom}] was ‘a separate, pre-existing debt unrelated to the operation of the depositor’s checking account,’ and there was no indication the depositor had ever consented to pay that debt from his independent checking account.” Id. The court found this distinction consistent with “the accepted meaning of set-off, which has traditionally been defined to mean a counterdemand ‘growing out of an independent transaction.’” See id. at 231–32 (quoting \textit{Black’s Law Dictionary} 1404 (8th ed. 2004)).
\textsuperscript{187} See id. at 232. “Section 864 of the [California] Financial Code requires a bank to give an account holder notice when it exercises any setoff for a debt, and an opportunity for the account holder to claim an exemption if the debt is not owing or the funds are exempt.” Id. However, if a bank obtains the customer’s advanced written consent, it does not have to adhere to these restrictions. See id.
\textsuperscript{188} See \textit{Miller}, 51 Cal. Rptr. 3d at 232–33.
\textsuperscript{189} See id. at 233. Several U.S. agencies and interest groups representing the banking industry weighed in on behalf of the defendant with amici curiae briefs. The Supreme Court of California heard oral argument for this case on April 7, 2009.
III. CLARIFYING THE PROHIBITIONS OF SECTION 207

There are several solutions that agencies, stakeholders, and policymakers have proposed that can help untangle what is an imbroglio of state and federal law, agency inaction, and business interests.190 These solutions must be combined in a cohesive regulatory effort to ensure that the purposes of the Social Security Act and section 207 are realized, uniform regulations are implemented, and that federal benefits will not be threatened by creditors.

A. Congress Must Have Intended for Section 207 to Apply to Garnishment and Bank Set-offs

The SSA and other federal regulatory agencies must recognize that they have an affirmative duty to ensure that banks and other creditors cease satisfying debts with federally-exempt funds.191 Although the legislative history of section 207 is bare, one can infer from the remedial nature of the Social Security Act that its exemptions should be liberally construed and should be interpreted to affect garnishment procedures and bank set-offs.192 During the Senate Finance Committee hearings in 2007, Senator Baucus did not hesitate in expressing his opinion that section 207 trumps state law in order to protect federal benefits.193 The Supremacy Clause of the U.S. Constitution is explicit: where there is a conflict between state and federal law, federal law prevails.194

Under the analysis for conflicts preemption, preemption will be found if compliance with both state and federal law prove impossible.195 If state laws permit banks and other creditors to attach and set-

190 See Hearings, supra note 1, at 9–11 (statement of Kelsey), 7–9 (statement of Sanders) and 10–12 (statement of Williams).
191 See 42 U.S.C. § 407(a)–(b) (2000). At the hearing, Senator Baucus expressed his frustration with federal banking regulators and the draft guidance they had issued prior to the hearing. See Hearings, supra note 1, at 2 (statement of Baucus).
192 See Dep’t of Health and Rehabilitative Servs., Fla. v. Davis, 616 F.2d 828, 831 (5th Cir. 1980); Schroeder v. Hobby, 222 F.2d 713, 715 (10th Cir. 1955); Mayers v. N.Y. Community Bankcorp, Inc. No. CV-03–5837, 2005 WL 2105810, at *15–17 (E.D.N.Y. Aug. 31, 2005) (refusing to dismiss plaintiff’s claim that New York state statute is preempted by section 207).
193 See Hearings, supra note 1, at 2 (statement of Baucus) (“Even if a state court wants a bank to freeze Social Security or other protected funds, the bank should not do so, because Federal law bans such garnishment.”).
194 See U.S. Const. art VI, § 2.
195 See id.; see, e.g., English v. Gen. Elec. Co., 496 U.S. 72, 79 (1984) (“[S]tate law is preempted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal
off the funds that Congress has specifically marked as exempt, a creditor’s action and the court’s compliance with that creditor is inconsistent with the intent of section 207.\textsuperscript{196} Congress added section 207 to provide a minimum level of protection for beneficiaries.\textsuperscript{197} Thus, section 207 sets a baseline; states can only legislate in this area if they are willing to provide more protection.\textsuperscript{198} This encourages states to experiment with different ways of protecting a beneficiary’s exempt assets.\textsuperscript{199} As mentioned, California and Pennsylvania have already taken the lead in fashioning specific protections that ensure some level of relief will be available to their citizens.\textsuperscript{200}
The FDIC expressed a preference at Senate Finance Committee hearings that language be inserted into section 207 making preemption explicit before they take action and regulate. The FDIC recommended that Congress amend section 207 and clarify the specific protections that are provided by adding language that the section is intended as an absolute bar against attachment, levy, or other legal processes. The FDIC has also suggested that Congress require specific accounting practices for accounts into which federally-exempt funds are directly deposited on a regular basis and that it cap the fees banks charge beneficiaries in the legislation itself.

Certainly Congress could make its intent more explicit in the legislation, but this should not be a prerequisite to action by the federal agencies. This cautious approach ignores the realities of legislative inaction and the need for those agencies with the most information and expertise—the SSA and the federal banking regulators—to provide necessary guidance. Asking Congress to go through the political process necessary to amend section 207 would be politically arduous and could limit the scope of section 207 if additional language narrowing the exemption was inserted into the bill in order to reach political compromise. The specific changes originally advocated by the FDIC are not the material of legislative amendments, but are best left to the

201 See id. at 10 (statement of Kelsey). The FDIC now favors rulemaking by the SSA and the Treasury Department as the best solution. Hearings II, supra note 1 (statement of Steve Fritts, Assoc. Dir., Risk Mgmt. Policy and Examination Support Branch, Div. of Supervision and Consumer Prot., Fed. Deposit Insurance Corp.).

202 Hearings, supra note 1, at 10 (statement of Kelsey).

203 See id.


205 See Gonzaga Univ. v. Doe, 536 U.S. 273, 292 (2002) (agency decision-making is product of expertise, uniformity, and wide-spread consultation); United States v. Craft, 535 U.S. 274, 287 (2002) (Legislative “inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change”) (quoting Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (1994)); cf. Commodity Futures Trading Comm’r v. Schor, 478 U.S. 833, 845 (1986) (“An agency’s expertise is superior to that of a court when a dispute centers on whether a particular regulation is ‘reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes’ of the Act the agency is charged with enforcing; the agency’s position, in such circumstances, is therefore due substantial deference.”).

agencies that are responsible for the day-to-day oversight of the federal exemption.

B. The Social Security Administration Must Clarify Congressional Intent Through Regulation

As the agency responsible for oversight of the Social Security Act, the SSA has the statutory authority and expertise to promulgate rules that clarify the rights of beneficiaries and the intent of Congress. The SSA is responsible for the implementation, oversight, and enforcement of its regulations promulgated under the Act and must effectively issue guidance for banks, creditors, and courts to follow. At a minimum, the SSA must revise the current regulations that imply that section 207 is to be raised as an affirmative defense. Raising the federal exemption as an affirmative defense harms beneficiaries and necessitates the need for social resources and legal advice that is not always readily available to indigent clients. Section 207 was clearly intended to bar action by banks and creditors in the first instance, without forcing beneficiaries to rely on it as an affirmative defense.

C. Federal Banking Agencies Must Take Action

Federal banking agencies must act to promulgate regulations that protect federally-exempt funds from garnishment and set-off. When

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207 Hearings II, supra note 1 (statement of Fritts); see Hearings, supra note 1, at 7–8 (statement of Saunders).
209 See Hearings, supra note 1, at 11 (statement of Williams).
210 See id. at 4 (statement of Kelsey ) and 6–7 (statement of Williams).
211 See Dennis W. Archer, Op-Ed., Legal System That Aids Society's Poor in Need Itself, San Antonio Express-News, Jan. 31, 2004, at 11B (discussing how politicians fail to provide adequate resources for legal services); Henry Weinstein, Legal Aid to the Poor Falls Short, L.A. Times, Nov. 21, 2002, at A1 (discussing how the number of lawyers providing services for the poor is declining as need for them grows). Studies have shown that seventy to eighty percent of the legal needs of the indigent are not met. See Archer, supra.
212 See 42 U.S.C. § 407(a). According to the FDIC, this formal rulemaking by the SSA would give banks the legal authority necessary to interpret the guidelines. Hearings, supra note 1, at 11 (statement of Williams).
213 See Hearings, supra note 1, at 7–9 (statement of Saunders). The agencies that must cooperate to ensure that uniform guidelines are issued include the FDIC, OCC, Treasury
federal agencies act within the scope of their congressionally delegated authority, state law is effectively preempted to the extent that it is incompatible with federal regulations. When analyzing the preemptive effect of federal agency action, a narrow focus on intent is inappropriate. Federal agencies have considerable latitude to promulgate rules so long as their actions are not arbitrary or capricious.

To the extent that there is any uncertainty among financial institutions and courts surrounding the scope of section 207, the banking agencies must offer guidance prohibiting the attachment or set-off of federally-exempt benefits. As counsel for NCLS explained during the 2007 Senate Finance Committee hearings, the federal banking agencies already provide guidance preempting and interpreting state law for their regulated institutions. The OCC and the OTS have issued directives preempting state laws in the areas of predatory mortgage lending, electronic deposits, and foreclosures. In fact, according to testimony at the hearing, the five agencies responsible for banking regulations recently offered guidance on predatory mortgage lending that was not grounded in any particular federal law, but was considered by these agencies as a necessary means of protecting consumers.

Department, Board of Governors of the Federal Reserve System, and the National Credit Union Administration.

214 See Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 694–709 (1984) (finding application of a state’s advertising ban preempted by Federal Communications Commission regulations); Fidelity Fed. Sav. & Loan Ass’n v. De la Cuesta, 458 U.S. 141, 154 (1982) (stating that courts will not disturb an agency’s regulations if the “choice represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute”). In fact, even agency orders and letters have been found to preempt state law in narrow circumstances. See Fidelity, 458 U.S. at 154.

215 See Hearings, supra note 1, at 8 (statement of Saunders)

216 See Chevron, 467 U.S. at 842–43. If a federal statute is silent or ambiguous, the court must determine whether the agency’s interpretation is based upon a permissible construction of the statute. See id. at 843. Where “Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.” Id. at 843–44. These agency regulations are given “controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” Id. at 844. If the legislative delegation to an agency on a particular question is implicit, a court “may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” Id.

217 See Hearings, supra note 1, at 8 (statement of Saunders). The FDIC has stated that the SSA and Treasury Department, “as the agencies responsible for implementation and interpretation of these benefits program, . . . are in the best position to address the garnishment exemption issue.” See Hearings II, supra note 1 (statement of Fritts).

218 See Hearings, supra note 1, at 7 (statement of Saunders).

219 See id.

220 Id.
At the hearing, the FDIC and OCC indicated their willingness to work together with Congress and the other federal banking regulators to explore possible solutions to the problem. In November 2007, the five agencies overseeing banking regulations requested public comment on best practices for handling garnishment orders and set-offs where federally-exempt funds are affected. At a later hearing in June 2008, the Treasury Department expressed its willingness to lead a joint inter-agency effort to find a regulatory solution to the problem. While it appears that these agencies are taking a first step, they must actively consider creative ways to ensure that beneficiaries are no longer the victim of creditors. The ultimate regulation must require that one of three alternatives be implemented. The agencies could mandate that federally-exempt funds be deposited into a separate account that only holds exempt funds. These could be offered at no cost to the account holder so long as he or she maintains an additional checking account with that financial institution. These accounts could easily be flagged as only containing exempt funds so that, upon the receipt of court orders, bank employees would know that these funds could not be attached or set-off. An alternative would be to set a minimum amount in the customer’s account that could not be set-off or garnished while the customer’s legal rights were being resolved, as in California. Finally, the banking regulators could require that all banks

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221 See id. at 12 (statement of Kelsey) and 8–9 (statement of Williams). In 2007, the FDIC formed an interagency working group that issued proposed guidance for banks to use when faced with garnishment orders. See Hearings II, supra note 1 (statement of Fritts).


223 See Hearings II, supra note 1 (statement of Gary Grippo, Deputy Assistant Sec’y for Fiscal Operations, U.S. Dep’t of the Treasury). Mr. Grippo, said that the interagency solution could include “provid[ing] guidance to financial institutions that follow the guidance and allow recipients access to funds.” Id.

224 At the June 2008 hearing, Mr. Grippo expressed that any solution must ensure that recipients of federal benefits have access to at least some of their funds while the garnishment order is being adjudicated and the value of exempt and non-exempt funds are determined. See Hearings II, supra note 1 (statement of Grippo). Mr. Grippo explained that “[t]he model used to establish the appropriate amount of funds excluded from an account freeze would need to be developed based on an analysis of benefit payment amounts and the ability of financial institutions to implement it without complex accounting or research.” Id.

225 See Hearings, supra note 1, at 10 (statement of Kelsey).

226 See id at 10 (statement of Kelsey) and 5 (statement of Saunders).

227 See id. at 5 (statement of Saunders).

228 See id. at 10 (statement of Kelsey) and 6 (statement of Saunders). According to testimony at the April 2008 hearing, a compromise regulation is forthcoming that proposes a similar solution. See Hearings II, supra note 1, at 14–15 (statement of Margot Saunders,
accepting direct deposits of federally-exempt funds apply a simple “First In Last Out” accounting system. 229 In this system, exempt funds would be considered to be both the first deposited and the last withdrawn on any given day. 230

The banking regulators must also cap overdraft and NSF fees that banks charge so that they reflect the actual costs of doing business. 231 The fees that the banks assess against frozen accounts are not based on the actual costs to the bank of doing business and result in a windfall to the banking industry. 232 Otherwise, banks are effectively making money off of the taxpayers that provide a portion of their earnings to help needy individuals like Mr. Taliaferro avoid destitution. 233

Conclusion

Millions of Americans rely on direct deposit for receipt of their monthly federal benefits. Many of these individuals will find themselves the victim of a bank set-off or attachment at some point. Each day, individuals like Mr. Taliaferro and Mr. Miller are forced to fight creditors with far greater resources. Congress never intended for these individuals to be deprived of the subsistence funds that our country has prom-

Counsel, Nat’l Consumer Law Ctr.). This regulation would ensure that once receiving an order to freeze an account, a bank would:

1. Review the electronic deposits made into the account in the previous 30 to 45 days (called the “look-back period”), to determine whether any are accompanied with the electronic designation for federally exempt funds.
2. If there are any exempt funds deposited into the account, then the total amount of exempt funds deposited within the look-back period will be multiplied by a factor . . . .
3. The multiplied sum of exempt funds will be considered the protected amount—this amount of money will always be kept safe from freezing or attachment or garnishment, regardless of the flow of money into and out of the account.
4. Funds in the account which are in excess of the multiplied sum will be frozen and held pursuant to state law for disposition.
5. The recipient will be free to seek to protect all exempt funds over the protected amount using the standard state court procedure.
6. No garnishment fees assessed by the bank can be taken from the protected amount.

Id. at 15.

229 See id. at 5 (statement of Saunders).
230 See id. at 5 (statement of Saunders).
231 See supra note 1, at 7.
232 See id; Miller, 2004 WL 3153009, at *6–11.
233 See Miller, 2004 WL 3153009, at *6–11; Hearings, supra note 1, at 7 (statement of Saunders).
ised them, and it certainly could not have foreseen the opprobrious
debt collection practices and inequitable fees of creditors and banks
when it enacted section 207. As the testimonies at the 2007 Senate Fi-
nance Committee hearings and the *Miller* decision make certain, the
magnitude of the problem requires that the federal government take
immediate action to ensure that those most in need of protection have
access to their federal benefits in order to honor the purpose of sec-
tion 207.234

234 *See Hearings, supra* note 1, at 1–2 (statement of Baucus), and 7–9 (statement of
Saunders).
PUTTING POVERTY IN MUSEUMS: STRATEGIES TO ENCOURAGE THE CREATION OF THE FOR-PROFIT SOCIAL BUSINESS

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Abstract: In Creating a World Without Poverty, Muhammad Yunus introduces the social business model which aims to provide a social benefit, not just a monetary profit. This model is distinct from a typical non-profit charity because investors expect to eventually recover their financial contributions to the social business. Yunus describes the Danone Communities mutual fund’s ability to protect the company from liability to shareholders for lack of a monetary profit while simultaneously providing food to malnourished children in Bangladesh. This Comment examines two different successful social business structures and argues that companies have yet to embrace this innovative model due to a lack of clear guidelines for this type of business in United States corporate law. The enactment of mutual fund regulations encouraging the creation of this for-profit sustainable social business would allow it to be very successful in reducing poverty.

Introduction

I firmly believe that we can create a poverty-free world if we collectively believe in it. In a poverty-free world, the only place you would be able to see poverty is in the poverty museums. When school children take a tour of the poverty museums, they would be horrified to see the misery and indignity that some human beings had to go through.

—Muhammad Yunus

The traditional capitalist business model is often criticized because of its over-emphasis on profit maximization. Even before the 2008 re-

2 See, e.g., Martin Wolf, The Mortality of the Market, 138 FOREIGN POL’Y 47, 47 (explaining that the market economy is criticized for its encouragement of greedy behavior which arguably results in global inequality); Sheridan Prasso, Saving the World with a Cup of Yogurt, FORTUNE, Feb. 19, 2007, at 98 (explaining Yunus’s belief that “[m]any of the problems in
cession, over thirty-seven million people in the United States were living below the poverty line.\(^3\) Some argue that this is a direct result of business’ obsession with profits.\(^4\) Recognizing a social duty, various organizations are embracing a business model that focuses on a social benefit, instead of the wealth of a few.\(^5\) Thus, it is time to embrace a new model that works within the capitalist system, but also addresses the pitfalls of the standard business model which exacerbates poverty.\(^6\)

Muhammad Yunus, winner of the 2006 Nobel Peace Prize and founder of Grameen Bank, introduces such a business model in his book, *Creating a World Without Poverty.*\(^7\) In 1976, Yunus established Grameen Bank with the goal of alleviating poverty by extending credit to the poor through microcredit financing.\(^8\) His belief that poverty is a threat to peace and human rights inspired him to pioneer this new type of banking.\(^9\) In 2000, world leaders pledged to reduce poverty by half by 2015; nonetheless, most observers do not believe this goal will be met.\(^10\) Yunus argues, however, that if the typical models of capitalist

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4 See, e.g., Frederic L. Pryor, *The Future of U.S. Capitalism* 82–111 (2002) (discussing capitalism’s role in the increasing income inequality in the United States); Prasso, *supra* note 2, at 98 (explaining Yunus’s view that poverty exists because of the focus on profitability and wealth in the current capitalist system); Ghalib & Hossain, *supra* note 2, at 5 (arguing that capitalism’s obsession with wealth has created economic inequality worldwide).


7 See id.; Yunus, *supra* note 1, at 267.

8 See Yunus, *supra* note 6, at 49; Hadley Rose, *The Social Business: The Viability of a New Business Entity Type*, 44 Willamette L. Rev. 131, 131 (2007). His bank has been self-reliant since 1995. Yunus, *supra* note 6, at 51. This can be attributed in part to the 98.5% payback rate. See id.


10 Yunus, *supra* note 6, at 4. The UN partially attributes this lack of progress to war and high food prices. See Dep’t of Econ. & Soc. Affairs, *The Millennium Development Goals Report 2008*, at 6–9 (2008). Nonetheless, Bangladesh, where Yunus has focused his efforts, is on track to reduce poverty by half or more by 2015. See Yunus, *supra* note 6, at 4.
banking and business evolve to fit the social needs of society, this goal will be achieved.\footnote{See \textit{Yunus}, supra note 6, at 48–52. Yunus argues that proper oversight can cause globalization to help, not hinder, the alleviation of poverty. \textit{Yunus}, supra note 1, at 273–74.}

Through Grameen, Yunus spearheaded the microcredit movement, which provides small collateral-free loans to poor villagers.\footnote{See \textit{Yunus}, supra note 1, at 268–69. Microcredit describes small, low-interest, collateral-free loans that are given to the poor in order for them to start for-profit businesses. \textit{Yunus}, supra note 6, at 68.} Yunus founded the bank and began giving these loans primarily to poor women, which remains Grameen’s primary project.\footnote{Rose, supra note 8, at 131. These villagers are required to form small groups for support and help with business decisions. \textit{Yunus}, supra note 6, at 57. Additionally, the Bank requires borrowers to attend weekly meetings where they handle repayments and applications and receive business guidance. \textit{Id.} at 58.} To ensure that it produces desired social results, each of these debtors is required to adhere to Grameen’s “Sixteen Decisions.”\footnote{See \textit{Yunus}, supra note 6, at 58–59. The Sixteen Decisions:}

\begin{enumerate}
  \item The four principles of Grameen Bank—Discipline, Unity, Courage, and Hard Work—we shall follow and advance in all walks of our lives.
  \item We shall bring prosperity to our families.
  \item We shall not live in dilapidated houses. We shall repair our houses and work towards constructing new houses as soon as possible.
  \item We shall grow vegetables all the year round. We shall eat plenty of them and sell the surplus.
  \item During the plantation season, we shall plant as many seedlings as possible.
  \item We shall plan to keep our families small. We shall minimize our expenditures. We shall look after our health.
  \item We shall educate our children and ensure that they can earn to pay for their education.
  \item We shall always keep our children and the environment clean.
  \item We shall build and use pit latrines.
  \item We shall boil water before drinking or use alum to purify it. We shall use pitcher filters to remove arsenic.
  \item We shall not take any dowry at our sons’ weddings; neither shall we give any dowry in our daughters’ weddings. We shall keep the center free from the curse of dowry. We shall not practice child marriage.
  \item We shall not inflict any injustice on anyone; neither shall we allow anyone to do so.
  \item For higher income we shall collectively undertake bigger investments.
  \item We shall always be ready to help each other. If anyone is in difficulty, we shall all help.
  \item If we come to know of any breach of discipline in any center, we shall all go there and help restore discipline.
  \item We shall take part in all social activities collectively.
\end{enumerate}

\textit{Id.} at 58–59. While requiring adherence to the Sixteen Decisions may seem coercive, it has helped fulfill the goals of the bank and expand its social benefit. See \textit{id.} at 58–60.
success; sixty-four percent of borrowers that have been with the bank for more than five years have emerged from poverty.\footnote{\textit{See id.} at 52. Grameen has adjusted to changing markets and current events. \textit{See id.} at 62–63, 65. It evolved from “Grameen I” to “Grameen II” as a result of large-scale loan defaults caused by the worst flood in Bangladesh history. \textit{See id.} at 62–65. This involved a significant increase in the amount of savings at Grameen Bank and an increase in flexibility with loans (such as more options with loan repayment). \textit{Id.} at 62–63. First, the ordinary, income-generated loan terms (the original) is offered at twenty percent interest. \textit{Id.} at 63. There is also an eight percent housing loan, and a student loan that has a zero percent interest rate during the study period and a five percent rate after degree completion. \textit{Id.} at 65. Finally, there is a “struggling member” loan that is granted to the very poorest members, usually about fifteen dollars to carry small merchandise when they are begging. \textit{Id.} Currently, Grameen loans to over seven million poor people in seventy-eight thousand villages in Bangladesh. \textit{Id.} at 51. Additionally, ninety-seven percent of their borrowers are women. \textit{Id.} Yunus claims that Grameen has achieved this success because he is not a trained banker, and thus thinks outside the normal constraints. \textit{See id.} at 48, 77. Accordingly, he built a system around the poor, instead of trying to fit them into the current one. \textit{See id.}}

Yunus has expanded on his success with microcredit to explore how business can benefit society as a whole.\footnote{\textit{See id.} at 77–82. Grameen Bank has expanded into a twenty-five unrelated for profit and not-for-profit companies that all work toward the same mission of alleviating poverty. \textit{Id.} at 78–80. The most recent of these companies is Grameen Danone, a model of the new social business theory. \textit{See id.} at 79, 161–62.} The model of a social business, which Yunus focuses on in his book, is one which provides a social benefit, rather than just a monetary profit.\footnote{\textit{Id.} at 28. He also introduces another social business model which is owned by the poor. \textit{See id.} at 28. This creates a social benefit through its ownership because any profit gained will benefit those in need. \textit{Id.} at 28–29. Grameen Bank is this second type of social business: ninety-four percent of its shares are owned by the borrowers, all of whom are below poverty level. \textit{Id.} at 30.} In this model, the poor will not necessarily own the company, but a social benefit will arise from the nature of the business.\footnote{\textit{Id.} at 28–29.} Investors will not make a donation, nor will they financially profit.\footnote{\textit{See \textsc{Yunus}, supra note 6, at 22–23.} \textit{Id.} at 22.} Instead, they will eventually recoup their initial investment.\footnote{\textit{Id.} at 22.} This allows any other profit to contribute to the expansion of the business to make it self-sustaining and increase the positive social results.\footnote{\textit{See id.} at 22.} Consequently, Yunus’s social business model is distinct from a charity because there is full cost recovery for investors.\footnote{\textit{See id.} at 22. For example, the mission of Yunus’s new Grameen Health program, “is to establish \textit{sustainable} best practices in a broad range of health care services for a broad market including the poor.” \textit{Press Release, Grameen Health, New Venture Extending the Success of the Principles of Microcredit to Health Care Delivery and Medical Research}}
because most human beings are not only profit driven but are also motivated by their good-will and compassion.\textsuperscript{23} Therefore, social businesses are necessary in order to allow entrepreneurs to address all sources of motivation, such as poverty or the environment.\textsuperscript{24}

This social business model is distinct from all other current, common corporate philanthropic practices.\textsuperscript{25} It has a more specific mission than social entrepreneurship because the latter may include any "economic or non-economic, for-profit or not-for-profit" initiative to help society.\textsuperscript{26} Additionally, social businesses are unlike the common practice of corporate social responsibility.\textsuperscript{27} Frequently, corporate social responsibility initiatives have some sort of financial benefit for the business through the establishment of goodwill, as companies attract consumers and investors by demonstrating that they are providing a service to the community at large.\textsuperscript{28} Investors will choose to invest in a social business, however, as a result of its unique social benefits, not because of a potential profit.\textsuperscript{29}

In the United States, most corporations have yet to practice social businesses because of the flexible and unclear nature of corporate law.\textsuperscript{30} Although corporate law does not bar the creation of these types

\begin{footnotes}
\item[23] See Yunus, supra note 6, at 37. According to Yunus, most of the world’s societal problems are caused by the restrictions on motivations in capitalist business, as they do not allow for any “political, emotional, social, spiritual, [or] environmental dimensions.” Yunus, supra note 1, at 271.
\item[24] See Yunus, supra note 1, at 271; Ghalib & Hossain, supra note 2, at 2.
\item[25] See Yunus, supra note 6, at 16–17, 32–34.
\item[26] Id. at 32.
\item[27] See id. at 16–17.
\item[28] See id. at 16 (referring to corporate social responsibility as “mere window dressing”). Corporate social responsibility is viewed as good practice because “[i]t is an aspect of taking care of a company’s reputation, managing its risks and gaining a competitive edge.” Do It Right, Economist, Jan. 19, 2008, at 24. Moreover, corporations often practice the double or triple bottom line, through which they acquire a social benefit while still maximizing profits. See Yunus, supra note 6, at 170. According to Yunus, companies who practice it are either trying to satisfy corporate guilt or are attempting to create support and publicity for their company. Id. at 171.
\item[29] See id. at 16 (referring to corporate social responsibility as “mere window dressing”).
\end{footnotes}
of businesses, very few established companies have created them.\textsuperscript{31} This innovative business model could have a widespread, positive effect on communities affected by poverty.\textsuperscript{32} The hesitancy, however, has prevented the self-sustaining social business model from thriving.\textsuperscript{33}

This Comment will examine Yunus’s social business model and the hesitancy of companies to adopt it. Part I will provide a detailed account of Yunus’s first social business and its social objective, business model, structure, and current success. Part II will show how the flexibility in corporate law in the United States has made the social business model less attractive for companies. Specifically, it will examine the current state of directors’ liability to shareholders for duty of care and duty of loyalty claims and how the lack of social businesses results from the absence of clear standards or guidelines for this type of business in corporate law. Furthermore, Part III will discuss two successful examples of social businesses and how they are structured in response to the flexibility of corporate law in this area. Finally, Part IV will advocate for clear mutual fund regulations to encourage the creation of this type of business. The for-profit sustainable social business could be very successful at eliminating poverty; however, clear, practical guidelines are necessary before they will be successful on a grand scale.\textsuperscript{34}

I. GRAMEEN DANONE: A SOCIAL BUSINESS EXPERIMENT

A. Grameen Danone’s Mission

As a result of poverty, Bangladeshi children do not have access to sufficient nutrition.\textsuperscript{35} Recognizing this problem, Yunus’s first attempts to implement the social business model came in the form of Grameen Danone, whose mission is “to bring daily healthy nutrition to low income, nutritionally deprived populations in Bangladesh and alleviate poverty through the implementation of a unique proximity business

\textsuperscript{32} See Yunus, supra note 1, at 268.
\textsuperscript{33} See Kerr, supra note 31, at 667; Milbrandt, supra note 30, at 429; Katie Hafner, Philanthropy Google’s Way: Not the Usual, N.Y. Times, Sept. 14, 2006, at A1 (explaining that there are many skeptics of the unique nature of the social business model).
\textsuperscript{34} See Yunus, supra note 1, at 274–75.
\textsuperscript{35} See UNICEF, Bangladesh Statistics, http://www.unicef.org/infobycountry/bangladesh_bangladesh_statistics.html#44 (last visited Apr. 14, 2009). Forty-eight percent of children under five in Bangladesh are moderately to severely underweight. Id. Moreover, forty-three percent suffer from moderate to severe stunting. Id.
model.” This joint venture between Grameen Bank and Groupe Danone is not a corporate social responsibility project because it is not “a project of a profit-maximizing business with a charitable veneer.” Instead, it is a social business with the specific social objective of providing Bangladeshi children access to nutritious yogurt on a daily basis. The business maintains its financial viability in order to create new opportunities for the poor, while still selling its yogurt at a very low price for accessibility. Additionally, to adhere to the social business model, Grameen Danone operates under a “proximity business model,” which eliminates the chain of distribution as a result of local manufacturing and consequently promotes employment in the region. Accordingly, Groupe Danone’s CEO and Yunus opted to build a small localized factory because of the social benefits for the local community.

In order to maximize the social benefit, any profit beyond the cost of capital will be reinvested to allow for an expansion of the social benefit, a plan consistent with Yunus’s model. Moreover, Groupe Danone will supply half of the initial $1.1 million funding and reinvest almost all of the profits to expand the social benefit. It predicts a two

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36 Press Release, Groupe Danone, Launching of Grameen Danone Foods Social Business Enterprise (Mar. 16, 2006) (on file with author); see Yunus, supra note 1, at 273. Malnutrition and poverty contribute to each other: “[P]overty brings with it severe health consequences, trapping the poor into a vicious cycle of sickness . . . [h]igh costs of health services make the poor even poorer.” Ghalib & Hossain, supra note 2, at 8.

37 Yunus, supra note 6, at 145. Groupe Danone and Grameen Bank partnered to create this social business. See Groupe Danone, supra note 36 (“The Grameen Group and Groupe Danone entered into a 50–50 joint venture agreement effective March 16, 2006, to form a company called the Grameen Danone Foods Social Business Enterprise in Bangladesh.”).

38 See Yunus, supra note 6, at 144. Grameen Danone’s Memorandum of Understanding specifically states that it will “help children of Bangladesh grow strong, thanks to tasty, nutritious food and beverage products they can consume every day, so that they can have a better future.” Id. (quoting Grameen Danone’s Memorandum of Understanding).

39 See id.; Ghalib & Hossain, supra note 2, at 12.

40 See Yunus, supra note 6, at 133 (noting that the yogurt would be sold in neighborhoods within less than forty-eight hours of its production, thus eliminating costs of shipping and refrigeration).

41 See id. at 139. Depending on the success of this first small factory, Grameen Danone plans to construct up to fifty similar factories throughout Bangladesh. Id. The first small plant was constructed in Bogra and received its supplies from the surrounding area. Id. at 139–40, 157. Also, all employees of the factory are local villagers and the yogurt is distributed by Bangladeshi women in various villages. Id. at 149, 151, 152, 157. As a result of the local distribution model, Danone entrusts all of the management to the local factory. Rose, supra note 8, at 151.

42 See Yunus, supra note 6, at 172–73.

43 Id. at 144.
to three percent rate of return on its investment, leaving some doubt as to whether investors will receive any return from this business.\textsuperscript{44}

\textbf{B. \textit{Groupe Danone’s Social Business Mutual Fund}}

\textit{Groupe Danone’s} CEO recognized the contradiction between this lack of return to shareholders and \textit{Groupe Danone’s} profit-maximization purpose.\textsuperscript{45} He was faced with a question of how to adhere to the stated purpose of \textit{Danone} while also investing in a social business.\textsuperscript{46} Accordingly, the \textit{Groupe Danone} board of directors decided to legally separate Grameen Danone from \textit{Groupe Danone} and create an “autonomous entity with its own specific shareholders” instead of a hybrid business model.\textsuperscript{47} This would solve the shareholder problem while still providing for a small monetary profit for \textit{Groupe Danone}.\textsuperscript{48}

To create this entity, \textit{Groupe Danone} created a mutual fund with a specific social mission and gave shareholders the option to join it.\textsuperscript{49} Thus, \textit{Groupe Danone} can clearly explain to investors that the fund

\begin{footnotesize}
\textsuperscript{44} See \textit{id.}; Interview by Danone Communities with Emmanuel Faber, Executive Vice-President, \textit{Groupe Danone} (Feb. 26, 2008), available at http://www.danonecommunities.com/?p=157 [hereinafter Interview with Emmanuel Faber]. In \textit{Yunus}, supra note 6, at 22. This one percent dividend shows \textit{Danone’s} partial ownership of Grameen Danone through the figure on its balance sheet. See \textit{id.} In response to a question about this dividend, \textit{Danone’s} Executive Vice-President stated that “[t]he one thing that is very clear is that the societal objective of all these projects supersedes any other objective.” Interview with Emmanuel Faber, supra.

\textsuperscript{45} See Interview with Emmanuel Faber, supra note 44. Specifically, \textit{Groupe Danone’s} Articles of Association do not set out any social objective. See \textit{GROUPE DANONE, ARTICLES OF ASSOCIATION ART. 2, available at http://media.corporate-ir.net/media_files/irol/95/95168/cg/Statuts_5MAI2008_en.pdf.}

The purpose of the company, whether directly or indirectly, shall be:

\begin{itemize}
\item Industry and trade relating to all food products;
\item The performance of all and any financial transactions and the management of all and any transferable rights and securities, listed or unlisted, French or foreign, the acquisition and the management of all and any real estate properties and rights.
\end{itemize}

\textit{Id.}

\textsuperscript{46} See \textit{Yunus}, supra note 6, at 169–70. \textit{Danone’s} Executive Vice-President stated that he was forced to grapple with the question: “[To] what extent do I have the shareholders’ mandate to invest, to involve myself or to let my company get involved in civil society?” Interview with Emmanuel Faber, supra note 44.

\textsuperscript{47} Interview with Emmanuel Faber, supra note 44.

\textsuperscript{48} \textit{Id.}; see \textit{Yunus}, supra note 6, at 170–71.

\textsuperscript{49} \textit{Yunus}, supra note 6, at 171. The title of the mutual fund is \textit{Société d’Investissement à Capital Variable, SICAV danone communities}. \textit{Id.}
\end{footnotesize}
only has a social benefit and no monetary dividends.\(^{50}\) To invest in the Danone Communities Fund (“Danone Communities”), Groupe Danone investors opt to receive a “social dividend,” which gives them shares in the fund, instead of a cash dividend from Groupe Danone.\(^{51}\) In this model, the pure social benefit and the lack of monetary return are immediately clear to shareholders.\(^{52}\) Ninety percent of funds in Danone Communities will be invested in money market instruments and ten percent will be invested in social businesses, which provide no return.\(^{53}\) Through this method, Danone Communities shareholders will have a near market yield on their investment and consequently have the capacity to support a number of social businesses.\(^{54}\)

This new fund is popular because of its unique model and has protected the company from liability, as well as created a new role for the banker because of its social focus.\(^{55}\) Even though Yunus and the Executive Vice-President of Danone were concerned about this new and unique concept being approved by the Securities and Exchange Commission (SEC) and its French equivalent, Autorité des Marchés Financiers (AMF), it was classified as a “social business development fund” and listed on both the French and U.S. financial markets.\(^{56}\) Danone Communities is underwritten and managed by a leading French bank, Crédit Agricole, and over thirty percent of Groupe Danone’s employees have opted to partially invest in it.\(^{57}\) Additionally, by creating this separate mutual fund, Groupe Danone is protected from shareholders who do not believe that this social benefit fulfills the purpose of the company.\(^{58}\)

\(^{50}\) See id. at 171–72; Ghalib & Hossain, supra note 2, at 3. The Executive Vice-President describes this as saying to shareholders: “We propose, if you like, that you invest all or some of your dividend for a social and societal mission that is closely interlinked with the company’s processes.” Interview with Emmanuel Faber, supra note 44.

\(^{51}\) See id. at 171–72.

\(^{52}\) See id. at 171–72. The Investment Company Act of 1940 and the Securities Act of 1933 require funds to have a prospectus to make their purpose clear to investors. See 15 U.S.C. § 77j(a) (2006); id. § 80a–24. Thus Danone Communities fulfilled this regulation by specifying this social benefit. See Yunus, supra note 6, at 171–72.

\(^{53}\) Yunus, supra note 6, at 171.

\(^{54}\) See id.

\(^{55}\) See id.; Interview with Emmanuel Faber, supra note 44 (explaining that Danone Communities needed to be a separate entity from Groupe Danone because of its shareholders).


\(^{57}\) Yunus, supra note 6, at 173.

\(^{58}\) See Interview with Emmanuel Faber, supra note 44.
Thus, Groupe Danone created this mutual fund to adhere to its original business purpose while still working towards eliminating poverty.\textsuperscript{59}

II. SOCIAL BUSINESSES AND POTENTIAL LIABILITY

Most companies considering creating a social business have the same hesitancy as Groupe Danone.\textsuperscript{60} Thus, while social businesses are not necessarily barred by law, they are not as popular as not-for-profit charities because of the unclear and flexible nature of corporate law.\textsuperscript{61} This flexibility protects directors that believe their decisions are in the best interest of their business.\textsuperscript{62} However, a lack of clear corporate law standards also causes directors to adhere to traditional business models and avoid new ideas, such as social businesses.\textsuperscript{63}

A. Business Judgment Rule Protection

Although directors are nervous about possible duty of care liability because of the lack of a clear social business model, United States courts generally remove themselves from business decisions.\textsuperscript{64} Conse-

\textsuperscript{59} See Yunus, supra note 1, at 275; Prasso, supra note 2, at 101.

\textsuperscript{60} See, e.g., Kerr, supra note 31, at 667 (explaining the misconception that “current laws do not protect socially outward looking decisions”); Ghalib & Hossain, supra note 2, at 12 (stating that “[d]oubts were raised as to how long [Grameen Danone] would be able to run operations ‘for social benefit’ alone, without reaping maximum profits”); Interview with Emmanuel Faber, supra note 44 (discussing Danone’s fear of not adhering to its business purpose).

\textsuperscript{61} See Michael D. Gottesman, Comment, From Cobblestones to Pavement: The Legal Road Forward for the Creation of Hybrid Social Organizations, 26 YALE L. & POL’Y REV. 345, 346 (2007) (explaining that despite the recent interest in the social business, very few commentators have proposed solutions to current regulations to allow for this type of business).

\textsuperscript{62} See Kerr, supra note 31, at 636.

\textsuperscript{63} See Gottesman, supra note 61, at 346, 351–58 (explaining the lack of models or regulations for this type of business model to follow).

\textsuperscript{64} See Kamin v. Am. Express Co., 383 N.Y.S.2d 807, 810–11 (Sup. Ct. 1976); Yunus, supra note 6, at 169–70; Gottesman, supra note 61, at 350–51. The duty of care claim ensures that “directors exercise the care that a person in a like position would exercise under similar circumstances.” See DENIS J. BLOCK ET AL., 1 THE BUSINESS JUDGMENT RULE 109 (5th ed. 2005). Courts, however, generally adhere to the principle that “[t]he director’s room rather than the courtroom is the appropriate forum for thrashing out purely business questions which will have an impact on profits, market prices, competitive situations, or tax advantages.” Kamin, 383 N.Y.S.2d at 810–11; see also In re The Walt Disney Co. Derivative Litig., 907 A.2d 693, 698 (Del. Ch. 2005), aff’d 906 A.2d 27 (Del. 2006) (“The redress for failures that arise from faithful management must come from the markets, through the action of shareholders and the free flow of capital, and not from this Court.”). The rationale behind this principle follows that “[s]hould the [c]ourt apportion liability based on the ultimate outcome of decisions taken in good faith by faithful directors or officers, those decision-makers would necessarily take decisions that minimize risk, not maximize value.
quently, directors and boards have a significant amount of flexibility in their decision making process. This principle is indoctrinated in the business judgment rule, which represents “a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.” It helps to ensure that directors maintain a business-centric attitude and adhere to a deliberate decision making process. Thus, the established standard to receive relief under a business judgment rule claim is gross negligence, making liability for duty of care very infrequent.

Directors who desire to create a social business will therefore be protected by the business judgment rule as long as they are informed in their decision making process. This rule only asks if there was a proper procedure followed to reach the decision and does not evaluate the decision itself. The business judgment rule furthers the policy of leaving business decisions in the boardroom. Thus, the concern of liability for a social business as a result of a breach of the director’s duty of care is unfounded unless there is some sort of gross negligence. Although the

. . . . [T]he Delaware corporation would cease to exist, with disastrous results for shareholders and society alike.” Disney, 907 A.2d at 698.

65 See Kamin, 383 N.Y.S.2d at 810–12; Kerr, supra note 31, at 635–39 (explaining that directors have significant independence in their decisions, despite the traditional director duties). Additionally, this flexibility is important because shareholder derivatives suits against directors’ judgment are timely and pricey. See Greenbaum v. American Metal Climax, 278 N.Y.S.2d 123, 130 (Sup. Ct. 1967). As a result, “[shareholders] are required to set forth something more than vague general charges of wrongdoing . . . conclusory allegations of breaches of fiduciary duty are not enough.” Id. at 130–31.

66 Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (establishing this presumption as the business judgment rule in Delaware common law). “Questions of policy of management . . . are left solely to [directors’] honest and unselfish decisions, for their powers therein are without limitation and free from restraint, and the exercise of them for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient.” Pollitz v. Wabash R. Co., 100 N.E. 721, 724 (N.Y. 1912). As a result of the business judgment rule, to establish liability for a breach of duty of care, the plaintiff must overcome the presumption that the directors acted with due care and then the burden will shift to the directors to prove they acted in an informed manner. Block, supra note 64, at 110–11.

67 See Smith v. Van Gorkom, 488 A.2d 858, 872–73 (Del. 1985) (reaffirming the business judgment rule). Although the Van Gorkom decision has been criticized, the decision still demonstrates the limits on court intervention in the board room. See Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 947 (Del. 2003) (Steele, J., dissenting).

68 See Van Gorkom, 488 A.2d at 873; Aronson, 473 A.2d at 812.

69 Van Gorkom, 488 A.2d at 872, 873; Aronson, 473 A.2d at 812.

70 Block, supra note 64, at 21–22.

71 See Pollitz, 100 N.E. at 724; Kamin, 383 N.Y.S.2d at 810–11.

72 See Van Gorkom, 488 A.2d at 873.
business judgment rule protects directors in their informed decisions, because of the lack of clear guidelines, directors are still nervous to stray from the traditional model, especially one that attempts to change the focus of the business away from its profit-making mission.\textsuperscript{73}

B. The Business Purpose Question

While the business judgment rule can protect the directors from a duty of care violation, it will not protect them from liability in a duty of loyalty breach if they were not acting in the best interest of their shareholders—consequently, directors may hesitate to put capital towards the creation of social businesses.\textsuperscript{74} Business decisions are still rarely subject to judicial scrutiny as long as the corporation is “managed by its directors pursuant to a free, honest exercise of judgment uninfluenced by personal, or by any considerations other than the welfare of the corporation.”\textsuperscript{75} This duty of loyalty is regarded as one of the paramount responsibilities of directors, and therefore courts give it great consideration.\textsuperscript{76} However, in order to allow a director to make independent decisions, claims are only viable against a board of directors if fraud, dishonesty, bad faith, or self-interest are involved in the director’s decision, as well as any neglect of corporate duties.\textsuperscript{77}

To determine whether a board might be liable for the creation of a social business under this standard, the (generally unclear) established purpose of a corporation is an essential consideration.\textsuperscript{78} \textit{A.P. Smith Manufacturing Co. v. Barlow} established the common law treatment of

\textsuperscript{73} See Aronson, 473 A.2d at 812; Gottesman, \textit{supra} note 61, at 350–51.

\textsuperscript{74} See Bayer v. Beran, 49 N.Y.S.2d 2, 6 (Sup. Ct. 1944); Oliver Hart, \textit{An Economist’s View of Fiduciary Duty}, 43 U. Toronto L.J. 299, 303 (1993); Interview with Emmanuel Faber, \textit{supra} note 44. The duty of loyalty “is designed ‘to avoid the possibility of fraud and to avoid the temptation of self–interest.” Bayer, 49 N.Y.S.2d at 6 (quoting \textit{In re} Ryan’s Will, 52 N.E.2d 909, 923 (N.Y. 1943)).

\textsuperscript{75} See Bayer, 49 N.Y.S.2d at 6.

\textsuperscript{76} See id. at 5–7.

\textsuperscript{77} See \textit{N.Y. Bus. Corp. Law} § 720(a)(1)(A)–(B) (McKinney 2003); Higgins v. N.Y. Stock Exch., Inc., 806 N.Y.S.2d 339, 357–58 (Sup. Ct. 2005). For example, New York’s law states that a director may be liable for actions if there was neglect or a failure to perform. \textit{See} \textit{N.Y. Bus. Corp. Law} § 720(a)(1)(A)–(B). The neglect used in duty of loyalty claims is not poor judgment in a business decision, but rather a neglect of a director’s duties, as set out in the corporation’s articles of incorporation. \textit{See} Kamin, 383 N.Y.S.2d at 811. There will sometimes be disagreement with director decisions but that does not mean that it is actionable neglect. \textit{See id.}

philanthropy in the overall purpose of a corporation. Generally, private profit is established to be the main objective of a corporation; thus, in the nineteenth and into the twentieth century, directors could not use corporate funds for a philanthropic purpose unless there was a resulting benefit for the corporation. Nevertheless, as a result of the aggregation of wealth within corporations, corporations, not individuals, can have the most significant effect on charities. Therefore, corporate participation in philanthropic work is encouraged and usually viewed as furthering a business purpose because of the amount of public support it helps create. Additionally, the purpose of the corporation is generally established in its articles of incorporation and thus can be altered by the corporation, underscoring the flexibility of business purposes.

79 See Barlow, 98 A.2d at 583–86; Nancy J. Knauer, The Paradox of Corporate Giving, 44 DePaul Law Rev. 1, 26–27 (1994). Originally, the intent of all corporations was considered to be for the benefit of the public and government. Barlow, 98 A.2d at 583.

80 See Barlow, 98 A.2d at 583–84, 586–87; Einer Elhauge, Sacrificing Corporate Profits in the Public Interest, 80 N.Y.U. L. Rev. 733, 830 (2005). This assumption did not harm charities in the nineteenth century because a very small amount of wealth was held by corporations. Barlow, 98 A.2d at 585–86. The only powers that a corporation held in the nineteenth and early twentieth century were those that the state and its articles of incorporation granted. See Faith Stevelman Kahn, Pandora’s Box: Managerial Discretion and the Problem of Corporate Philanthropy, 44 UCLA L. Rev. 579, 594–95 (1997).

81 See Barlow, 98 A.2d at 584, 585–86. As a result of lucrative tax incentives for corporations, some consider it more beneficial for a corporation to make philanthropic donations rather than individual stockholders after the corporation has been taxed. See R. Franklin Balotti & James J. Hanks, Jr., Giving at the Office: A Reappraisal of Charitable Contributions by Corporations, 54 Bus. Law. 965, 991 (1999). Additionally, some argue that corporations are better suited to make these donations; this solves a collective action problem and corporations are in a better position to monitor the use of the contribution. See Elhauge, supra note 80, at 830–40.

82 See Barlow, 98 A.2d at 584. The benefits of corporate philanthropy are numerous, including forming a positive image for the corporation. See Balotti & Hanks, supra note 81, at 967; Knauer, supra note 79, at 29–30, 53–60. Additionally, even if a philanthropic contribution or venture cannot easily be linked to a business benefit, virtually all are justified that way. See Balotti & Hanks, supra note 80, at 968. The public attitude in favor of a charitable corporation may “not be measured in accounting terms, but it apparently counts to legitimize the donation and to distinguish it from a gift for which absolutely nothing is received that would be unauthorized unless approved unanimously by the stockholders.” Victor Brudney & Allen Ferrell, Corporate Charitable Giving, 69 U. Chi. L. Rev. 1191, 1193–94 (2002).

83 See, e.g., Cal. Corp. Code § 202(b)(1)(i) (West 1990) (stating that “[t]he purpose of the corporation is to engage in any lawful act or activity for which a corporation may be organized”); Del. Code Ann. tit. 8 §§ 101(b), 102(a)(3) (1974) (stating that the purpose of the corporation must be stated in the articles of incorporation and that the purpose may be any lawful activity); N.Y. Bus. Corp. Law § 201(a) (McKinney 2003) (explaining that “[a] corporation may be formed . . . for any lawful business purpose or purposes except to do in this state any business for which formation is permitted under any other statute of this state”); Consolidated Film Indus., Inc. v. Johnson, 197 A. 489, 493 (Del. 1937) (explaining that a company’s articles of incorporation may be amended).
As a result of this shift in the common law, many states have codified the right of business directors to contribute to philanthropic causes. For example, Delaware General Corporation Law section 122 allows directors to “[m]ake donations for the public welfare or for charitable, scientific or educational purposes, and in times of war or other national emergency in aid thereof.” This is listed among the powers of corporations, all of which are authorized in order for corporations to meet their ultimate goal, the maximization of profit. Likewise, California Corporations Code section 207(e) authorizes philanthropic contribution, “regardless of specific corporate benefit.” The statute still maintains, however, a relation to maximizing profit. While common law and statutory law both recognize the right of charitable giving, directors still strive to have some justification that they are furthering the purpose of the business.

84 See, e.g., Model Bus. Corp. Act. § 3.02(13) (2007) (granting corporations the power “to make donations for the public welfare or for charitable . . . purposes”); Cal. Corp. Code § 207(e) (West 1990) (granting corporations the power to “[m]ake donations, regardless of specific corporate benefit, for the public welfare or for community fund, hospital, charitable . . . purposes”); Del. Code Ann. tit. 8, § 122(9) (granting corporations the power to “[m]ake donations for the public welfare”); N.Y. Bus. Corp. Law § 202(12) (McKinney 2003) (granting corporations the power, “[t]o make donations, irrespective of corporate benefit, for the public welfare or for community fund, hospital, charitable . . . or similar purposes”); Elhauge, supra note 80, at 830 (explaining that states reacted to the common law change in corporate law by creating charitable contribution statutes). These statutes give significant discretionary power to directors in terms of the company’s charitable actions. See Kahn, supra note 80, at 602–05. Some argue that the state of the law is too flexible, allowing whatever a director’s whim may be. Id. A consequence of this lack of clear regulations is that directors may be unclear about the state of the law in regard to unique business models. Kerr, supra note 31, at 637; Rana, supra note 30, at 93–95.

85 Del. Code Ann. tit. 8 § 122(9).

86 See id. In Delaware, a corporation may “promote any lawful business or purposes.” Del. Code Ann. tit. 8 § 101(b). This business or purpose must be specified in the articles of incorporation and is generally considered to exist for the benefit of stockholders. See id. § 102(a)(3); Gottesman, supra note 61, at 350–51. Thus, all the powers of the corporation must be considered within the scope of the corporation’s purpose. See Del. Code Ann. tit. 8 § 121(a).


88 See Cal. Corp. Code § 207(e) (West 1990). This part of the Code begins: “[s]ubject to any limitations contained in the articles and to compliance with other provisions of this division and any other applicable laws . . . .” Id.

89 See Balotti & Hanks, supra note 81, at 968, 991.
Additionally, it is unclear to what extent directors may consider others over the company’s shareholders. The Michigan Supreme Court decision in *Dodge v. Ford Motor Co.* established the rule that businesses cannot be run primarily for the benefit of others and that all decisions are to be made with the shareholders in mind. Nonetheless, in Illinois, the *Schlensky v. Wrigley* decision determined that directors may consider others besides shareholders when making a decision, as long as the shareholders’ benefit is still of foremost importance. In *Schlensky*, the directors may have considered the effect on the surrounding neighborhood, but that did not preclude them from also considering the benefit for or detriment of the shareholders. As a result of this lack of clear guidelines, a corporation will often show, unlike in Yunus’s model, that there is also a business purpose if it is aiming for a social result. This demonstrates that the directors consider their shareholder’s benefit along with those who benefit from the social result (for example, Bangladeshi children).

### III. REACTIONS TO CORPORATE LAW UNCERTAINTY

Although corporate law affords significant flexibility to directors, its uncertain nature may cause some companies to reject Yunus’s unique idea. Nevertheless, Grameen Danone and another corporation,

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90 *Compare* *Dodge v. Ford Motor Co.*, 170 N.W. 668, 685 (Mich. 1919) (forbidding the consideration of the benefits of employees and the general public over those of the shareholders), and Gottesman, *supra* note 61, at 350, *with* *Schlensky v. Wrigley*, 237 N.E.2d 760, 780 (Ill. App. 2d 1968) (allowing the consideration of the welfare of the general public in the business decision).

91 *Dodge*, 170 N.W. at 682–85; Knauer, *supra* note 79, at 24–26. The Court stated that Ford Motor Company was able to take care of its own affairs; however it did not allow directors to keep profits from shareholders. *Dodge*, 170 N.W. at 682.

92 *See* Schlensky, 237 N.E.2d at 780. This case is distinguished from *Dodge v. Ford* because there was fraud or breach of good faith in the *Dodge* case in the eyes of the court. *See id.* at 779–80. Thus, there only needed to be a connection between the decision and shareholder’s interest. *See id.*

93 *See id.* at 780. This was a dispute over installing lights for night games at Wrigley Field; most ballparks had already installed the lights. *See id.* at 777–78, 780. However, the owner of Chicago Cubs chose not to because it would adversely affect the neighborhood, among other reasons. *See Schlensky*, 237 N.E.2d at 777–78, 780.

94 *See* Yunus, *supra* note 6, at 170–71; Balotti & Hanks, *supra* note 81, at 968.

95 *See* Yunus, *supra* note 6, at 171–72. Thus, corporate giving currently requires that directors act in what they, “reasonably believe is the corporation’s best interests . . . based on the traditional profit-maximization theory of corporate purpose.” Balotti & Hanks, *supra* note 81, at 980.

96 *See* Balotti & Hanks, *supra* note 81, at 968 (explaining that the uncertain nature of charitable contribution and fear of angry shareholders results in the veiling of philanthropy as a business purpose).
Google, have embraced the social business model. Each reacted to the potential liability in different ways: Google by embracing the flexibility of the business purpose, and Groupe Danone by creating a completely separate legal entity.

A. Google.org as an Anomaly

Google’s social business, Google.org, is not legally separated from its parent company, but is structured to eliminate the uncertainties of corporate law. Google.org defines itself as “a hybrid philanthropy that uses a range of approaches to help advance solutions within . . . five initiatives.” Like Yunus’s model of a social business, Google.org is a for-profit business. Although Google provided the start-up capital for Google.org, it is not worried about angering shareholders because its founders Larry Page and Sergey Brin clearly stated the company’s mission of a social benefit in its infancy. In order to give Google.org the necessary start-up capital, Google contributed one percent of its equity

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98 See Kerr, supra note 31, at 628; Rana, supra note 30, at 87–88; Interview with Emmanuel Faber, supra note 44.


100 About Google.org, supra note 97. These five initiatives are to: “1) develop renewable energy cheaper than coal, 2) rechargeIT [to accelerate the adoption of plug-in electric vehicles], 3) predict and prevent [emerging infectious diseases and environmental disasters], 4) inform and empower to improve public services, and 5) fuel the growth of small and medium-sized enterprises.” Google.org Homepage, http://www.google.org (last visited Apr. 10, 2009). These initiatives are more than charitable causes, they are meant to support economies of scale in the future. Milbrandt, supra note 30, at 427.

101 See Milbrandt, supra note 30, 427–28; Hafner, supra note 33. Google founders Larry Page and Sergey Brin felt too constrained by the requirements of a 501(c)(3) foundation. Hafner, supra note 33, at C4. Google.org’s executive director noted that “Google.org can play on the entire keyboard. . . . It can start companies, build industries, pay consultants, lobby, give money to individuals and make a profit.” Hafner, supra note 33. Page and Brin believe this flexibility will significantly benefit their corporation’s reach because it essentially eliminates all possible limitations that would apply if it was a not-for-profit. See Rana, supra note 30, at 93–94.

102 See Kerr, supra note 31, at 627; About Google.org, supra note 97.
and profits. The main objective of this contribution was to produce social results. Some shareholders could disagree with the use of capital for a social purpose because Google pays no shareholder dividends at this time.

Google is an anomaly because it took advantage of the flexibility of corporate law by making its mission of working towards a social benefit clear in its infancy. Before its initial public offering, Page and Brin clearly set out their commitment to philanthropic work through directly stating their plans to put one percent stock and equal percentage of profit towards social issues. In its initial public offering letter, they also brought attention to Google’s well-known motto “don’t be evil.” Establishing this unique goal as a priority in the infancy of the company not only made Google an anomaly, but also protected it from disgruntled shareholders because social benefits are an established purpose of the company.

103 See About Google.org, supra note 97. This capital, which originated from seed money from the Google Initial Public Offering, amounted to over one billion dollars. Kerr, supra note 31, at 627. Additionally, Google has supplied Google.org with its employees and various other resources. See About Google.org, supra note 97.

104 See Hafner, supra note 33, at A1. The executive director of Google.org noted, “[w]e’re not doing it for the profit. And if we didn’t get our capital back, so what? The emphasis is on social returns, not economic returns.” Id. Thus, like Yunus’s model of social business, all of the emphasis in Google.org is on the social benefit. See id. The issue is how to describe a profit here because it would not be monetary. See Rana, supra note 30, at 94.

105 See Rana, supra note 30, 94–95; Milbrandt, supra note 30, 428; Hafner, supra note 33.

106 See Kerr, supra note 31, at 627–28. The creation of this philanthropy is early in comparison to most companies, such as Microsoft and its not-for-profit foundation, the Gates Foundation. See Kerr, supra note 31, at 628; Hafner, supra note 33. Gottesman discusses an idea, similar to Yunus’s, of B corporations which are traditional corporations but spell out their social commitments in their governing documents to give investors notice. Gottesman, supra note 61, at 355.


108 See IPO Letter, supra note 107, at 32. Brin and Page use the “don’t be evil” motto to describe their attitude that Google and its shareholders, “will be better served . . . by a company that does good things for the world even if we forgo some short term gains.” Id. This motto runs through everything Google does; for example, the Google Code of Conduct is structured around it. See Google, Inc., Code of Conduct, http://investor.google.com/conduct.html (last visited Apr. 15, 2009). Additionally, the motto is one of the identifying and popular characteristics of Google in the public mind. See Adam Lashinsky, Can Google Three-Peat?, CNN.com, Jan. 31, 2008, http://money.cnn.com/2008/01/28/news/companies/google qa.fortune/index.htm.

109 See Rana, supra note 30, at 94–95 (“Google’s founders informed potential investors of their plans to devote a certain amount of funds to a philanthropic entity before taking the company public, so the investors have little basis to complain now that the founders are ‘robbing’ them by doing so.”). Additionally, if necessary, Google could argue that there is a business purpose to this social business because it is well publicized and makes the
B. Danone’s Separate Legal Entity Model

While Google.org finds solace in the flexibility of corporate law, this lack of clarity causes other companies to shy away from creating these businesses. Since Danone did not establish a social goal in its infancy like Google, its foremost concern when its CEO decided to become involved in a social business was the company’s liability to the shareholders for not following the stated purposes of the company. Most companies, notably those with the most significant amount of capital to contribute, will be similar to Danone and will not have established a social purpose in their infancies. Thus, directors of a corporation established for profit maximization may also be liable to shareholders because the lack of dividends could suggest that the shareholders’ benefit is not of the foremost importance. Companies that desire to establish or contribute to social businesses and have not established this in their articles of incorporation will want to protect themselves from the risk of liability. They could take remedial steps, such as amending their charter; however, these may detract from the appeal of investing in the company. Therefore, these companies must find some way, like Danone, to separate this social business from their original business.

See Milbrandt, supra note 30, at 437; Hafner, supra note 33. This distinguishes Google.org from Yunus’s model because he advocates a purely social purpose with no general business purpose for the company whatsoever. See YUNUS, supra note 6, at 170–71.


111 See YUNUS, supra note 6, at 169–70. The main question for Danone was: “How do we defend ourselves when the shareholders ask, ‘How dare you invest our money in a project that creates no profit for us? You are violating your mandate in doing so.’” See id. at 170.

112 See Hafner, supra note 33.

113 See A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 587 (N.J. 1953) (explaining the power of corporations to give to philanthropies while remaining true to their shareholders); Kerr, supra note 31, at 636–37 (discussing the current unclear state of the corporate fiduciary duty).

114 See YUNUS, supra note 6, at 169–70.

115 See Steen v. Modern Woodmen of Am., 129 N.E. 546, 549 (Ill. 1921) (establishing the right of those who make bylaws to amend them). This could detract from the appeal of a company to potential investors if they are interested only in the company’s original profit-maximization purpose. YUNUS, supra note 6, at 39–40.

116 See YUNUS, supra note 6, at 170–71.
IV. ENCOURAGING SOCIAL BUSINESSES THROUGH THE MUTUAL FUND MODEL

To encourage the creation of these social businesses and to address the uncertainty in corporate law, the United States should create incentives or guidelines for their formation. Specifically, the Securities and Exchange Commission (SEC) should enact mutual fund regulations modeled after Danone Communities Social Investment Fund given its success and popularity with investors. Because this is such a new type of business, there are not any other models, but most Grameen social businesses will likely be similar to the Danone mutual fund model. However, like corporate law, mutual fund regulations are currently unclear on the subject because while they would allow for social mutual funds, regulations do not specify how such funds would differ from the typical mutual fund which has profit as its goal. The goal of mutual fund regulations is, “to provide full and fair disclosure of the character of securities sold . . . and to prevent frauds in the sale thereof.” Therefore, to help social investment companies meet this goal, the SEC should set guidelines on how to properly disclose a social purpose.

A. The Mutual Fund Model

Generally, there are no bars to expansion or creation of new investment funds; therefore, as long as a social mutual fund follows SEC registration guidelines, it will not be barred because of its philanthropic goal. Currently, a mutual fund must register with the SEC under the

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117 See, e.g., id. (advocating for specific social business regulations); Brudney & Ferrell, supra note 82, at 1210 (arguing that a program of shareholder choice would have to be implemented at the federal level, not state level); Gottesman, supra note 61, at 351–54 (explaining the arguments that legislation for new corporate forms or new tax laws are necessary for the not-for-loss corporation).

118 See Yunus, supra note 6, at 172–73.

119 See E-mail from Shadab Mahmud, Program Manager, Graeme Health, to author (Oct. 11, 2008, 11:59:00 EST) (on file with author).

120 See 15 U.S.C. § 77g (2006); id. § 80a–24(a); Yunus, supra note 6, at 171–72.


123 See Yunus, supra note 6, at 171–73 (discussing the creation of Danone Communities as a social business development fund); John C. Coates IV & R. Glenn Hubbard, Competition in the Mutual Fund Industry: Evidence and Implications for Policy, 33 J. Corp. L. 151, 168–69 (2007) (noting that the absence of the barriers to new funds creates competition in the industry);
Investment Company Act of 1940 and its issued securities under the Securities Act of 1933 by filing Form N-1A. This form has three specific parts to guide the investment company in disclosing the proper information to investors. A prospectus is required to ensure that shareholders make informed decisions on their investments. Additionally, the investment company must include the fund’s investment objective goals and a summary of how it intends to achieve them. Thus, mutual funds must ensure that the information in its registration statement meets the requirements of section 10(a) of the Securities Act of 1933 so they are not liable for a materially misleading or false statement on its prospectus.

To clarify the current regulations for businesses with a social purpose, there must be clear guidelines or new regulations for how to properly explain a social purpose because the current regulations do not distinguish a profit maximizing fund from this concept.

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Interview by Danone Communities with Xavier de Bayser, Chairman and Founder, IDEAM (Integral Development Asset Management) (Feb. 26, 2008), available at http://www.danonecommunities.com/?p=156 (stating that Danone Communities is “a social-minded money market investment”).


125 Form N–1A, supra note 124, at 6; Fortune, supra note 124, at 50.


127 15 U.S.C. § 77j; id. § 80a–24; Form N-1A, supra note 124, at 6–8. The registration statement must also have a proper front and back cover page, fee table, shareholder information, how to purchase securities, repurchase information, financial highlights, and any additional information that the SEC has concluded is not necessary but may be helpful. Form N-1A, supra note 124, at 6–8.


129 See 15 U.S.C. § 77b; YUNUS, supra note 6, at 175, 178–79. For example, the statute could change by specifying that a social business must, “clearly state any social purpose
tionally, these guidelines must also explain how the fund would measure and report the social benefit, since the regulations now only refer to the reporting of a monetary profit.\textsuperscript{130} Thus, to facilitate the creation of new social mutual funds, more precise regulations in terms of a social business are necessary.\textsuperscript{131}

B. Advantages for Corporations

A mutual fund model can encourage directors to form social businesses because it gives them confidence that this business model will stand up against shareholder suits.\textsuperscript{132} Additionally, this model removes any uncertainty in the ever-evolving field of corporate charitable law.\textsuperscript{133} There would be no duty of loyalty or duty of care question because it would be clear from the outset, as in Google’s model, that there is only a social, not monetary purpose.\textsuperscript{134} To fulfill their duties, the directors of the fund will have a duty to be loyal to others besides their shareholders—to those who are receiving the social benefit—consequently elimi-
nating the uncertainty in this area of law.\(^{135}\) It will also allow directors to create a social business with no compromise to their original profit maximizing company.\(^{136}\) Therefore, they will not need to take any action that may alienate investors, such as amending their charter.\(^{137}\)

C. Advantages for Shareholders

The mutual fund model for social businesses will benefit shareholders because it increases their choice.\(^{138}\) They will have the decision as to whether or not they want to invest in a social business at all.\(^{139}\) This enhanced choice influenced Danone’s decision to create a mutual fund.\(^{140}\) Additionally, if the fund provides options, the choice of whether to invest or not could give an investor a choice as to which type of social benefit to support.\(^{141}\) Typically, a director will make a decision on charitable contributions without any authorization from the shareholders.\(^{142}\) However, shareholders, not corporations, are the individuals with morals and passions who will want to choose where their contribution is directed.\(^{143}\) The mutual fund model increases shareholder power.


\(^{136}\) See Prasso, supra note 2, at 100; Interview with Emmanuel Faber, supra note 44.

\(^{137}\) See Consol. Film Indus., Inc. v. Johnson, 197 A. 489, 493 (Del. 1937); Yunus, supra note 6, at 170–71.

\(^{138}\) See Interview with Emmanuel Faber, supra note 44.

\(^{139}\) See, e.g., Brudney & Ferrell, supra note 82, at 1198–209 (discussing the numerous benefits of shareholder choice within corporate philanthropy); Kahn, supra note 80, at 635–36 (explaining possible solutions to the lack of shareholder choice in corporate charitable law); Yunus, supra note 1, at 273 (explaining the “Social Stock Market”, where social business investors could invest in “a social business, which has a mission of his liking”).

\(^{140}\) See Interview with Emmanuel Faber, supra note 44.

\(^{141}\) See Brudney & Ferrell, supra note 82, at 1196. Warren Buffet’s company, Berkshire Hathaway, allows for a choice in what type of company receives a donation because shareholders designate a beneficiary of corporate giving. See id. Nevertheless, there have been problems with this sort of charitable contribution scheme because “[Berkshire Hathaway] found that a large number of gifts were made to charities with a religious affiliation.” See Jill E. Fisch, Questioning Philanthropy From a Corporate Governance Perspective, N.Y.L. SCH. L. REV. 1091, 1100–01 (1997). “The contribution policies of most publicly-held corporations, however, explicitly prohibit donations that are to be used for religious purposes.” Id. at 1101.

\(^{142}\) See Elhauge, supra note 80, at 830–31. Elhauge argues that shareholders should have a voice in profit-sacrificing donation decisions. Id. at 830–31, 868–69. He states that there should be some sort of process under which the shareholders give approval. Id. at 830–40. Especially if corporations are allowed to make donations to solve a free rider problem, monitoring problem, or tax problem, one would assume that rational shareholders who wish to make donations would vote to approve them. Id. at 830–40.

\(^{143}\) See Brudney & Ferrell, supra note 82, at 1205–06, 1208; Elhauge, supra note 80, at 830–40.
and eliminates the typical corporate charitable contribution problem. Shareholders will benefit from this model because they will be able to view the social progress and sustainability of the company through required reports, which do not exist for charitable contributions.

**Conclusion**

Muhammad Yunus’s social business idea not only represents a unique development for charity and non-profit businesses but for the for-profit corporations as well. This idea could have a significant effect on marginalized groups and completely redevelop the approach to the elimination of poverty because of its self-sustaining nature. Muhammad Yunus introduces this business model as an evolution of his microcredit success. Grameen Bank has expanded its experiment in social businesses with the creation of a number of partnerships for healthcare, eye care, and nutrition. The potential success of these programs is dependant upon the public and corporate interest in them. While Grameen Danone is still experimenting with the most cost-efficient way to produce yogurt and remain self-reliant, it will have two more factories in the near future. The companies, like Grameen Danone, that have taken the risk to create them serve as examples to the rest of the corporate community.

Other companies, however, have yet to embrace social businesses as a result of the unclear state of corporate law. For Yunus’s idea to be successful on a grand scale, there must be some kind of incentives or guidelines for their creation. If Groupe Danone’s mutual fund serves as a model for creation of a social business investment fund, these social businesses could be groundbreaking. Clear regulations to encourage the creation of not-for-profit social businesses must be enacted if social businesses are to have any chance to put poverty in museums.

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144 See Balotti & Hanks, *supra* note 81, at 980–90 (explaining that current corporate law allows directors too much flexibility in their philanthropic decisions); Kahn, *supra* note 80, at 586 (arguing that the SEC should require regular disclosures of charitable contributions). Kahn argues that required disclosure of charitable contributions will eliminate misuse of philanthropic contribution, enhance the shareholder’s role in corporate social responsibility, and allow them the choice to withdraw if they do not agree with the cause. Kahn, *supra* note 80, at 585–87.

145 See Kahn, *supra* note 80, at 581–83, 586; Prasso, *supra* note 2, at 100 (quoting Danone’s Executive Vice President’s statement: “The strength is that it is a business, and if it is a business, it is sustainable. Your shareholders are happy.”).

146 See Ghalib & Hossain, *supra* note 2, at 11.

147 Yunus, *supra* note 1, 274–75.
CORPORATE AIDING AND ABETTING LIABILITY UNDER THE ALIEN TORT STATUTE: A LEGISLATIVE PREROGATIVE

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Abstract: Since the landmark decision in Filártiga v. Pena-Irala, U.S. courts have struggled determining actionable claims under the enigmatic Alien Tort Statute (ATS). While the Supreme Court recognized the viability of the ATS as a jurisdictional statute in Sosa v. Alvarez-Machain, its scope was restricted to an amorphous “eighteenth century paradigm.” This model has proven to be a murky standard. One of the most contentious and uncertain claims under the ATS involves corporate liability for aiding and abetting human rights violations. This Comment argues that based upon the limited holding of Sosa, aiding and abetting liability would not be recognized as an actionable claim under the ATS. Therefore, similar to the Torture Victim Protection Act, it is Congress’s role to clarify the ATS and ensure that victims of human rights are able to hold complicit corporations liable.

Introduction

In 1980, the Court of Appeals for the Second Circuit held that a Paraguan official residing in New York was civilly liable to the family of Dr. Joel Filártiga for the torture and death of Dr. Filártiga’s son, Joelito. According to Dr. Filártiga, Inspector Americo Norberto Pena-Irala murdered Joelito to quiet Dr. Filártiga, an outspoken critic of Paraguay’s dictator Alfredo Stroessner. What was remarkable about the case was that the torture and murder occurred in Paraguay, and neither party was a United States citizen.

Despite each party’s lack of citizenship, the Filártigas were able to seek redress for their suffering in the United States federal courts four

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1 Filártiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).
3 Filártiga, 630 F.2d at 878. The Alien Tort Statute was by and large unknown before the Filártiga case. See Davis, supra note 2, at 3. The Filártigas’ lawyers at the Center for Constitutional Rights were skeptical of utilizing the act because they were afraid that “any such suit would be laughed out of court.” Id.
years after Joelito’s death. The basis for the decision rested upon an obscure section of the original Judiciary Act known as the Alien Tort Claims Act, or the Alien Tort Statute (ATS). This provision, crafted in 1789 as part of the Judiciary Act, states that federal district courts “shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

Judge Irving Kaufman, writing for the Second Circuit Court of Appeals, determined that the court had subject matter jurisdiction over the Filártiga’s allegations of torture and extrajudicial murder. Justice Kaufman stated that the judiciary may recognize certain universally recognized violations of international law under the ATS’s grant of jurisdiction for violations against the “law of nations.” Because deliberate torture and murder violate universally accepted norms of international law, the ATS provides federal jurisdiction “whenever an alleged torturer is found and served with process by an alien within our borders.” Pena-Irala was residing in Brooklyn, New York at the time and therefore he was subject to the jurisdiction of the Second Circuit.

Twenty-four years after Filártiga v. Pena-Irala, the Supreme Court decided its only case under the ATS in Sosa v. Alvarez-Machain. Writing for the majority, Justice David Souter held that while the ATS is a purely jurisdictional statute, it is not rendered “stillborn” without a cause of action to compliment its jurisdictional grant. Instead, the Court held

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4 See Davis, supra note 2, at 3.
6 § 1350.
7 Filártiga, 630 F.2d at 878.
8 Id. at 880. At the time of the first Judiciary Act, the “law of nations” was considered part of federal common law. Sosa v. Alvarez-Machain, 542 U.S. 692, 714 (2004). The law of nations governed the norms of behavior of nation states with one another; the conduct of individuals outside of their respective borders but “carrying on an international savor” (for example, mercantile questions), and rules binding individuals in conduct that overlapped with the considerations of state relationships. Id. at 715. The latter included three specific offenses identified by Blackstone: violation of safe conduct, infringement of the rights of ambassadors, and piracy. Id. While the prevailing conception of common law has changed as a result of Erie Railroad Co. v. Tompkins, the law of nations still represents an interstitial area of substantive law that federal courts may recognize under the common law. Id. at 729; see Erie R.R. Co. v. Tompkins, 304 U.S. 58, 78 (1934).
9 Filártiga, 630 F.2d at 878.
10 Davis, supra note 2, at 18. By happenstance, Dr. Filártiga’s daughter, Dolly, determined Pena-Irala’s whereabouts during a trip to Washington, DC. Id.
11 Sosa, 542 U.S. at 738.
12 Id. at 714, 719. Justice Souter rejected the argument that the first Congress passed the ATS “as a jurisdictional convenience to be placed on the shelf for use by a further Congress . . . that might, some day, authorize the creation of causes of action.” Id. at 719.
that the ATS enables federal courts to hear a finite amount of claims defined by the law of nations, as incorporated into federal common law. \(^{13}\) While the Court did not expressly enumerate actionable claims under the ATS, it did qualify that courts should require claims based “on the present day law of nations to rest on a norm of international character accepted by the civilized world.” \(^{14}\) Since *Sosa*, courts have struggled with identifying claims that fit into the narrow class of claims permitted under the ATS. \(^{15}\)

One of the most contentious and elusive questions that remains unresolved under the ATS involves the liability of corporations for aiding and abetting human rights violations. \(^{16}\) Increasingly over the past twenty years, victims of human rights violations have sought to hold complicit corporations liable for their involvement in gross human rights violations. \(^{17}\) Because the individual perpetrators are often low level judgment-proof actors, complicit corporations provide victims with a higher profile culpable party that is better able to provide monetary redress. \(^{18}\) Furthermore, because the corporations are frequently multinational, victims are better able to locate and effectuate service of process than if they are reliant on the happenstance of an individual being found within the borders of the United States. \(^{19}\) Finally, a more “constructive engagement” is furthered in developing nations by holding corporations liable for complicit conduct than if corporations stand idly by while condoning or abetting human rights violations. \(^{20}\)

The Justice Department adamantly opposed corporate aiding and abetting liability during President George W. Bush’s administration, arguing that aiding and abetting liability is inconsistent with judicial restraint in cases involving foreign affairs and political questions, an

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\(^{13}\) Id. at 712.

\(^{14}\) Id. at 725.

\(^{15}\) *See Sosa*, 542 U.S. at 738 (refusing to recognize illegal detention of less than a day as actionable under the ATS); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167–69 (5th Cir. 1999) (refusing to recognize claims of environmental torts and cultural genocide under the ATS); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d. 289, 319 (S.D.N.Y. 2003) (recognizing corporate liability for *jus cogens* violations).


\(^{17}\) *See Doe v. Unocal*, 395 F.3d 932, 936 (9th Cir. 2002).

\(^{18}\) *See id.*

\(^{19}\) *See Filártiga*, 630 F.2d 876.

impermissible foray into federal common law, and an improper interference with foreign relations. \(^{21}\) In contrast, human rights groups have traditionally argued that aiding and abetting liability for gross human rights violations has long been recognized since the Nuremburg Tribunal in 1945. \(^{22}\) They argue that aiding and abetting liability is incorporated into federal common law as an international norm actionable under the paradigm enunciated in \textit{Sosa}. \(^{23}\) While no inter-circuit disagreement currently exists over aiding and abetting liability, its viability is in no way certain. \(^{24}\) Furthermore, there remains disagreement over the appropriate level of complicity required. \(^{25}\) Is the standard drawn from international law or domestic law? \(^{26}\)

An opportunity to answer these questions was side-tracked when the Supreme Court denied certiorari in \textit{American Isuzu Motors, Inc. v. Ntsebeza}. \(^{27}\) This petition arose out of the Second Circuit Court of Appeal’s decision in \textit{Khulumani v. Barclay National Bank Ltd.}, which recognized aiding and abetting liability under the ATS. \(^{28}\) The petition was denied due to a lack of quorum when four of the nine justices recused themselves on account of conflict of interests. \(^{29}\) The refusal to hear this

\(^{21}\) Brief for the United States as Amicus Curiae in Support of Petitioners at 8–16, \textit{Am. Isuzu Motors}, 128 S. Ct. 2424 (No. 07–919).


\(^{23}\) Reply Brief for Plaintiff-Appellants at 11, \textit{Khulumani}, 504 F.3d 254 (No. 05–2326).

\(^{24}\) Cassel, \textit{supra} note 22, at 322.

\(^{25}\) \textit{See Khulumani}, 504 F.3d at 277 (Katzmann, J., concurring); \textit{id.} at 288 (Hall, J., concurring), \textit{id.} at 337(Korman, J., concurring in part & dissenting in part). Judge Katzmann and Judge Korman ruled that aiding and abetting liability is governed by international law and requires a mens rea of purpose. \textit{Id.} at 277 (Katzmann, J., dissenting), 337 (Korman J., concurring in part & dissenting in part). However Judge Hall contended that the model should be drawn from federal common law and requires a mens rea of knowledge. \textit{Id.} at 284, 288 (Hall, J., concurring).

\(^{26}\) \textit{See id.} at 277, 284.

\(^{27}\) \textit{Am. Isuzu Motors}, 128 S. Ct. at 2424.

\(^{28}\) \textit{See id.; Khulumani}, 504 F.3d at 264.

\(^{29}\) \textit{See Linda Greenhouse}, \textit{Conflicts for Justices Halt Appeal in Apartheid Case}, \textit{N.Y. Times}, May 13, 2008, at A14. Justice Alito owns stock in Exxon-Mobil and Bristol-Myers Squibb. \textit{See id.} Justice Breyer owns stock in several of the companies named. \textit{See id.} Chief Justice Roberts owns stock in Hewlett-Packard. \textit{See id.} Justice Kennedy’s reason for recusal appears to be his son’s employment with another defendant, Credit Suisse, a conflict that has led the justice to disqualify himself in previous cases as well. \textit{See id.}
petition means that the scope and viability of aiding and abetting liability remains in question. 30

This Comment argues that Congress, and not the courts, should resolve this uncertainty by providing a clear answer to the question of corporate liability under the ATS. 31 Part I discusses the Supreme Court’s limited holding in Sosa which cautiously restricted the judiciary’s ability to uncover causes of action from federal common law under the ATS. 32 Part II then explains how the Second Circuit Court of Appeals’ most recent decision in Khulumani recognizing aiding and abetting liability does not presently conform to the limited holding of Sosa. 33 Part III details the Torture Victim Prevention Act and argues that Congress is the legitimate branch to resolve questions arising from a statute which delves so deeply into the actions of foreign sovereigns. 34 Finally, Part IV concludes that when Congress does address such questions, it should provide a cause of action for aiding and abetting liability. 35 By providing a cause of action for aiding and abetting liability, a clear standard of liability will be set with a uniform level of complicity, thereby avoiding an inevitable clash with the Supreme Court’s limited holding in Sosa. 36

30 See Am. Isuzu Motors, 128 S. Ct. at 2424.
31 Aiding and abetting liability under the ATS will not withstand the limited application of Sosa. See Sosa 542 U.S. at 732; Virginia Monken Gomez, Note, The Sosa Standard: What Does It Mean for Future ATS Litigation?, 33 PEPP. L. REV. 469, 499 (2006) (“Evaluated on its own, aiding and abetting would seem to meet the same fate as Alvarez-Machain’s arbitrary detention claim [in Sosa] . . . . In fact, a broad notion such as aiding and abetting would seem to be the very type of claim the Supreme Court seeks to invalidate by setting forth its stringent standard.”). It is important that Congress recognize aiding and abetting liability as an actionable claim for the development of human rights. See Unocal, 395 F.3d at 953.
33 See Khulumani, 504 F.3d at 254.
34 See Sosa, 542 U.S. at 731.
35 See Hannah Bornstein, Note, The Alien Tort Claims Act in 2007: Resolving the Delicate Balance Between Judicial and Legislative Authority, 82 IND. L.J. 1077, 1097–98 (2007). Ms. Bornstein argues that Congress should recognize corporate aiding and abetting liability under the ATS. Id. However, Ms. Bornstein also maintains that courts may properly recognize aiding and abetting liability as Congress has implicitly recognized their ability by not amending or repealing the ATS. Id. at 1089. Given the Supreme Court’s limited holding in Sosa, this Comment argues that aiding and abetting liability is not well defined enough for courts to provide actionable claims under the ATS. See Sosa, 542 U.S. at 725.
36 See Sosa, 542 U.S. at 731.
I. The Limited Holding of Sosa

In 2004 the Supreme Court heard its first and only case under the ATS. In Sosa, the plaintiff Humberto Alvarez-Machain brought suit against Jose Sosa and several Drug Enforcement Administration (DEA) officials for his illegal detention. Alvarez was wanted by the DEA after his indictment for the murder of a DEA agent. However, the DEA was unable to obtain his extradition from an uncooperative Mexican government. The DEA enlisted Sosa, a Mexican citizen, to abduct Alvarez and bring him to the United States where federal officers arrested Alvarez. After being acquitted of murder, Alvarez brought suit against the United States under the Federal Tort Claims Act and against Sosa under the ATS for violating the law of nations.

In addressing Alvarez’s claim against Sosa, the Court first needed to determine whether or not the ATS provides a cause of action for international violations, or whether it was merely a jurisdictional statute. The Supreme Court held that it was both. Although the ATS is a jurisdictional statute, the original drafters likely expected the courts to apply their grant of jurisdiction to redress specific and limited violations of the “law of nations” recognized at common law. Relying on Blackstone’s list of specific offenses against the law of nations addressed under English common law, the Court surmised that the drafters had three universally recognized claims in mind: violation of safe conduct, infringement upon the rights of ambassadors, and piracy.

While the Court did not limit the current application of the ATS to these three specific violations, it did command that courts use the same “eighteenth century paradigm” that the drafters envisioned. That is,

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38 See id. at 697.
39 See id.
40 See id. at 698.
41 Id.
42 See Sosa, 542 U.S. at 698.
43 See id. at 714.
44 See id. at 724.
46 See id. at 715. The impetus for the Alien Tort Claims Act seems to stem from the initial inability of the Continental Congress to “cause infractions of treaties, or the law of nations to be punished.” Id. at 716. This inability was highlighted in May of 1784 when the Continental Congress could not provide redress for the so-called “Marbois incident.” Id. Specifically, the United States was embarrassed by not being able to deal with an assault on the Secretary of the French Legion in Philadelphia by French adventurer DeLongchamps. Id.
47 See Sosa, 542 U.S. at 725.
for a claim to be viable under the ATS, it must be as specific and as universally accepted as the three Blackstone violations.\textsuperscript{48}

In Sosa, Justice Souter determined that the illegal detention claim at issue lacked the certainty and specificity necessary to come within the stringent eighteenth century paradigm that the Court had just established.\textsuperscript{49} The Court reasoned that unlike crimes such as torture or genocide, which are clearly defined and invariably recognized as contrary to the law of nations, a claim for illegal detention could vary from a serious violation to something as mundane as a botched warrant.\textsuperscript{50} Because of the difficulty in defining which illegal detentions cross the line into actionable claims, the Court held that Mr. Alvarez’s claim failed.\textsuperscript{51}

By requiring that the violation be universal and specific, the Court also stressed judicial caution in discerning actionable claims.\textsuperscript{52} In particular, Justice Souter highlighted five reasons why judicial application of the ATS is extremely limited.\textsuperscript{53} First, he noted that the idea of judicial recognition of “common law” has changed from the statute’s inception to present day.\textsuperscript{54} No longer is common law considered “discovered,” but rather, it is viewed in a positivistic way as the result of judicial creation.\textsuperscript{55} Second, the judiciary’s role in creating federal common law was drastically reduced by its decision in Erie Railroad Company v. Tompkins; since Erie, “the general practice has been to look for legislative guidance before exercising innovative authority over substantive law.”\textsuperscript{56} Third, the Court recognized that the decision to create private causes of action is generally best left to the judgment of the legislative branch.\textsuperscript{57} Fourth, the Court recognized the clear potential for infringement upon the discretion of the legislative and executive branches by unfettered restrictions on actionable claims.\textsuperscript{58} Finally the Court called for restraint due to

\begin{itemize}
\item \textsuperscript{48} See id. at 732 ("[W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.").
\item \textsuperscript{49} See id. at 738.
\item \textsuperscript{50} See id. at 737–38.
\item \textsuperscript{51} See id. at 738.
\item \textsuperscript{52} See Sosa, 542 U.S. at 725.
\item \textsuperscript{53} See id. at 725–29.
\item \textsuperscript{54} See id. at 725.
\item \textsuperscript{55} Id. at 725.
\item \textsuperscript{56} Id. at 726.
\item \textsuperscript{57} See Sosa, 542 U.S. at 727.
\item \textsuperscript{58} See id.
\end{itemize}
the lack of any specific mandate by Congress to create new actionable violations of the “law of nations.”

Despite these powerful limitations, Justice Souter recognized a limited exception that allows the judiciary to recognize specific and universally accepted violations. In support of this exception, Justice Souter noted that Congress enacted the Torture Victim Prevention Act (TVPA) in response to the judiciary’s decision in Filártiga. The TVPA provides clear statutory authorization for action involving torture and extrajudicial killing, thereby affirming the decision of Filártiga.

Other than its requirement that judges remain “vigilant” in their recognition of the ATS claims, the Supreme Court did not provide a bright-line standard for other judges to follow. However, the Court did refer to corporate complicity litigation in the Second Circuit that involved victims of apartheid. While the Court did not explicitly answer whether it considered the victims’ claims actionable, it did suggest that the litigation involved political questions better left to the other two branches of government.

The potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs. Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.

Id. at 727–28.

59 See id. at 728.

60 See Sosa, 542 U.S. at 729 (“[T]he judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.”).


62 Sosa, 542 U.S. at 731 (adding that “[the court] would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations”).

63 See id. at 729.

64 See id. at 732 n.20 (“A related consideration [of whether a norm is sufficiently definite] is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”).

65 See id. at 733 n.21.

There are now pending in Federal District Court several class actions seeking damages from various corporations alleged to have participated in, or abetted, the regime of apartheid. In such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.

Id.
II. THE SECOND CIRCUIT COURT OF APPEALS DECISION IN KHULUMANI

The most public and expansive litigation to date under the ATS commenced in 2004, when victims of apartheid era South Africa sued nearly every major corporation operating in South Africa during that period. The victims in *Khulumani v. Barclay International Bank Ltd.* instituted suit against approximately fifty corporate defendants and hundreds of “corporate Does” for “willingly collaborating with the government of South Africa in maintaining a repressive, racially based system known as ‘apartheid.’” After the district court determined that the plaintiffs had failed to establish subject matter jurisdiction under the ATS, the Court of Appeals reversed, recognizing aiding and abetting liability as a viable cause of action under the ATS.

In a concurring opinion, Judge Katzmann explained that the district court’s substantive evaluation of the aiding and abetting claim was improperly tainted by prudential considerations, such as the foreign

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67 *Id.* at 258. The Government of South Africa opposes the litigation. Brief for the United States as Amicus Curiae, *supra* note 21, at 2. The President of South Africa spoke out against the litigation in front of the National Assembly stating that it is “completely unacceptable that matters that are central to the future of our country should be adjudicated upon in foreign courts which bear no responsibility for the wellbeing of our country and the observance of the perspective contained in our Constitution on the promotion of national reconciliation.” *Id.* at 19. While the government seems to oppose the litigation, prominent and distinguished South Africans, such as Archbishop Desmond Tutu, support it. Sampson Mulugeta, *Apartheid Suits Reach Overseas*, NEWSDAY, Sept. 14, 2002, at A15. Other nations have also stood in opposition to suits against defendant corporations incorporated within their borders. *See Brief for the United States as Amicus Curiae*, *supra* note 21, at 1a–6a. The government of the United Kingdom argued in a letter to Secretary of State Condoleezza Rice that the lawsuit “infringes upon the sovereign rights of States to regulate their citizens and matters in their own territory.” *Id.* at 4a–6a.

68 *See Khulumani*, 504 F.3d at 260. Besides the disagreement over whether aiding and abetting is universally accepted and definite enough to fit within the ATS, the court faced another formidable challenge over whether the decision in *Central Bank of Denver v. First Interstate Bank of Denver* prevented this type of liability in the ATS cases. *See* 511 U.S. 164, 182 (1994); *Khulumani*, 504 F.3d at 282 (Katzmann, J., concurring). In *Central Bank*, the Supreme Court held that aiding and abetting liability must be explicitly listed in the statutory text. *See Central Bank*, 511 U.S. at 182 (“[W]hen Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant’s violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors.”). Judge Katzmann disregarded the district court’s adherence to *Central Bank*, instead arguing that the norm for providing aiding and abetting liability was not a domestic statute but the law of nations, and therefore *Central Bank* was inapposite. *See Khulumani*, 504 F.3d at 282 (Katzmann, J., concurring).
policy consequences.\textsuperscript{69} While recognizing that prudential considerations are proper and should be conducted upon remand, the court maintained that the determination of the viability of an aiding and abetting claim is a separate inquiry from the case-specific prudential concerns highlighted by the Supreme Court in \textit{Sosa}.\textsuperscript{70}

Turning to the viability of the victims’ claim, Judge Katzmann canvassed various sources of international law to determine whether, as required by \textit{Sosa}, the requisite “universal recognition” of aiding and abetting liability existed in the international community.\textsuperscript{71} From the London Charter establishing the International Military Tribunal at Nuremburg, to the Rome Statute of the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the military commissions set up after September 11, 2001, Judge Katzmann noted that aiding and abetting has been repeatedly recognized as an accepted form of liability.\textsuperscript{72} Moreover, Judge Katzmann found the provisions requiring liability in the London Charter and the ICTY Statute to be particularly significant because each statute was “intended to codify existing norms of customary international law.”\textsuperscript{73}

While international acceptance is certainly key to the recognition of any claim under the ATS, it is only one of the requisite standards that \textit{Sosa} set forward in order to determine if a claim is cognizable.\textsuperscript{74} As previously noted, a claim under the ATS must have both international “acceptance” and “definite content” to fall within the stringent eighteenth century paradigm that Justice Souter enunciated in \textit{Sosa}.\textsuperscript{75} The latter requirement serves to quiet any concerns regarding judicial common

\textsuperscript{69} See \textit{Khulumani}, 504 F.3d at 262 n.12 (Katzmann, J., concurring).
\textsuperscript{70} See \textit{id.} at 263 (per curiam).
\textsuperscript{71} See \textit{id.} at 270–74 (Katzmann, J., concurring).
\textsuperscript{72} See \textit{id.} at 270–71. The district court reasoned that because the Rome Statute and the statutes for the ICTY and ICTR related to criminal, and not civil, liability, they were not applicable. \textit{Id.} at 270 n.5. However, Judge Katzmann rebutted the court’s reluctance to apply these statutes, stating that “the distinction finds no support in our case law, which has consistently relied on criminal law norms in establishing the content of customary international law for the purposes of the ATCA [Alien Tort Claims Act].” \textit{Khulumani}, 504 F.3d at 270 n.5 (Katzmann, J., concurring).
\textsuperscript{73} See \textit{id.} at 274.
\textsuperscript{74} See \textit{Sosa}, 542 U.S. at 732.
\textsuperscript{75} See \textit{id.;} Philip Scarborough, Note, \textit{Rules of Decision for Issues Arising Under the Alien Tort Statute}, 107 \textit{COLUM. L. REV.} 457, 479–80 (2007). Mr. Scarborough also recognized the problem with utilizing an unformed standard of liability from international law because, “adopting a new international rule wholesale subjects businesses to evolving standards of international law decided by forums over which there is little or no democratic control.” Scarborough, \textit{supra}, at 480.
law lawmaking and imposes judicial restraint on the judiciary’s federal common lawmaking ability.\textsuperscript{76}

In canvassing the international scope of aiding and abetting liability, Judge Katzmann ultimately incorporated the Rome Statute as his standard for liability under the Alien Tort Claims Act.\textsuperscript{77} Judge Katzmann remarked that the language of the Rome Statute was influential in his choice because, “unlike other sources of international legislation, [the Rome Statute] articulates the \textit{mens rea} required for aiding and abetting liability.”\textsuperscript{78} However, it seems difficult to characterize an international violation as specific and definite if only one legislative source provides a clear level of requisite complicity.\textsuperscript{79} In contrast to the Rome Statute’s requirement for a purposeful \textit{mens rea}, the ICTY and the ICTR tribunal decisions hold that liability is cognizable when an individual provides assistance with “the knowledge that the acts performed by the aider and abettor assist in the commission of the specific crime of the principal.”\textsuperscript{80} Judge Katzmann even conceded that the definiteness of the Rome Statute’s definition was ultimately uncertain.\textsuperscript{81} As evidenced by the three varying opinions of \textit{Khulumani}, while general recognition of aiding and abetting liability exists in the international community, it lacks the definite character necessary to appease the stringent paradigm set up by the Supreme Court in \textit{Sosa}.\textsuperscript{82}

Although courts may properly identify and recognize violations of international law that are specific and definite, any exercise that requires the judicial molding of a claim runs up against the arguments for judicial caution outlined in \textit{Sosa}.\textsuperscript{83} Thus, the aiding and abetting claim that the Second Circuit crafted in \textit{Khulumani} conflicts with the

\textsuperscript{76} See \textit{Sosa}, 542 U.S. at 732.
\textsuperscript{78} See \textit{Khulumani}, 504 F.3d at 275.
\textsuperscript{79} See \textit{Sosa}, 542 U.S. at 732.
\textsuperscript{80} \textit{Khulumani}, 504 F.3d at 278 (Katzmann, J., concurring).
\textsuperscript{81} See \textit{id.} at 275–76 (Katzmann, J., concurring). “In drawing upon the Rome Statute, I recognize that it has yet to be construed by the International Criminal Court; its precise contours and the extent to which it may differ from customary international law thus remain somewhat uncertain.” \textit{id.}.
\textsuperscript{82} See \textit{Sosa}, 542 U.S. at 732. Judge Katzmann notes that his definition “is not necessarily set in stone.” \textit{Khulumani}, 504 F.3d at 277 (Katzmann, J., concurring). Mr. Scarborough also notes that while international third party liability is gaining widespread acceptance, its “contours are still in flux and could change . . . [and] [t]he developing nature of the standard indicates there is general agreement on the underlying principle but continued debate about the specific way in which the standard should be implemented.” \textit{Scarborough, supra} note 75, at 479–80.
\textsuperscript{83} See \textit{Sosa}, 542 U.S. at 725–29.
ideological shift noted in \textit{Sosa} in regard to the common law.\footnote{See id. at 726.} As common law was no longer regarded as “discovered” or “found” after the Court’s decision in \textit{Erie}, judges should be particularly weary in formulating their own standards of liability under the auspices of their federal common lawmaking ability.\footnote{See id. at 725–26.} Because aiding and abetting liability is not clearly defined at international law, any recognition thereof necessarily involves judicial formulation of a proper standard of complicity or liability.\footnote{See \textit{Khulumani}, 504 F.3d at 275–76 (Katzmann, J., concurring).} While Judge Katzmann required purpose for a requisite level of complicity under the ATS, in his concurring opinion, Judge Hall considered knowledge sufficient.\footnote{Id. at 288 (Hall, J., concurring).} In one instance while a defendant may be liable for being “aware” of his role in a tortuous activity, in another he or she would not be liable unless it was their conscious “purpose of facilitating the crime.”\footnote{See id. at 275–76, 288.} If neither the source nor the scope of aiding and abetting liability is certain, the court should defer to the legislative branch for guidance.\footnote{See \textit{Sosa}, 542 U.S. at 727 ("[T]his Court has recently and repeatedly said that a decision to create a private right of action is one better left to the legislative judgment in the great majority of cases.").}

### III. The Torture Victim Protection Act and the Role of Congress in Creating Aiding and Abetting Liability

In 1992, Congress codified the \textit{Filártiga} decision by passing the TVPA as an amendment to section 1350.\footnote{Torture Victim Protection Act, Pub. L. No. 102–256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 note (2006)); 138 Cong. Rec. S2667 (1992). Congress based its authority to create the Torture and Victim Protection Act on two Constitutional grounds. 138 Cong. Rec. S2667 (1992). First, on the Article III grant to the Federal courts to hear cases “arising under” the law of the United States (which includes international law). \textit{Id.}; see U.S. CONST. art. III, § 2, cl. 1. Second, on its own authority in Article I Section 8, which authorizes Congress to “define and punish . . . offenses against the Law of Nations.” U.S. CONST. art. I, § 8, cl. 10.} The TVPA creates a federal cause of action for both aliens and citizens of the United States “against an individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture \ldots or (2)
subjects an individual to extrajudicial killing.” The act also defines both “torture” and “extrajudicial killing.”

The purpose of the act is twofold. First, it was intended to provide a clarification of those causes of action already deemed to be actionable under the ATS. Second, the TVPA extends a cause of action to United States citizens for torture and extrajudicial murder committed abroad. Unlike the Alien Tort Claims Act, the Torture Victim Protection Act is not limited to aliens: it extends the cause of action to U.S. citizens as well as non-U.S. citizens. Despite the addition of a cause of action for U.S. citizens, the TVPA only addresses the two basic and universally accepted causes of action of torture and extrajudicial killing. The ATS remains the sole remedy for every other international human rights violation.

While limited in scope, the value of the TVPA lies with its clear expression of actionable claims and standards of liability. As torture and extrajudicial killing would likely be considered actionable claims under the ATS because of their universal condemnation and definite character in international law, the TVPA does not substantively add to or mod-

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91 106 Stat. at 73–74.
94 Id.
95 The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act). . . . Section 1350 has other important uses and should not be replaced. There should also, however, be a clear and specific remedy.
97 See id.
98 See § 1350 note.
ify the ATS in any way.\textsuperscript{100} Rather, Congress intended the TVPA to act as an unequivocal expression of two already accepted violations of the ATS.\textsuperscript{101} Despite its elementary nature, the TVPA provides modern recognition by a political branch that these claims are justiciable.\textsuperscript{102} In this way, the judiciary is empowered and emboldened to recognize actionable claims of torture and extrajudicial killing.\textsuperscript{103}

While this may seem duplicative, Congressional recognition of actionable claims lends authority to the judiciary’s judgment over foreign parties.\textsuperscript{104} By enunciating actionable claims under the TVPA, courts are less apt to worry about their ability to divine the “law of nations” from interstitial federal common law.\textsuperscript{105} As the Senate report noted, the TVPA was designed to correct “at least one Federal judge [who] has questioned whether section 1350 can be used by victims of torture committed in foreign nations absent an explicit grant of a cause of action by Congress.”\textsuperscript{106} Even with universally accepted and customary international law prohibitions against torture and extrajudicial killing, more conservative judges might otherwise feel squeamish deriving causes of action from the “law of nations.”\textsuperscript{107}

The Torture and Victim Protection Act also limits political question and separation of powers challenges to the judiciary’s recognition of the ATS causes of action, at least for the two named violations.\textsuperscript{108} Despite the viability of a plaintiff’s claims, the uncomfortable situation of sitting in judgment of the actions of another sovereign nation might

\textsuperscript{100} H.R. Rep. No. 102–367, at 2 (“Official torture and summary execution violate standards accepted by virtually every nation. The universal consensus condemning these practices has assumed the statues of customary international law.”).

\textsuperscript{101} See id. at 2–3.

\textsuperscript{102} See id. at 3.

\textsuperscript{103} See id. at 4.


\textsuperscript{105} See id. at 739.

\textsuperscript{106} H.R. Rep. No. 102–367, at 4. In particular the House Report singled out Judge Bork’s concurring opinion in \textit{Tel-Oren v. Libyan Arab Republic}, 726 F.2d 774, 815 (D.C. Cir. 1984), which “questioned the existence of a private right of action under the Alien Tort Claims Act, reasoning that separation of powers principles required an explicit—and preferably contemporary—grant by Congress of a private right of action.” \textit{Id.}

\textsuperscript{107} See Sosa, 542 U.S. at 739 (Scalia, J., concurring). While Justice Scalia concurred with the judgment in Sosa, he took issue with the judiciary’s ability to find actionable claims. See \textit{id}. Justice Scalia wrote that doing so “would commit the Federal Judiciary to a task it is neither authorized nor suited to perform.” \textit{Id.}

\textsuperscript{108} See \textit{id}. at 728. There has been a marked increase in these challenges under the current Justice Department. \textit{Davis, supra} note 2, at 118–25. “Of the thirty-seven cases in which the United States has participated, twenty-two of these occurred during the Bush administration. The Bush administration supported the defendant in every case.” \textit{Id}. at 125.
have led courts to shy away from hearing viable human rights claims.\textsuperscript{109} By amending the ATS with the TVPA, Congress put its stamp of approval on these claims, giving courts and skeptical judges a clear grant of jurisdiction.\textsuperscript{110} No longer would judges have to engage in the complicated “eighteenth century paradigm” calculus of \textit{Sosa} to determine whether torture and extrajudicial killing were actionable; the judiciary would have both a clear invitation to enforce these claims, as well as a definite and uniform standard of liability to apply.\textsuperscript{111}

As Justice Souter noted in his opinion in \textit{Sosa}, it is preferable for Congress to define actionable claims under the ATS rather than rely on judicial interpretation of this enigmatic statute.\textsuperscript{112} The political branches of the United States government are given deference within the separation of powers scheme to deal with matters that implicate foreign relations.\textsuperscript{113} This is not to say that the judiciary is barred from hearing or involving itself in matters involving foreign affairs; on the contrary, it is sometimes required to involve itself in matters that involve political or foreign policy.\textsuperscript{114} However, when a private cause of action is created, especially in the realm of foreign affairs, it is prudent to rely on the legislative branch.\textsuperscript{115}

\textsuperscript{109} \textit{See Sosa}, 542 U.S. at 727. Justice Souter argued that “[i]t is one thing for American courts to enforce constitutional limits on our own State and Federal Governments’ power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits.” \textit{Id.}


\textsuperscript{111} \textit{See Sosa}, 542 U.S. at 727. Justice Souter referenced the TVPA as providing a clear mandate to the courts in this opinion in \textit{Sosa}. \textit{Id.}

\textsuperscript{112} \textit{Id.}

\textsuperscript{113} \textit{Baker v. Carr}, 369 U.S. 186, 211 (1962). In \textit{Baker}, Justice Brennan noted that the reason for judicial deference under the political question doctrine in the field of foreign relations was because “resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; [and] many such questions demand single voiced statement of the Government’s views.” \textit{Id.} Furthermore, it is arguable that the grant of Article I, Section 8 providing Congress with the power to “define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations” is a textual commitment to the legislative branch and therefore one to which the judiciary should defer. \textit{See U.S. Const.} art. I, § 8, cl. 10; \textit{Baker}, 369 U.S. at 217.

\textsuperscript{114} \textit{Baker}, 369 U.S. at 211. (“[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”).

\textsuperscript{115} \textit{See Sosa}, 542 U.S. at 727.
IV. THE IMPORTANCE OF RECOGNIZING CORPORATE LIABILITY FOR VIOLATIONS OF HUMAN RIGHTS

The importance of legislative action with respect to aiding and abetting liability is evident from the Torture and Victim Protection Act.\textsuperscript{116} While aiding and abetting liability undoubtedly enjoys a certain amount of international acceptance, it is by no means as clearly defined as torture or extrajudicial killing.\textsuperscript{117} Even with clear international standards for torture and extrajudicial killing, the judiciary remained constrained from enforcing viable claims due to prudential considerations until the TVPA.\textsuperscript{118} As the varying opinions in \textit{Khulumani} made evident, both the source and the standard of complicity for aiding and abetting liability remain uncertain.\textsuperscript{119} Without legislative action, the success of viable aiding and abetting claims remains highly improbable.\textsuperscript{120} With legislative action, a definitive standard of liability similar to those laid down in the Torture Victim Protection Act could be enunciated.\textsuperscript{121} In this way, competing views of the appropriate standard of complicity would be avoided.\textsuperscript{122} Furthermore, skeptical jurists would no longer have to rely on limited federal common lawmaking ability, but would be


\textsuperscript{117} See H.R. Rep. No. 102–367, at 2–3 (“Official torture and summary execution violate standards accepted by virtually every nation. The universal consensus condemning these practices has assumed the status of customary international law.”); Scarborough, supra note 75, at 481–82 (“The definition of corporate aiding and abetting liability for international law violations is unlikely to be clear enough or universally condemned enough to satisfy the Sosa standard.”).

\textsuperscript{118} H.R. Rep. No. 102–367, at 4. Legislative action would satisfy the major objection raised by the Justice Department with respect to aiding and abetting liability. Brief for the United States as Amicus Curiae, supra note 21, at 8 (“[T]he creation of civil aiding and abetting liability is a legislative act separate and apart from the recognition of a cause of action against the primary actor, and one that the courts should not undertake without congressional direction.”).


\textsuperscript{120} Davis, supra note 2, at 233. The only successful resolution of an aiding and abetting claim was \textit{Doe v. Unocal}, which was settled out of court. 403 F.3d 708, 708 (9th Cir. 2005); Saad Gul, \textit{The Supreme Court Giveth and the Supreme Court Taketh Away: An Assessment of Corporate Liability Under § 1350}, 109 W. Va. L. Rev. 379, 409 (2007).

\textsuperscript{121} See 106 Stat. at 73.

\textsuperscript{122} See \textit{Khulumani}, 504 F.3d at 277, 288, 337.
restored to their more familiar job of interpreting and applying statutory law.\textsuperscript{123}

It is important that Congress provide a remedy for aiding and abetting liability not simply to clarify the murky waters of \textit{Sosa}, but more importantly to ensure victims redress and to prevent human rights violations by states and corporate actors.\textsuperscript{124} An example of one of the more poignant instances of the corporate complicity existed in \textit{Doe v. Unocal}.\textsuperscript{125} In \textit{Unocal}, the Ninth Circuit Court of Appeals recognized aiding and abetting liability for Unocal’s role in atrocities committed by members of the Myanmar military on local villagers from the Tenasserim region.\textsuperscript{126} Unocal Corporation utilized Myanmar military forces to secure the construction of an oil pipeline in Burma.\textsuperscript{127} While overseeing the construction of the pipeline, the Myanmar military forces raped, tortured and murdered local Burmese citizens while working for Unocal.\textsuperscript{128} There were clear implications that officials from Unocal were complicit in the violations.\textsuperscript{129} While settled out of court, the case was the first instance when a corporation was successfully held accountable under the ATS for its involvement in gross human rights violations.\textsuperscript{130}

Aside from the overarching need for punishment and vindication of violations similar to \textit{Unocal}, corporate accountability for aiding and abetting human rights is important for several other reasons.\textsuperscript{131} First and most basically, the ATS is a civil statute that contemplates money damages.\textsuperscript{132} One of the underlying purposes of tort law is to make victims whole by compensating them for their injuries.\textsuperscript{133} However, the majority of individual defendants held liable under the ATS are judgment proof because they have no assets.\textsuperscript{134} Therefore, while victims are provided a forum to air their grievances, they are typically not “made

\textsuperscript{124} See generally \textit{Doe v. Unocal}, 395 F.3d 932 (9th Cir. 2002) (recognizing aiding and abetting liability for complicity in human rights violations including forced labor, murder and rape by the Myanmar military while constructing a pipeline).
\textsuperscript{125} See id.
\textsuperscript{126} Id. at 956.
\textsuperscript{127} Id. at 936.
\textsuperscript{128} Id.
\textsuperscript{129} Unocal, 395 F.3d at 937–38. The court cited a particularly notorious quote by Unocal president John Imle discussing the enlistment of the Burmese military for help with the pipeline. \textit{Davis, supra} note 2, at 209. Imle stated that “‘if forced labor goes hand in glove with the military, yes there will be more forced labor.” Id.
\textsuperscript{130} See \textit{Davis, supra} note 2, at 211.
\textsuperscript{131} See id.
\textsuperscript{133} \textit{Victor Schwartz et al., Prosser, Wade and Schwartz’s Torts} 1 (10th ed. 2000).
\textsuperscript{134} See \textit{Davis, supra} note 2, at 20.
whole,” at least in terms of monetary compensation. Conversely, if culpable, corporations provide victims with a responsible party able to appropriately compensate victims for their suffering.

Next, by holding corporations liable for their complicity, Congress would incentivize corporations to be proactive (as opposed to passive or even complicit) in ensuring that they are not involved in human rights violations. Without aiding and abetting liability, there is no form of accountability preventing corporations from turning a blind eye to oppressive regimes. Corporations, once having invested in an abusive regime, have an incentive to maintain the status quo in order to prevent any future challenges to their involvement. Furthermore, victims cannot hope to seek redress in their own countries for human rights violations by corporate actors operating within their borders, especially if the state itself is involved in the abuses. By holding corporations liable for complicity in human rights violations, there is a real incentive for multinational businesses to actively oppose repressive regimes and voice their opposition to a repressive government’s actions, thereby engaging in a much more “constructive engagement.”

Conclusion

It has been almost thirty years since the landmark decision of Filártiga utilized the ATS to provide redress for a torture and murder that

136 See Bhashyam, supra note 135, at 246.
137 See Herz, supra note 20, at 222–23. Mr. Herz makes a very strong argument that corporate complicity furthers constructive engagement as opposed to the Justice Department’s argument that third party liability would prevent corporations from investing in questionable states, thereby chilling the liberalizing effects of capitalism. See id. Mr. Herz rightly points out that U.S. companies are hardly promoting democracy and human rights in their interactions with foreign governments if they are complicit in these same violations. See id.
138 Id. at 210.
139 Id. at 223.
141 Herz, supra note 20, at 222–23. It is also arguable that the only way to reach a guilty state is by seeking redress through a proxy corporation. Roger P. Alford, Arbitrating Human Rights, 83 Notre Dame L. Rev. 505, 506–07 (2008). Professor Alford argues that while victims may not be able to seek redress from foreign states because of sovereign immunity, complicit corporations may be able to share responsibility through their contractual relations with a state or through arbitration. Id. In this way, victims are able to hold states liable, albeit through the third party proxy of a corporation. Id.
occurred in Paraguay.\footnote{See Filártiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980). The case “served notice that . . . [U.S.] courts are open to judge actions in any corner of the world.” \textit{Davis}, \textit{supra} note 2, at 21.} Since then, the ATS has allowed victims of human rights violations to confront their oppressors, seek redress for their suffering, and air their stories to the world.\footnote{See \textit{Brief of Amici Curiae International Human Rights Organizations, TRC Commissioners, and Others in Support of Plaintiffs at 3, Khulumani v. Barclay Nat’l Bank Ltd., 504 F.3d 254 (2d Cir. 2007) (03-CV-4524), aff’d for lack of quorum sub nom., Am. Izuzu Motors, Inc. v. Ntsebeza, 128 S. Ct. 2424 (2008).} Litigation under the ATS since \textit{Filártiga} has grown rapidly, with the most contentious and expansive litigation revolving around the area of corporate liability.\footnote{Plaintiffs in actions under the Alien Tort Statute (“ATS”) often have no other avenue of relief. The vindication of their rights promotes healing, both for them and for their communities, with the official recognition that the deprivations they suffered are universally condemned. These cases often break down the walls of silence and fear, enabling survivors of unspeakable atrocities to find dignity and composure. \textit{Id.} (citation omitted).} While several district courts recognize aiding and abetting liability as actionable under the ATS, it remains uncertain whether a cause of action for corporate aiding and abetting liability would meet the Supreme Court’s stringent standards enunciated in \textit{Sosa}.\footnote{See \textit{Sosa} v. Alvarez-Machain, 542 U.S. 692, 727 (2004) (stating that the creation of private rights of actions is best left to the legislature). \textit{But see Khulumani}, 504 F.3d at 270 (recognizing aiding and abetting liability).} Furthermore, even if aiding and abetting liability is cognizable under the ATS, judges are likely to shy away from dealing with matters that delve so deeply into the foreign affairs of other countries and are therefore apt to dismiss the claims on prudential considerations.\footnote{See \textit{Sosa}, 542 U.S. at 727.} It is the prerogative of Congress to resolve this confusion and uncertainty.\footnote{See \textit{id.} at 733; Torture Victim Protection Act, Pub. L. No. 102–256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 note (2006)).} As it did with the TVPA, Congress would be able to provide a legitimate and unified voice with regards to corporate complicity in human rights violations.\footnote{106 Stat. at 73; \textit{Bornstein}, \textit{supra} note 35, at 1099–100.} In doing so, Congress would send a clear signal to both the international community and to multinational corporations that such behavior is unacceptable and will be punished in United States courts.\footnote{See 106 Stat. at 73.}
DUE PROCESS RESTRAINED: THE DUAL DILEMMAS OF DISCRIMINATE AND INDISCRIMINATE SHACKLING IN JUVENILE DELINQUENCY PROCEEDINGS

LEAH RABINOWITZ*

Abstract: In Hidden in Plain Sight, Barbara Bennett Woodhouse argues for the advancement of children’s rights through the development of a child-centric perspective. She identifies five principles to further that goal, including the principles of agency and dignity. These principles shed light on the problem of shackling juveniles during their delinquency proceedings. While a recent United States Supreme Court ruling barred indiscriminate shackling for all adult defendants, the status of juveniles remains unclear. Yet even in states that do not shackle juveniles without cause, significant problems remain. This Comment identifies and examines these problems, arguing for increased attention to shackled juveniles’ due process and fundamental dignity rights. The Comment concludes with proposals to improve the discriminate approach, with Woodhouse’s child-centric model in mind.

Introduction

[All juvenile proceedings must contain essentials of due process and fair treatment. In our view, the constitutional presumption of innocence, the right to present and participate in the defense, the interest in maintaining human dignity and the respect for the entire judicial system, are among these essentials whether the accused is 41 or 14.]

Mike, a sixteen-year old African-American male, stands in the crowded and boisterous hallway of the Boston Juvenile Court. He has bravely agreed to discuss his experience with being shackled. The police detained Mike and brought him into court following a school fight.

1 Tiffany A. v. Superior Court, 59 Cal. Rptr. 3d 363, 375 (Ct. App. 2007).
2 Interview with Juvenile, in Boston, Mass. (Dec. 3, 2008). The juvenile’s name is changed to protect his identity.
3 Id.
but the charges were dismissed before arraignment.\textsuperscript{4} As his defense attorney put it, “the case never went anywhere.”\textsuperscript{5}

Even so, like hundreds of other boys and girls, he appeared before the judge in handcuffs and leg irons.\textsuperscript{6} Surely he posed some sort of danger? Not at all, Mike scoffed; he never missed a court appearance or attempted escape from custody.\textsuperscript{7} He never did or said anything threatening either in detention or in court.\textsuperscript{8} No one ever explained to Mike why he was shackled, though he seemed to understand and accept it as “standard procedure.”\textsuperscript{9}

When asked to describe what being shackled felt like, Mike did not hesitate. “I felt bad,” he said. “The cuffs are too tight. They hurt.”\textsuperscript{10} What about the leg irons? “Your legs are squished together. You can’t walk right.”\textsuperscript{11} Mike heard other juveniles tell court officers that their cuffs were too tight. Some officers loosened them; others refused. Mike never bothered to complain, he said with a tone of defeat.\textsuperscript{12} Did shackling make Mike feel anything else? “Yeah,” he replied. “It made me feel like a criminal.”\textsuperscript{13}

This young man’s experience directly contradicts the fundamental notion of due process within the juvenile justice system.\textsuperscript{14} As with America’s adult justice system, due process rights are deeply cherished and

\textsuperscript{4} Interview with Cecely Reardon, Supervising Att’y, Youth Advocacy Project, Comm. for Pub. Counsel Servs., in Boston, Mass. (Dec. 3, 2008).
\textsuperscript{5} Id.
\textsuperscript{6} Interview with Juvenile, supra note 2.
\textsuperscript{7} Interview with Reardon, supra note 4.
\textsuperscript{8} Interview with Juvenile, supra note 2.
\textsuperscript{9} Id.
\textsuperscript{10} Id.
\textsuperscript{11} Id.
\textsuperscript{12} Id.
\textsuperscript{13} Interview with Juvenile, supra note 2.
\textsuperscript{14} See \textit{In re Gault}, 387 U.S. 1, 12, 29 (1967) (explicitly granting due process rights to juveniles, including the right to notice of charges, to counsel, to confrontation and cross-examination of witnesses, and to the privilege against self-incrimination) (“[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.”); Kent v. United States, 383 U.S. 541, 554, 557 (1966) (granting juveniles in the waiver context the right to a hearing and to a statement of reasons for the judge’s decision) (“[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner.”). For decades, \textit{Kent} and \textit{Gault} have served as launch-pads for legal study on the intricate relationship between due process and juvenile delinquency matters. \textit{See}, e.g., \textit{State ex rel. Juv. Dep’t of Multnomah County v. Millican}, 906 P.2d 857, 860 (Or. Ct. App. 1995) (expanding upon \textit{Gault} and expressly noting that “juveniles have the same right as adult defendants to appear free from physical restraints”).
embedded in the juvenile justice system.\textsuperscript{15} Such rights are meant to provide children appearing in court with essential safeguards against unjust deprivation of their liberty.\textsuperscript{16} In the past four decades, beginning with \textit{Kent v. United States} and \textit{In re Gault}, the Supreme Court has made admirable strides towards recognizing the importance of children’s rights by demonstrating an enhanced understanding of and sensitivity to those rights.\textsuperscript{17}

Nevertheless, scholars have questioned whether \textit{Gault}'s promises to juveniles and their advocates have been fulfilled, particularly in juvenile delinquency cases.\textsuperscript{18} The propriety of shackling juveniles during delinquency proceedings is one area that has gained increasing prominence during the past three years.\textsuperscript{19} This question has posed a particularly difficult challenge for legal scholars because the factors on both sides—the child’s liberty versus the security of the courtroom and the safety of its occupants—are unusually compelling.\textsuperscript{20}

\begin{itemize}
\item \textsuperscript{15} See \textit{Gault}, 387 U.S. at 29; \textit{Kent}, 383 U.S. at 554.
\item \textsuperscript{16} See \textit{Tiffany A.}, 59 Cal. Rptr. 3d at 374 (concluding that the “unjustified use of physical restraints relate[s] directly to the constitutional values . . . that the due process clause was intended to protect”). In addition, the court referred to the importance of an accused’s “right to present a defense” and the “presumption of innocence.” \textit{Id.}
\item \textsuperscript{17} See \textit{Roper v. Simmons}, 543 U.S. 551, 553 (2005) (noting three differences between juveniles and adults: their “susceptibility to immature and irresponsible behavior,” their “vulnerability and comparative lack of control over their immediate surroundings,” and their “struggle to define their identity”). The Court then concludes, “[o]nce juveniles' diminished culpability is recognized, it is evident that neither of the two penological justifications for the death penalty—retribution and deterrence of capital crimes by prospective offenders—provides adequate justification for imposing that penalty on juveniles.” \textit{Id.}
\item \textsuperscript{18} See \textit{Jay D. Blitzman, Gault’s Promise}, \textbf{9} \textit{Barry L. Rev.} 67, 68 (2007). In delinquency cases, district attorneys seek an adjudication from the court that a juvenile is a delinquent because he or she has committed an offense proscribed by law. \textit{See, e.g., MASS. GEN. LAWS ch. 119, § 52 (2008)}.
\item \textsuperscript{19} See \textit{In re Staley}, 352 N.E.2d 3, 5–6 (Ill. App. Ct. 1976) (grappling with the issue of shackling juveniles during their adjudicatory hearings in Illinois juvenile courts). Among the court's considerations were the juvenile's ability to communicate with counsel and assist in his or her own defense. \textit{Id.} at 5. Ultimately, the court held that shackling the juvenile Staley was an error warranting remand for another adjudicatory hearing. \textit{Id.} at 6. Cases like \textit{Staley} are helpful in that they hone in on the particular dilemma posed by shackling pre-adjudicated juveniles \textit{in court} as opposed to on route to and from the courtroom. \textit{See id.} at 5. \textit{But cf.} State v. Lewis, 990 So. 2d 109, 118 (La. Ct. App. Aug. 13, 2008) (considering defendant’s argument for reversible error after a juror saw the defendant “being transported to the courtroom for trial [in shackles] and mentioned it to another juror”); State v. Tommy Y., Jr., 637 S.E.2d 628, 638 (W. Va. 2006) (“[N]o court in the country . . . prohibits transporting a prisoner to a courthouse wearing prison garb or shackles. Any rule to the contrary would be ludicrous.”). While shackling during transportation is an issue that merits attention, this Comment does not address it.
\end{itemize}
In 2005, in *Deck v. Missouri*, the Supreme Court held the indiscriminate shackling of a criminal defendant during the sentencing phase of a capital case unconstitutional under the Fifth and Fourteenth Amendments, absent a showing that restraints are “justified by an essential state interest.” This holding was consistent with a line of cases in which courtroom security alone was deemed an insufficient justification for shackling an accused. The decision also served as the capstone to over a century of legal thought, in which the shackling of any accused was generally and persistently disfavored. However, the *Deck* court did not comment on whether its ruling applied to juvenile delinquency cases, which, strictly speaking, are not criminal proceedings.

Even in the wake of *Deck*, Massachusetts, like other states, has continued to shackle all juveniles indiscriminately during delinquency proceedings. Other states have adopted an approach more in line with *Deck*—in these states, the juvenile court conducts a case-specific evaluation before a juvenile is left shackled. However, even this discriminate

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22 See *id.* at 632; *Solomon v. Superior Court*, 177 Cal. Rptr. 1, 3–4 (Ct. App. 1981) (finding a failure to prove necessity because the trial judge did not send for more bailiffs before ordering the defendant shackled). This logic was then cited in *Tiffany A.*. See *59 Cal. Rptr. 3d* at 372–73 (“We note that no California State court has endorsed the use of physical restraints based solely on the defendants’ status in custody, the lack of courtroom security personnel, or the inadequacy of the court facilities.”).

23 See *People v. Allen*, 856 N.E.2d 349, 367 (Ill. 2006) (Freeman, J., dissenting) (“The United States Supreme Court has acknowledged the deep-rooted, historical aversion the judiciary has long had toward trying a criminal defendant in restraints.”).

24 See *Kent*, 383 U.S. at 554 (noting that delinquency proceedings are “designated as civil rather than criminal” and therefore strive “to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment”). Indeed, there is an important distinction between an adjudication of delinquency and a finding of guilt because a finding of guilt implicates the adult justice system and the protections therein. See *id.* at 556; Courtney P. Fain, *What’s in a Name? The Worrisome Interchange of Juvenile “Adjudications” with Criminal “Convictions”,* 49 B.C. L. Rev. 495, 498 (2008).


26 See *Tiffany A.*, 59 Cal. Rptr. 3d at 365; *In re Deshaun M.*, 56 Cal. Rptr. 3d 627, 629 (Ct. App. 2007); *In re R.W.S.*, 728 N.W.2d 326, 331 (N.D. 2007).
approach fails to protect juveniles’ full rights to procedural and substantive due process.27

These failures become even more apparent in light of Barbara Bennett Woodhouse’s book, *Hidden in Plain Sight.*28 Woodhouse argues for an enhanced view of children’s rights and advocates for a child-centric perspective.29 She identifies five values or “principles” at the heart of this child-centric perspective—privacy, agency, equality, dignity, and protection.30 In particular, the practice of shackling runs afoul of Woodhouse’s agency and dignity principles.31 Under the agency principle, a child is entitled to “play an active role in shaping his or her own destiny.”32 An important component of the agency principle, according to Woodhouse, is the right to be heard in court.33 Under the “indispensable” dignity principle, every child deserves “inherent human dignity.”34 In order to realize that dignity, she continues, jurists should adopt a broad reading of the guarantee of “liberty” expressed in the Fourteenth Amendment.35 Woodhouse sees “freedom from bodily harm and restraint” as falling well within the bounds of the Fourteenth Amendment’s protections.36 With Woodhouse’s two principles in mind, one can better analyze and attempt to resolve the defects in the discriminate approach.37

Part I of this Comment explores indiscriminate shackling. This Comment first uses Massachusetts as a case study and then touches upon other states, particularly Florida, through recent criticism of the practice. This Comment then explores criticism of indiscriminate shackling in light of the agency and dignity principles, with a special emphasis on physical and psychological harms. Part II describes the discriminate approach in detail. Part III explains how discriminate shackling of Defendants in Juvenile Delinquency Proceedings

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28 See *BARBARA BENNETT WOODHOUSE, HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN’S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE* 29–34 (2008). Woodhouse is the David H. Levin Chair in Family Law and founding director of the Center on Children and Families at the University of Florida.

29 Id. at 30.
30 Id. at 34.
31 See id.
32 Id. at 37.
33 WOODHOUSE, supra note 28, at 38.
34 Id. at 40.
35 Id.
36 Id.
37 See id. at 34.
shackling is problematic because it deprives juveniles of due process and represents an affront to their fundamental rights. This Comment first argues that current practices violate juveniles’ agency right, at both the trial and appellate levels. It then argues that current practices violate juveniles’ dignity right by failing to consider excessive psychological harms. Part IV draws upon Woodhouse’s child-centric framework to suggest ways to remedy and improve the indiscriminate approach and argues for a legal analysis that better recognizes shackled juveniles’ fundamental rights.

I. Indiscriminate Shackling in Action

A. The Curious Case of Massachusetts

Many states, including Massachusetts, continue to employ the indiscriminate approach. In Massachusetts, all juveniles brought to court from detainment are transported in shackles, remain shackled during their proceedings, and, if they are not released from custody, escorted back to detainment in shackles. The rationale underlying this practice is simple—shackling is thought to be the best, if not the only, way to ensure safety in the courtroom. The justification for the practice arose from two courtroom disruptions—one in which a juvenile flipped a counsel table over, breaking the glass pane on top, and another in which a juvenile made rude comments to an Assistant District Attorney as he was escorted behind the Commonwealth’s table.

However, hindsight suggests that shackling would not have prevented either of these two incidents because a handcuffed juvenile could still muster enough leverage to flip a table, and shackles cannot prevent rude comments. In addition, the second juvenile would not have passed by the Commonwealth’s table at all if the placement of people and furniture in the courtroom had been less “ill-considered.” Escape attempts are especially unlikely in a courthouse like the Boston Juvenile Court, where the delinquency session has only one public

38 Telephone Interview with King, supra note 25.
39 Id. Judge King notes that this practice applies to most proceedings, but not to some fact-finding proceedings, such as trials, competency hearings, or hearings on motions to suppress. E-mail from Ken King, Middlesex Juvenile Court, to author (Mar. 17, 2009, 14:18:00 EST) (on file with author).
40 Telephone Interview with King, supra note 25.
41 Id.; E-mail from Ken King, supra note 39.
42 E-mail from Ken King, supra note 39.
43 Telephone Interview with King, supra note 25.
doorway with heavy swinging doors, officers are stationed in the courtroom and in the hallway, and at least two floors separate the courtroom from the main exit.\textsuperscript{44} Successful escape, therefore, is “virtually impossible.”\textsuperscript{45}

Moreover, the mandate for the indiscriminate approach in Massachusetts does not come not from the bench; rather, it seems to derive from the unwritten policies of courtroom security personnel.\textsuperscript{46} There is not a single statute, precedent, or court rule that authorizes the indiscriminate shackling of juveniles.\textsuperscript{47} However, the Massachusetts Rules of Criminal Procedure, which generally apply to delinquency proceedings, require discriminate shackling for adult defendants.\textsuperscript{48} It is unclear why this particular Rule does not extend to delinquency matters—or if it does, why it is so openly disregarded.\textsuperscript{49}

\textbf{B. Academic Criticism of Indiscriminate Shackling}

Following \textit{Deck}, juveniles have legally challenged indiscriminate shackling policies in a few states, though no such challenges have been brought in Massachusetts.\textsuperscript{50} Opponents of the practice launched an especially prominent anti-shackling movement in Florida in late 2006.\textsuperscript{51}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{44} Id.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Id. (commenting that there is “no articulated, principled reason” for the indiscriminate shackling policy).
\item \textsuperscript{48} See Mass R. Crim. P. 45(a).
\item \textsuperscript{49} Telephone Interview with King, \textit{supra} note 25.
\item \textsuperscript{50} See \textit{id.}; Anita Nabha, \textit{Shuffling to Justice: Why Children Should Not Be Shackled in Court}, 73 Brook. L. Rev. 1549, 1550 (2008) (noting pending litigation in Florida and New York); Press Release, Legal Aid of N.C., Legal Aid Requests Court Cease Shackling of Minor Child (Feb. 5, 2007), available at http://www.lsc.gov/press/updates_2007_detail_T158_R4.php (introducing litigation in North Carolina). Procedurally, the shackling issue usually arises in the form of a post-adjudication appeal from a denied motion to unshackle, where the relief sought is vacating the adjudication or, at the very least, reversal and remand for a new trial. See, \textit{e.g.}, \textit{In re Deshaun M.}, 56 Cal. Rptr. 3d 627, 628–29 (Ct. App. 2007).
\end{enumerate}
\end{footnotesize}
As a result, scholars have begun to take notice of the problems with indiscriminately shackling all juveniles.\textsuperscript{52} One scholar extensively critiqued Florida’s indiscriminate shackling policy, exploring the way that it violates the due process rights of juveniles.\textsuperscript{53} He noted that indiscriminate shackling fails to consider children’s constitutionally guaranteed liberty interest.\textsuperscript{54} The scholar then compared juveniles’ due process rights to those of adult defendants, placing a special emphasis on the impact of \textit{Gault} and the rights it guarantees to juveniles.\textsuperscript{55} He noted that the \textit{Gault} court “would find routine indiscriminate shackling a thoroughly reprehensible practice.”\textsuperscript{56} The scholar concludes that indiscriminately shackling juveniles is an undesirable policy that should be terminated.\textsuperscript{57}

Another scholar argued that \textit{Deck}’s bar on indiscriminate shackling should apply to delinquency proceedings.\textsuperscript{58} Moving away from indiscriminate shackling, she concludes, is more in line with the juvenile justice system’s goal of rehabilitation.\textsuperscript{59} Moreover, eliminating indiscriminate shackling would provide a sense of fairness to juveniles appearing in court.\textsuperscript{60}

Finally, a study conducted by the Center on Children and Families challenged the practice of shackling as a courtroom security measure.\textsuperscript{61} The study first noted that only 4.5 percent of juvenile offense cases nationwide in 2006 involved a violent crime, whereas property crimes represented eighteen percent and non-violent status offenders comprised twenty-nine percent.\textsuperscript{62} The study also reported on its observations of juveniles during their proceedings in Alachua County, Florida in 2007.\textsuperscript{63} Overall, ninety-three percent of juveniles there were rated as

\textsuperscript{52}See Perlmutter, \textit{supra} note 51, at 25.
\textsuperscript{53}See \textit{id}. at 4.
\textsuperscript{54}See \textit{id}. at 47.
\textsuperscript{55}\textit{Id}. at 35–37.
\textsuperscript{56}\textit{Id}. at 36.
\textsuperscript{57}See Perlmutter, \textit{supra} note 51, at 58.
\textsuperscript{58}Nabha, \textit{supra} note 50, at 1575.
\textsuperscript{59}\textit{Id}. at 1551.
\textsuperscript{60}\textit{Id}. at 1587.
\textsuperscript{61}See Banks \textit{et al.}, \textit{supra} note 51, at 3, 9.
\textsuperscript{62}\textit{Id}. at 3.
\textsuperscript{63}\textit{Id}. at 8.
“compliant,” four percent “withdrawn,” and a mere one percent “defiant.” Given these data, the efficacy of shackling as a courtroom security measure comes under great scrutiny.

C. The Harms of Indiscriminate Shackling

Indiscriminate shackling is problematic because it fails to acknowledge juveniles’ agency and dignity rights. First, the agency right is violated because juveniles are given no opportunity to participate in the decision-making process—in fact, there is no decision-making process at all. The practice of deferring to security personnel runs counter to a great deal of modern case law. For example, the Supreme Court of North Dakota found error when a judge below deferred to law enforcement’s decision to shackles. Similarly, an Oregon court emphasized the duty of the trial judge: “[A] conclusory statement alone by a prosecutor or law enforcement officer is not sufficient to permit the independent analysis necessary for the exercise of [the court’s] discretion.” Moreover, the emphasis on courtroom security to the total exclusion of all other factors such as agency stands against the heft of case law. For instance, as a California court recently commented, “no California [s]tate court has endorsed the use of physical restraints based solely on the defendants’ status in custody, the lack of courtroom security personnel, or the inadequacy of the court facilities.”

Second, juveniles’ dignity rights are violated because shackling often results in physical and psychological harm. The effects of shackling, particularly the physical effects, have been documented for over a century. Moreover, juveniles are more susceptible to suffering

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64 Id. at 9.
65 See id. at 3, 9.
66 See Woodhouse, supra note 28, at 34–35.
67 See id. at 37.
69 R.W.S., 728 N.W.2d at 331.
72 Id.
73 See Woodhouse, supra note 28, at 40; Telephone Interview with King, supra note 25 (describing indiscriminate shackling as “destructive and unnecessary”).
74 See Tiffany A., 59 Cal. Rptr. 5d at 370 (“As early as 1871 the California Supreme Court recognized placing the criminal defendant in shackles ‘imposes physical burdens,
psychological harms after being shackled than are their adult counterparts. Shackled juveniles suffer embarrassment and humiliation, particularly when surrounded by strangers in the court gallery. They develop a lowered self-image, feel like captive animals, and are forced to surrender their psychological supremacy. Some juveniles have been shackled for hours at a time while awaiting their turn in court. Exceptionally young juveniles have been shackled, and often experience intense confusion at the experience. Shackling is particularly painful for juveniles who already have a background of abuse, usually from an authority figure like a parent.

75 See Millican, 906 P.2d at 861 (DeMuniz, J., dissenting); Perlmutter, supra note 51, at 19–20 (citing Bennett H. Brummer et al., Pub. Defender Eleventh Jud. Cir. Ct. of Fla., Motion for Child to Appear Free from Degrading and Unlawful Restraints, available at http://www.pdmiami.com/unchainthechildren/Unshackle_Calendar_Motion2.pdf); Telephone Interview with King, supra note 25 (noting a “labeling, branding, and shaming effect” to shackling juveniles).

76 See People v. Allen, 856 N.E.2d 349, 372 (Ill. 2006) (Freeman, J., dissenting); Perlmutter, supra note 51, at 19–20 (“[B]eing shackled in public is humiliating for young people, whose sense of identity is vulnerable.” (citing Brummer et al., supra note 75 at 8)).

77 See Allen, 856 N.E.2d at 372 (Freeman, J., dissenting); Perlmutter, supra note 51, at 19–20, 37 (“The young person who feels like he/she is being treated like a dangerous animal will think less of him/herself. . . . [B]eing chained like a ‘dangerous animal’ may cause the child to feel like one. . . . Being shackled conveys that others see the child as ‘a contained beast,’ an image that ‘becomes integrated in his own identity formation, possibly influencing his behavior and responses in the future.’”) (citing Brummer et al., supra note 75, at 20, 27, 34).

78 See Perlmutter, supra note 51, at 6–7 (describing the physical effects of extended shackling on juveniles in Miami-Dade, Florida). Perlmutter points to juveniles whose “chains stay on for hours at a time, sometimes as long as a full day, and are not removed even when the children need to use the bathroom.” Id. Such juveniles suffer “cuts, bruises and abrasions from the tight cuffs,” which cause “bleeding and other serious physical harms and discomforts.” Id. at 7.

79 See id. at 6–7; Bob Herbert, Op-Ed., 6-Year Olds Under Arrest, N.Y. TIMES, Apr. 9, 2007 at A17. Herbert’s article recounts the arrest and shackling of six-year old Desre’e Watson of Avon Park, Florida. After misbehaving in her kindergarten class, the child was charged with felony battery on a school official for flailing and kicking at teachers who tried to control her during a tantrum, as well as a misdemeanor for disrupting a school function for yelling in class. Herbert, supra. She was also charged with resisting a law enforcement officer because when she saw officers approaching, she crawled under a table. Id. The officers finally pulled Desre’e out from under the table and placed handcuffs on her. Id. They had to place them on her biceps because her wrists were too tiny. Id.

80 See Perlmutter, supra note 51, at 19–20 (noting that shackling poses special psychological dangers to children “who have been previously traumatized by physical and sexual abuse, loss, neglect, and abandonment”). Such children “suffer from depression, attention and conduct disorders, and substance abuse.” Id. Shackling also “exacerbates trauma, re-
niles who have been shackled report feeling like their chained and enslaved ancestors.\textsuperscript{81}

Courts’ failure to consider shackled juveniles’ agency and dignity is especially disconcerting because of the rehabilitative aims at the heart of the juvenile justice system.\textsuperscript{82} Troubled juveniles who perceive a court system as totally dismissive of their rights have no incentive to reform their behavior or to avoid later returning to court as adult defendants.\textsuperscript{83} Shackling also fails to serve as a deterrent for future delinquent behavior.\textsuperscript{84} As one former defense attorney describes the reasoning of juveniles, “people already think I’m bad, so I may as well be bad.”\textsuperscript{85}

The notion of shackling as antithetical to the goals of rehabilitation is reflected in the context of secured treatment facilities.\textsuperscript{86} In Massachusetts, for instance, a juvenile committed to the custody of the Department of Youth Services and housed in a secured facility cannot be shackled without cause, and then only as a last resort.\textsuperscript{87} Such policies recognize that shackling is often contrary to a juvenile’s rehabilitation, and therefore take into account a juvenile’s physical and psychological characteristics before making the decision to shackle.\textsuperscript{88} Thus, common sense dictates that judges proceed with caution when the individual to be shackled is a juvenile.\textsuperscript{89}

\textit{viving feelings of powerlessness, betrayal, and self-blame.” Id. Finally, when restraint was part of prior abuse, in-court shackling can “trigger flashbacks and reinforce early feelings of powerlessness.” Id.}

\textsuperscript{81} See id.


\textsuperscript{83} See Nabha, \textit{supra} note 50, at 1582 (“Children may understand that their out-of-control behavior in a facility has a consequence and may result in the use of restraints. However, in court, if without acting inappropriately they are still restrained, children will not understand why they are being punished.”).

\textsuperscript{84} See id. at 1574 (“Juvenile defenders and scholars note that there is no evidence to suggest that shackling juveniles is an effective deterrent to juvenile crime.”).

\textsuperscript{85} Telephone Interview with King, \textit{supra} note 25.

\textsuperscript{86} See Mass. Dep’t of Youth Servs. Policy 03.02.08(d), available at http://www.mass.gov/Eeohhs2/docs/dys/policies/030208d_restraint_use_force.doc.

\textsuperscript{87} See id.

\textsuperscript{88} See id.

\textsuperscript{89} See Perlmutter, \textit{supra} note 51, at 19–20.
II. THE DISCRIMINATE APPROACH IN ACTION

A. The Requirement of Necessity

In states that have abandoned indiscriminate shackling, the practice is presumed unwarranted unless and until evidence is presented to demonstrate otherwise. This policy reflects the notion found at the heart of American jurisprudence that all defendants are innocent until proven guilty. While each state using this discriminate approach uses slightly different language to define its standard, each definition includes the requirement of need. In California, for instance, the court asks whether there is a “manifest need” to shackle a pre-adjudicated juvenile. In Illinois, children appearing in juvenile court cannot be shackled unless there is a “good reason” to do so. The state bears the initial burden of satisfying these standards, and can only succeed upon presenting sufficient evidence that a juvenile “has been unruly, has announced an intention to escape, or when the evidence shows that the [juvenile] would likely disrupt the judicial process if left unrestrained.” More specifically, a court will weigh such considerations as the likelihood that the juvenile will attempt escape or disrupt the pro-

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90 Cf. People v. Duran, 545 P.2d 1322, 1326 (Cal. 1976) (stating that a trial court must allow a defendant to appear “without physical restraints unless there was ‘evident necessity’ for the restraint”). This Comment does not argue that there is no case in which in-court shackling is unwarranted. See State v. Lehman, 749 N.W.2d 76, 79 (Minn. Ct. App. 2008). For instance, in Lehman, a defendant was shackled after he attacked his attorney in court, grabbing the attorney by the neck and “punching him repeatedly in the face.” Id. The defendant drew blood, and the attorney “suffered a cut lip and a black eye.” Id. The Court of Appeals of Minnesota held that the “district court did not abuse its discretion by ordering appellant [defendant] restrained for the remainder of the trial.” See id. at 84. Additionally, in People v. Kimball, the Court correctly found sufficient justification to place handcuffs on the defendant. See 55 P.2d 483, 484 (Cal. 1936). There, the government produced “evidence tending to show that defendant had expressed an intent to escape; that he had threatened to injure or kill three or four witnesses in the courtroom by striking them over the heads with a chair; [and] that on the first day of the trial a piece of lead pipe, fourteen inches in length, was found concealed in the top of one of his boots and under the leg of his overalls.” Id.


92 See, e.g., CAL. PENAL CODE § 688 (West 2008) (“No person charged with a public offense may be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge.”).

93 See In re Deshaun M., 56 Cal. Rptr. 3d 627, 629 (Ct. App. 2007) (citing People v. Fierro, 3 Cal. Rptr. 2d 426, 445 (1991)).


ceedings, and the juvenile’s “past criminal record, his reputation, and his character.”96

Courts have further held that there is no need to shackle a juvenile in court when less drastic alternatives are available and are reasonably sufficient.97 For example, a judge who orders a juvenile to be shackled solely because there are no or few guards in the courtroom should first attempt to procure additional guards.98 A judge’s failure to employ these less drastic alternatives when it is reasonable to do so constitutes an abuse of that judge’s discretion.99 Unsurprisingly, then, shackling an accused during court proceedings is often considered a “last resort.”100

B. Jury Prejudice and Effect on the Defense

The analysis under the discriminate approach does not end with necessity, however, because necessity must be balanced against other important factors.101 Foremost among those factors is prejudice in the eyes of the jury.102 In fact, jury prejudice is such an important consideration that, in some jurisdictions, a juvenile’s or defendant’s failure to show actual or potential jury prejudice essentially concludes the analysis in the state’s favor, with no other factors coming into play at all.103 Focusing on jury prejudice puts juveniles at a disadvantage because juveniles do not have a constitutional right to a jury trial, and only a few states allow juries in delinquency cases.104

96 See Deshaun, 56 Cal. Rptr. 3d at 629; Staley, 352 N.E.2d at 6.
98 See In re Staley, 364 N.E.2d 72, 74 (Ill. 1977).
99 See Boose, 337 N.E.2d at 341; Randall E. Tuskowski, Spain v. Rushen: Shackles or Showtime? A Defendant’s Right to See and Be Seen, 20 Golden Gate U. L. Rev. 175, 175 (1990).
101 See, e.g., Tiffany A. v. Superior Court, 59 Cal. Rptr. 3d 363, 375 (Ct. App. 2007).
102 See State v. E.J.Y., 55 P.3d 673, 679 (Wash. Ct. App. 2002) (“This was a proceeding without a jury, which greatly reduces the likelihood of prejudice.”).
103 See United States v. Lu, 174 F. App’x 390, 396 (9th Cir. 2006); People v. Horn, 755 N.W.2d 212, 218 (Mich. Ct. App. 2008) (“[Michigan’s] caselaw holds that a defendant is not prejudiced if the jury was unable to see the shackles on the defendant.”).
Nevertheless, even if a juvenile has not suffered jury prejudice, he or she can still demonstrate that being shackled was improper.105 Beyond jury prejudice, many courts also consider the impact of shackling on courtroom decorum, the juvenile’s ability to confer with counsel, and the juvenile’s decision about whether to testify on his or her own behalf.106 In evaluating the impact of shackling on courtroom decorum, the court is concerned with infringing upon the defendant’s right to be presumed innocent, for to unfairly shakele an accused is deeply offensive to our system of justice.107

Further, a juvenile’s ability to confer with counsel and to freely decide whether to take the stand is an essential part of the adjudication process.108 If a juvenile is ordered to wear handcuffs, the court must consider whether the cuffs would unfairly infringe on that juvenile’s ability to write notes to his attorney.109 Similarly, courts must consider whether shackling would cause the juvenile such anxiety that he would not be able to concentrate on communicating with counsel or on delivering testimony from the witness stand.110 Overall, the juvenile court judge’s mandate is to analyze and weigh all of these factors together, thereby engaging in an individualized risk assessment of each case and


108 Cf. Allen, 397 U.S. at 344 (“[O]ne of the defendant’s primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total physical restraint.”); Gonzalez v. Plier, 341 F.3d 897, 900 (9th Cir. 2003).

109 See Deshaun M., 56 Cal. Rptr. 3d at 630 (holding that any error in shackling juvenile was harmless because juvenile’s “right hand was freed from restraints so that he could write and communicate with counsel”).

110 See State ex rel. Juv. Dep’t of Multnomah County v. Millican, 906 P.2d 857, 860–61 (Or. Ct. App. 1995); cf. People v. Allen, 856 N.E.2d 349, 372 (Ill. 2006). The issue of the distracted defendant-witness takes on greater importance when stun belts are used. See United States v. Durham, 287 F.3d 1297, 1306 (11th Cir. 2002). The court explained that

[w]earing a stun belt is a considerable impediment to a defendant’s ability to follow the proceedings and take an active interest in the presentation of his case. It is reasonable to assume that much of a defendant’s focus and attention when wearing one of these devices is occupied by anxiety over the possible triggering of the belt. A defendant is likely to concentrate on doing everything he can to prevent the belt from being activated, and is thus less likely to participate fully in his defense at trial.

Id.; see People v. Mar, 52 P.3d 95, 106 (Cal. 2002).
making a reasoned decision on shackling accordingly.\textsuperscript{111} This analysis makes clear that unwarranted shackling interferes with the right to a fair trial and constitutes a due process violation.\textsuperscript{112}

III. THE PROBLEMS WITH DISCRIMINATE APPROACH

A. No Requirement of a Hearing

While the discriminate approach is certainly superior to the indiscriminate approach described in Part I, it is flawed in that it fails to fully protect pre-adjudicated juveniles’ right to due process.\textsuperscript{113} One defect in the discriminate approach is that juvenile court judges are not required to hold formal hearings on the propriety of shackling pre-adjudicated juveniles.\textsuperscript{114} However, it is a positive step forward that, in most states, courts must make a record as to the necessity of shackling pre-adjudicated juveniles.\textsuperscript{115} The record must go beyond mere insinuation and contain facts that document the child’s risk level.\textsuperscript{116} It is helpful, too, that there can be no presumption of necessity where a record is silent on the question.\textsuperscript{117}

Yet the lack of a formal hearing poses numerous legal and moral problems—most importantly, without a formal hearing, a juvenile court judge is far less likely to understand the full impact of his or her decision to shackle any given juvenile.\textsuperscript{118} A hearing allows a juvenile to call witnesses who can rebut the state’s evidence of risk and offer mitigating physical or psychological evidence.\textsuperscript{119} Withholding this opportunity can cause a shackled juvenile significant harm.\textsuperscript{120} First, a juvenile may perceive that the court is not giving him the chance to be heard fully on such a crucial point, and thereby runs afoul of Woodhouse’s agency

\textsuperscript{112} See James Benjamin, Note, \textit{Failure to Object to In-Court Restraints: The Boose and Plain Error Doctrines in People v. Allen}, 57 \textit{DePaul L. Rev.} 193, 206 (2007); Tuskowski, \textit{supra} note 94, at 176.
\textsuperscript{114} \textit{Cf.} State v. Kunze, 738 N.W.2d 472, 478 (N.D. 2007).
\textsuperscript{116} \textit{Cf. People v. McDaniel}, 71 Cal. Rptr. 3d 845, 850 (Ct. App. 2008) (quoting People v. Anderson, 22 P.3d 347, 382 (Cal. 2001)).
\textsuperscript{117} \textit{See} State v. Brewster, 261 S.E.2d 77, 82 (W. Va. 1979).
\textsuperscript{118} \textit{See} Nabha, \textit{supra} note 50, at 1576.
\textsuperscript{119} \textit{See} \textit{Allen}, 856 N.E.2d at 377–78 (Freeman, J., dissenting).
\textsuperscript{120} \textit{See} Nabha, \textit{supra} note 50, at 1575–78.
principle. Second, without the ability to introduce mitigating evidence, an especially vulnerable juvenile might suffer special physical or psychological harm due to shackling, beyond the already substantial harms that exist for the average juvenile in the justice system.

B. Passive Appellate Review

Not only do juveniles face due process difficulties at trial, but they also face formidable obstacles on appeal. To counter the state’s evidence that shackling was needed, the petitioner-juvenile is expected to produce concrete evidence that he or she posed no risk of harm or escape and therefore was prejudiced below. But as Justice Freeman commented in People v. Allen, “How exactly is a defendant to show that his presumption of innocence was compromised? What type of record evidence would support a finding of a compromised presumption of innocence?”

Justice Freeman explained that the negative effects of shackling, such as nervous twitching or shaking, likely would not appear on the record because they are non-verbal. In fact, a juvenile may purposefully refrain from verbalizing his or her discomfort out of fear that he or she would receive worse treatment from security personnel in the future. These non-verbal cues are important because they can represent the difference between finding a juvenile delinquent or not delinquent, particularly when the case is heard by a jury. Yet a dilemma arises because “a defendant’s nontestifying demeanor is not a traditional form of courtroom evidence.”

The gaps in the record due to non-verbal factors place shackled juveniles at a tremendous disadvantage on appeal. With appellate courts generally declining to conduct a de novo review of a juvenile court judge’s shackling decision, those juvenile court judges have wide

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121 See id. at 1587–88; Woodhouse, supra note 28, at 37.
122 See infra Part I.C; cf. Allen, 856 N.E.2d at 377–78 (Freeman, J., dissenting); Tuskowski, supra note 99, at 180.
124 See Allen, 856 N.E.2d at 373 (Freeman, J., dissenting).
125 Id.; see Benjamin, supra note 112, at 211.
126 See Allen, 856 N.E.2d at 374 (Freeman, J., dissenting).
127 See id.
129 See id. at 600.
discretion. Appellant-juveniles are not granted relief unless there was an abuse of discretion by the trial judge. Moreover, a juvenile who meets the high abuse of discretion standard is not automatically victorious. Upon finding an abuse of discretion, an appellate court will then inquire into whether the abuse constituted harmful, as opposed to harmless, error. Yet when the harms alleged are not reflected in the record, an appellate court cannot conduct a full analysis. In many cases, therefore, appellate courts reach the paradoxical conclusion that a trial judge’s decision about shackling was in error but resulted in no harm.

C. Limited Factors in the Court’s Analysis

Courts’ failures to perceive real harm in what they admit to be cases of wrongful and unnecessary shackling are indicative of a failure to fully appreciate the high stakes of shackling decisions. In defining the question as one of a technical legal error, courts gloss over the fundamental right- and dignity-based errors at the heart of the matter. In addition to the due process protections lost when juveniles do not get a formal hearing or strident appellate review, shackled juveniles lose protections through courts’ overly narrow analyses, which do not include any consideration of juveniles’ dignity.

131 See Commonwealth v. Chase, 217 N.E.2d 195, 197 (Mass. 1966) (“[A] judge’s refusal to order the removal of the shackles, where there exists any reasonable basis for anticipating that a prisoner may attempt to escape, will not be overruled.”) (emphasis added); Jona Goldschmidt, “Order in the Court!”: Constitutional Issues in the Law of Courtroom Decorum, 31 Hamline L. Rev. 1, 51–52 (2008) (discussing the possibility of trial judges shackling a juvenile because the judge was “personally slighted or annoyed” at the accused); David R. Wallis, Note, Visibly Shackled: The Supreme Court’s Failure to Distinguish Between Convicted and Accused at Sentencing for Capital Crimes, 71 Mo. L. Rev. 447, 447 (2006).


135 See Kenneth T., 2008 WL 3856658, at *10; Tuskowski, supra note 99, at 198.

136 See Kenneth T., 2008 WL3856658, at *10; Christian G., 2007 WL 1302433, at *2; R.W.S., 728 N.W.2d at 331.

137 See Deshaun, 56 Cal. Rptr. 3d at 630–31; In re Staley, 364 N.E.2d 72, 75–76 (Ill. 1977) (“[I]n my opinion it is better to offend the dignity of the defendant than to suffer violence to erupt in the courtroom.”).

138 See R.W.S., 728 N.W.2d at 331 (holding that shackling the juvenile was harmless error even though the court below “made no findings that [the juvenile] posed an immediate and serious risk of dangerous or disruptive behavior or of escape or flight”).

139 See People v. Wallace, 189 P.3d 911, 927 (Cal. 2008); Millican, 906 P.2d at 860–61.
Discriminate shackling only exacerbates the physical and psychological harms that indiscriminate shackling induces. The discriminate approach does not necessarily exclude the most vulnerable juveniles, for whom the effects of shackling are heightened. Juveniles in this class might include the exceptionally young, the physically abused, and the sexually abused. Not only does the approach fail to consider factors like abuse history, but were such histories to be taken into account, there would be no way to know how much weight they would be given.

It is at best uncertain that invoking a juvenile’s dignity principle would be sufficient to overcome even the most scant indicia of that juvenile’s dangerousness. For instance, assume someone physically abused the juvenile during early childhood, but (or perhaps as a result) the juvenile also has a history of unpredictable violent outbursts. While violent tendencies would almost certainly appear in the court’s shackling analysis, there is nothing to ensure that even the most insidious abuse history would likewise appear. And even if factors like abuse history were part of the analysis, there is also no measure of how much the shackles would have to impact the juvenile—how much anxiety he or she would have to display—before the line between acceptable and unacceptable discomfort would be crossed. In this way, even

140 See, Perlmutter, supra note 51, at 19–20; supra Part I.C.
141 Cf. Tuskowski, supra note 99, at 180 (noting that the defendant’s shackling aggravated his preexisting physical and psychological conditions).
142 See Perlmutter, supra note 51, at 19–20.
143 See Wallace, 189 P.3d at 927 (refusing to “depart from the prejudice analysis we have applied for over [thirty] years” and thereby declining to consider “the psychological effects on a defendant—specifically, mental impairment, physical pain, and obstruction of communication with defense counsel—that result from the imposition of restraints”)
144 See Illinois v. Allen, 397 U.S. 337, 351–52 (1970) (Douglas, J., dissenting) (expressing uncertainty as to the balancing between a mentally ill defendant who creates a disturbance in the courtroom); see also Millican, 906 P.2d at 860–61 (declining to embrace the juvenile’s argument that “his demeanor itself—that is, the manner in which he presented himself to the court through posture, facial expressions, and the like—was affected by his shackling”).
146 See Press Release, Legal Aid of N.C., supra note 50. In North Carolina, a fourteen-year old girl was shackled in court despite having a history of sexual abuse in which she was handcuffed by her abuser. Id. The girl was reminded of her past abuse by being shackled in court, where she cried and became very emotional. Id. The trial judge did not consider the girl’s abuse history as a mitigating factor warranting unshackling the girl. See id. However, based upon this case, the North Carolina legislature passed a bill in 2007 shifting state policy from indiscriminate to discriminate shackling. See Banks et al., supra note 51, at 10.
147 See Benjamin, supra note 112, at 214–15.
if a hearing on shackling were to occur, the hearing would be unfairly skewed against the juvenile.\textsuperscript{148} While it is possible that courtroom security may well outweigh any particular juvenile’s case for freedom from restraint, this determination cannot be made under the current analytical framework.\textsuperscript{149}

IV. Improving the Discriminate Approach to Shackling

A. Require a Hearing upon the Juvenile’s Request

In order to protect the fundamental rights of juveniles in delinquency proceedings, juvenile court judges should adopt and expand the discriminate approach by holding a formal hearing on the issue of shackling, at a juvenile’s request.\textsuperscript{150} Hearings will ensure that judges have a full understanding of the implications of shackling on any given juvenile, and will further enhance the process of assessing the individual juvenile’s risk level.\textsuperscript{151} Additionally, hearings will allow the most vulnerable juveniles to present mitigating factors to the court, thereby increasing the probability that they will be shackled only when absolutely necessary.\textsuperscript{152} This result is precisely what the discriminate approach seeks to achieve, and is consistent with what Woodhouse encourages under the agency principle of her child-centric perspective.\textsuperscript{153}

The desired result is possible to achieve if we build upon the foundations already in place.\textsuperscript{154} In Illinois, for instance, a trial judge must “give defense counsel an opportunity to present reasons why the defendant should not be shackled.”\textsuperscript{155} This practice at least allows the juvenile to place mitigating circumstances like abuse history before the

\textsuperscript{148} See Wallace, 189 P.3d at 927; Millican, 906 P.2d at 860–61.
\textsuperscript{149} See Wallace, 189 P.3d at 927; Millican, 906 P.2d at 860–61.
\textsuperscript{150} See State v. Kunze, 738 N.W.2d 472, 478 (N.D. 2007) (“[T]he physical indicia of innocence are so essential to a fair trial that the better practice is to hold a hearing so that factual disputes may be resolved and evidence of the facts surrounding the decision are made a part of the record.”) (quoting Kennedy v. Cardwell, 487 F.2d 101, 107 (6th Cir. 1973)); see also Brian D. Gallagher & John C. Lore III, Shackling Children in Juvenile Court: The Growing Debate, Recent Trends and the Way to Protect Everyone’s Interest, 12 U.C. Davis J. Juv. L. & Pol’y 453, 478–79 (2008) (proposing a statute that would require a brief on the record hearing on the propriety of shackling a juvenile and suggesting a ten-point checklist of factors for the court to consider).
\textsuperscript{151} See Tiffany A. v. Superior Court, 59 Cal. Rptr. 3d 363, 370–71 (Ct. App. 2007).
\textsuperscript{152} See id.
\textsuperscript{153} See Woodhouse, supra note 28, at 37–38.
\textsuperscript{155} Id.
court, which can then be fleshed out at a hearing with the examination of witnesses.  

Another source of options for reform comes from the adult criminal justice system in Massachusetts, in which a defendant must receive a hearing before it is permissible to shackle the defendant in the courtroom. The required hearing is by nature flexible, without a “rigid legislative formulation.” At the hearing, facts on both sides are able to be “thrashed out.” Given the extent to which due process in Massachusetts’ juvenile system echoes its adult system, this would not be a difficult procedure to implement in juvenile court.

### B. Re-evaluate Notions of Harmless Error

In addition to reforms at trial, changes are needed on appeal. Appellate courts must serve as more of a check on trial judges, and should adopt a broader interpretation of the harmless error standard. Rather than focus on whether a trial judge made a technical error of law, an appellate court should center its analysis on whether a juvenile’s fundamental rights were fairly weighed at trial. This shift in focus would allow juveniles an additional opportunity to present evidence of mitigating factors where the juvenile court denies or disregards that opportunity. Defense counsel and juvenile court judges should be encouraged to place their observations of the juvenile on the record so that the non-verbal harms of shackling will be more readily

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156 See id.


158 See Martin, 676 N.E.2d at 456; Benjamin, supra note 112, at 206.

159 See Martin, 676 N.E.2d at 456 (citing Commonwealth v. Brown, 305 N.E.2d 830, 836 (Mass. 1973)).

160 See Barbara Kaban, Rethinking a “Knowing, Intelligent, and Voluntary Waiver” in Massachusetts’ Juvenile Courts, 5 J. CTR. FOR FAMS., CHILD. & CTS. 35, 37 (2004) (“In Massachusetts, children are afforded the full panoply of due process rights and protections enjoyed by adults.”).

161 See People v. Allen, 856 N.E.2d 349, 373–74 (Ill. 2006) (Freeman, J., dissenting).


163 See Allen, 856 N.E.2d at 373–74 (Freeman, J., dissenting); People v. Blue, 724 N.E.2d 920, 940–41 (Ill. 2000) (“We ask whether a substantial right has been affected to such a degree that we cannot confidently state that defendant’s trial was fundamentally fair. . . . When an error arises at trial that is of such gravity that it threatens the very integrity of the judicial process, the court must act to correct the error, so that the fairness and the reputation of the process may be preserved and protected.”).

164 See Allen, 856 N.E.2d at 373–74 (Freeman, J., dissenting).
apparent to appellate courts. Defense counsel, of course, should be especially careful to object to shackling when, in his or her experience, the shackling appears unjustified or excessive. Further, defense counsel should encourage their clients to speak up and tell sitting judges about their discomforts, assuring the youths that they will not be punished for doing so. This would encourage the juvenile to become a more active and engaged participant in the court proceeding and would provide him or her with an enhanced sense of agency, regardless of how the court ultimately rules.

C. Institute a More Expansive Analysis

In addition to these changes, juvenile court judges should also consider a wider array of factors than they do at present, including juveniles’ dignity. This would make the discriminate approach more fair, humane, and rehabilitative. Moreover, by taking a more child-centric perspective, the court would better satisfy Woodhouse’s dignity principle.

One promising option is to look to the international stage. One scholar has critiqued shackling juveniles in light of the United Nations Declaration of Human Rights, which bans “cruel, inhuman or degrading treatment.” The scholar further cites to the United Nations Convention on the Rights of the Child (CRC). The CRC requires that children’s dignity receive respect.

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165 See id.
166 See Thompson, supra note 91, at 980. The level or frequency of the objections required by defense counsel remains unclear. Benjamin, supra note 112, at 216. The best advice to practitioners, therefore, is to object strenuously and continuously. See id.
167 Cf. Allen, 856 N.E.2d at 374 (Freeman, J., dissenting).
168 See Woodhouse, supra note 28, at 37.
169 See Illinois v. Allen, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring) (stating that shackling an accused without cause “offends not only judicial dignity and decorum, but also that respect for the individual, which is the lifeblood of the law”).
171 See Woodhouse, supra note 28, at 40–41.
175 See id. art. 37.
Some U.S. jurisdictions are already off to a good start. In California, for instance, one of the justifications for the requirement of necessity is “the affront to human dignity” that accompanies indiscriminate shackling. In Texas, Chief Justice Hedges of the Texas Court of Appeals issued a recent dissent in which he considered the accused’s dignity by accounting for potential embarrassment to the accused as well as “physical burden and pain of restraints.” Finally, Illinois practice, once again, offers a good model for reform. The factors in an Illinois court’s shackling analysis include:

(1) the seriousness of the present charge against the defendant; (2) the defendant’s temperament and character; (3) the defendant’s age and physical characteristics; (4) the defendant’s past record; (5) any past escapes or attempted escapes by the defendant; (6) evidence of a present plan of escape by the defendant; (7) any threats by the defendant to harm others or create a disturbance; (8) evidence of self-destructive tendencies on the part of the defendant; (9) the risk of mob violence or of attempted revenge by others; (10) the possibility of rescue attempts by other offenders still at large; (11) the size and mood of the audience; (12) the nature and physical security of the courtroom; and (13) the adequacy and availability of alternative remedies.

It is noteworthy that Illinois courts consider such factors as the juvenile’s age, character, and temperament, and that they make room for alternatives.

The expansive list in the Illinois analysis gives juvenile court judges the ability to balance both child-centric and security concerns. The addition of factors such as a juvenile’s abuse history would further bolster the courts’ attention to the particular child at issue. Of course,

176 See, e.g., Tiffany A., 59 Cal. Rptr. 3d at 372–76; R.W.S., 728 N.W.2d at 329, 331 (noting, as a matter of first impression, that North Dakota juvenile courts should consider “the accused’s physical condition” in the shackling analysis).
177 See People v. Wallace, 189 P.3d 911, 927 (Cal. 2008) (citing People v. Duran, 545 P.2d 1322, 1327 (Cal. 1976)).
179 See Allen, 856 N.E.2d at 353.
180 See id.
181 Cf. id.
182 See id.
183 See id.; Perlmutter, supra note 51, at 19–20.
the weight given to a juvenile’s dignity would vary with the severity of the risk posed, as balanced by other mitigating factors. The key task for courts in the future will be to build off of this foundation, more fully weighing the child-centric concerns as outlined in this Comment.

CONCLUSION

While the discriminate approach to shackling is certainly preferable to the indiscriminate approach, it nevertheless fails to provide juveniles with the due process they dearly need. By requiring a hearing, encouraging more active appellate review, and adopting a more expansive totality test that includes a juvenile’s dignity, juveniles’ fundamental rights will be much better protected. Moreover, Woodhouse’s agency and dignity principles will be more fully observed.

With a child-centric framework in hand, substantive reforms may be just off the horizon. On the national scale, current efforts in Florida and North Carolina will provide a good barometer for just how far we have come and just how far we have yet to go. Yet we must remain confident that the courts will soon come to realize the fact that, even in states that have progressed beyond the indiscriminate approach to the discriminate approach, the fundamental rights of juveniles are under restraint.

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184 See Allen, 856 N.E.2d at 353.
185 See Woodhouse, supra note 28, at 34–35.
188 See Woodhouse, supra note 28, at 34–35.
189 See id.
190 See Perlmutter, supra note 51, at 25.
191 See Tiffany A. v. Superior Court, 59 Cal. Rptr. 3d 363, 375 (Ct. App. 2007).
Abstract: Developing countries are a fertile testing ground for the research and development of new drug products. Recently, Western pharmaceutical companies expanded their overseas drug testing from India and Africa to the former Soviet Union, where doctors in need of reliable income conduct clinical trials on subjects seeking access to medical care. Although U.S. government agencies monitor clinical drug trials sponsored by American pharmaceutical companies, the scope of governmental authority is effectively limited to the companies’ domestic activities. In October 2008, restrictions on the FDA’s supervisory powers were further reinforced by the agency’s substitution of the ethical research principles found in the Declaration of Helsinki with other, less subject-oriented standards. This revision threatens the health and safety of clinical trial participants in the former Soviet Union, where the medical needs of the ailing poor prevent local governments from imposing substantial restrictions on Western pharmaceuticals manufacturers. This Comment criticizes the practice of exploiting underprivileged populations for Western scientific progress, and argues that Congress must immediately respond to the FDA’s October 2008 resolution by acknowledging the Nuremberg Code as customary international law by which American pharmaceutical companies must abide.

Introduction

As the life expectancy of the average American increases, a greater percentage of the U.S. population develops debilitating conditions, in-
cluding heart disease, cancer, Alzheimer’s, and Type II diabetes. Accordingly, Americans have grown increasingly demanding of pharmaceutical companies, believing advances in medical research warrant better, less expensive drug therapies. The process of developing a new drug, however, is costly and slow—any prescription or over-the-counter drug must be approved for marketing and sale within the United States by the U.S. Food and Drug Administration (FDA)’s Center for Drug Evaluation and Research (CDER). New drugs are approved on the basis of their efficacy and safety as determined by the results of time-consuming and expensive three-phase human clinical trials. Struggling to attain sufficiently large numbers of domestic drug trial participants, American pharmaceutical companies are increasingly turning to foreign populations for test subjects and research scientists. As a result, these companies have become key players in overseas medical research.

Despite efforts to improve their image through corporate giving and public relations programs, American pharmaceutical companies are often maligned for putting profits before patients. Well-publicized

4 See About Center for Drug Evaluation and Research, supra note 3; CDER New Drug Application Process, supra note 3.
6 See, e.g., State of Readiness for 2005-2006 Flu Season: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce, 109th Cong. (2005) (statement of Jesse L. Goodman, Director, Center for Biologics, Evaluation and Research, Department of Health and Human Services), available at http://www.fda.gov/ola/2005/influenza0504.html (explaining that concerns about the U.S. supply of influenza vaccines incited the FDA to “stimulate interested foreign-licensed manufacturers to provide or, where needed, develop the safety and effectiveness data required for U.S. licensure”). U.S. government agencies such as the Food and Drug Administration (FDA), for example, also play a monumental role in exporting clinical drug research. See id.
7 See, e.g., Robert O’Harrow Jr., FDA Takes and End Run to Award Contract to PR Firm, WASH. POST, Oct. 2, 2008, at A1 (reporting the FDA’s attempt to hire Qorvis Communica-
allegations of failures to warn of side effects associated with medications contribute to drug manufacturers’ negative image and sometimes result in costly pre-trial settlements. Not surprisingly, citizens of developing nations are attractive targets for clinical drug trials, because they are generally ill-informed about judgments against American pharmaceutical companies and lack the same degree of access to their countries’ courts. Furthermore, despite potential safety risks, government entities in underdeveloped nations are often reluctant to regulate their citizens’ participation in experimental drug trials because these trials are often perceived as the only method of obtaining otherwise unaffordable medical treatment.

In recent years, countries of the former Soviet Union have attracted the attention of Western pharmaceutical companies that previously focused their clinical trials in India and Africa. The former So-
viet Union offers many of the same opportunities for pharmaceutical companies that make India, a country nicknamed the “guinea pig of the world,” an attractive option.\textsuperscript{12} Namely, the former Soviet Union offers pharmaceutical companies three advantages. First, the area offers an abundance of clinical test subjects—volunteers who, because of poverty and poor health, are willing to gain access to healthcare by participating in risky trials without explanation of potential health consequences.\textsuperscript{13} Second, the former Soviet Union is home to many highly trained civilian doctors willing to carry out clinical trials on their own countrymen—even to the point of exploitation—in exchange for the steady, competitive salaries offered by American pharmaceutical companies.\textsuperscript{14} Third, the centralized hospital system found in many former Soviet republics facilitates the process of recruiting clinical trial participants, further lowering costs for American pharmaceutical companies conducting trials there.\textsuperscript{15}

Regardless of whether a clinical research study is performed in a developed or developing nation, the benefits of such research can only be achieved with negative tradeoffs, usually in the form of health risks to clinical trial participants.\textsuperscript{16} Compounding these patients’ vulnerability in the former Soviet Union is the lack of the strict regulations that, in Western nations, direct clinical drug researchers to comply with
ethical standards during the course of their research. As in other countries where underprivileged populations serve as clinical trial participants, tension has developed between the twin aims of thoroughly vetting new drugs and the importance of protecting subjects’ health and safety.

A principal ethical concern arising from these conflicting objectives is the question of distributive justice—the equitable distribution of the risks and benefits arising from using underprivileged test subjects in Western pharmaceutical research. Despite known instances of abuse of test populations in these countries, the dearth of lawsuits by test subjects against pharmaceutical manufacturers and the researchers they employ suggests that underprivileged clinical test subjects in the former Soviet Union lack access to the justice system when the research process proves harmful. Moreover, mere access to the courts is an insufficient guarantor of justice for international test subjects. Even if clinical trial subjects in the former Soviet Union were to file suit—domestically, or in the United States—against American pharmaceutical manufacturers, such plaintiffs would have very little chance of success because of the absence of positive law granting specific court jurisdiction over such cases.

18 See Laughton, supra note 5, at 191.
20 See 3 Doctors Charged in Vaccine Scandal, MOSCOW TIMES, Apr. 3, 2007, at 1. Although the former Soviet Union is notorious for keeping its own failures from the public eye, a tragic incident involving the severe illness of Russian infants was reported by The Moscow Times in April 2007. See id. After doctors at Independent Clinical Hospital included children with neurological disorders and chronic illnesses in a vaccine trial for British pharmaceutical company GlaxoSmithKlein, prosecutors in Volgograd began a criminal investigation of the pharmaceutical company. Id. They discovered that GlaxoSmithKlein paid two of the three hospital directors approximately $84,000 in order to gain access to over 100 children between the ages of one and two. See id.; Andrew Osborn, GSK at Centre of Russian Vaccine Scandal, INDEP. (London), Apr. 4, 2007, at 36. Such drug trials are illegal in Russia because the subjects were minors; furthermore, the parents of the children included in the study did not consent to their children’s participation. See Osborn, supra.
21 See Ford & Tomossy, supra note 19.
22 See id. Furthermore, the Alien Tort Statute, enacted as part of the Judiciary Act of 1789, and stating in relevant part that, “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States,” fails to provide potential plaintiffs with a cause of action because it provides redress only where there is a violation of established international law recognized as such at the time of the statute’s enactment. See Alien Tort Claims Act, 28
Just as in India and Africa, the safety challenges presented by human experimentation in the former Soviet Union show a need for regulating human clinical trials and for balancing scientific progress with the protection of test subjects. This Comment posits that human rights violations perpetrated by American pharmaceutical companies conducting clinical drug trials in the former Soviet Union—a region largely overlooked in existing legal literature—are likely to escape judicial scrutiny. This Comment assesses the potential for existing international customary law to provide a set of comprehensive standards that would apply to these trials. Part I introduces the FDA's drug approval process and examines the primary advantages gained by Western pharmaceutical companies who conduct clinical drug trials abroad. Part II highlights the failure of Contract Research Organizations (CROs), American pharmaceutical companies themselves, and U.S. regulatory agencies to provide for the health and safety of clinical test subjects. Part III examines the ethical debate over exporting pharmaceutical testing to the former Soviet Union as well as the role of CROs in the trial export process. Part IV presents and analyzes two sets of international guidelines that attempt to set standards for ethical experimentation on humans. The analysis in Part IV concludes that the FDA's October 2008 rejection of certain principles espoused by the Declaration of Helsinki leaves foreign clinical trial participants more vulnerable than ever before to ethical violations. Part V argues that the Nuremberg Code, an international code of ethics, should be recognized in the United States as customary international law applicable to American pharmaceutical manufacturers in their research and development process, regardless of whether the companies conduct their clinical trials in the United States or abroad.

I. Defining the Problem

References to “Big Pharma” are well-deserved, as the American pharmaceutical industry has been the most consistently profitable sector of the economy since World War II. Before a pharmaceutical

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23 See Cekola, supra note 16, at 126.

company can market a drug in the United States, the drug must obtain FDA approval. The approval process, overseen by the FDA’s Center for Drug Evaluation and Research (CDER), ensures that new drugs are safe and effective. To obtain CDER approval, a drug must undergo three phases of clinical trials as well as institutional review by the CDER. As each clinical investigation proceeds, progressively more clinical test subjects are required for each phase. A phase III clinical trial can involve up to 3000 test subjects. Large numbers of volunteers...

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27 See id.; ClinicalTrials.gov, Understanding Clinical Trials, http://www.clinicaltrials.gov/ct2/info/understand (last visited Apr. 24, 2009) [hereinafter Understanding Clinical Trials]. A fourth phase of clinical trials involves post-marketing studies that may reveal additional information regarding a drug’s risks, benefits and optimal use. See Understanding Clinical Trials, supra; see also Richard E. Ashcroft & A.M. Viens, Clinical Trials, in THE CAMBRIDGE TEXTBOOK OF BIOETHICS 202 (Peter A. Singer & A.M. Viens eds., 2008) (explaining that this “postmarketing surveillance phase” may also entail studies of the effect of different dosages, schedules, and length of drug administration on patients’ reactions to newly-developed drugs).

28 See Understanding Clinical Trials, supra note 27.

29 See CDER FAQ, supra note 26; Understanding Clinical Trials, supra note 27. At each phase, scientists learn the answers to different questions. See Understanding Clinical Trials, supra note 27. In Phase I trials, researchers conduct the first-ever test of the experimental drug or treatment on a small group of study participants (twenty to eighty people) to evaluate drug safety, determine a safe dosage range, and identify side effects. See id. In Phase II trials, the experimental drug or treatment is given to a larger group of study par-
are gathered to ensure that a sufficient number of participants will both meet a trial’s eligibility requirements and successfully comply with the prescribed protocol. The federal government requires that before a pharmaceutical manufacturer may begin a clinical trial on a newly-developed drug or treatment, the trial must be approved by an Institutional Review Board (IRB) to ensure it is ethical and that the risks are as low as possible and worth the potential benefits.

Pharmaceutical manufacturers have found Americans increasingly hesitant to participate in drug experiments because of skepticism about their safety. In accordance with the position taken by the American Civil Liberties Union and other organizations advocating the need for patients’ informed consent, the FDA requires that clinical test participants be willing volunteers, and federal regulation prohibits the testing of drugs in development on non-volunteer populations. These participants (100 to 300 people) to ensure efficacy and evaluate safety. See id. Phase III is used to confirm the experimental drug or treatment’s effectiveness, collect further safety-related information, and to make comparisons to other commonly used drugs or treatments. See id.

31 See Understanding Clinical Trials, supra note 27. IRBs are comprised of independent committees of physicians, statisticians, community advocates and others and are responsible for the initial approval and periodic review of research results. Id. An IRB may be “any board, committee, or other group formally designated by an institution to review, to approve the initiation of, and to conduct periodic review of, biomedical research involving human subjects.” Id. The primary purpose of such review is to assure the “protection of the rights and welfare of the human subjects.” See Cekola, supra note 16, at 132 (quoting 21 C.F.R. § 56.102(g) (2005)).
32 See Shah, supra note 30, at 4–5. Shah notes that fewer than one in twenty Americans are willing to participate in clinical trials and that less than four percent of cancer patients would participate in a new cancer drug trial. Id.
33 See 21 C.F.R. § 50.20 (2009). In an attempt to ensure the informed consent of clinical trial participants, the FDA set forth guidelines codified as General Requirements for Informed Consent in 21 C.F.R. Section 50.20. See id. The preface to these requirements states that human subjects may only participate in clinical investigations if the investigator has received their informed consent and requires that written notification provide prospective trial participants sufficient opportunity to decide whether or not to participate in the study without coercion or undue influence. See id. Although the General Requirements for Informed Consent provide that the information given to the subject shall be in language understandable to the subject or his or her representative, these regulations were enacted specifically to protect U.S. citizens from potential harms associated with experimental or untested treatment, and they make no mention of their applicability to human test subjects outside the United States. See id.; Couture, supra note 25, at 133–34. Further suggesting that these requirements were intended only to apply within the United States is the understanding that the standard for “understandable language” is a fourth grade reading level. See Couture, supra note 25, at 138 n.62. The United States may have been targeted because of its unfortunate history of ethical violations in clinical trials. Perhaps the most notorious U.S.-based trial is the United States Public Health Service Syphilis Study, a
ernment-imposed restrictions and the difficulty drug companies have had in recruiting domestic volunteers contributed to the backup in the “pipeline” of developing drugs.\textsuperscript{34} An industry study in 2000 estimated that a single day’s delay in getting a major drug to market can cost a pharmaceutical company $1.3 million in unrealized sales.\textsuperscript{35} Pressure from shareholders to turn a profit and the large number of test subjects needed for every drug trial combine to foster intense competition between drug manufacturers for test subjects.\textsuperscript{36} As a result of these trends, pharmaceutical companies are bypassing academic medical centers and utilizing Contract Research Organizations (CROs)—independent contractors who are able to perform clinical trials more quickly than pharmaceutical or biotech companies.\textsuperscript{37}

CROs, as for-profit companies, are more aggressive and efficient in finding patients and carrying out clinical trials.\textsuperscript{38} CROs may even be responsible for inciting many Western pharmaceutical giants to hold medical experiment that took place from 1932 until 1972 in Tuskegee, Alabama in which medical researchers working for the U.S. government withheld readily available medical treatment from poor black men. See Khan, \textit{supra} note 22 at 883. Less well-known is the fact that clinical drug trials were performed on the U.S. prison population until ethical reforms incited Congress to outlaw the practice in the 1970s. See \textit{Shah}, \textit{supra} note 30, at 6; Khan, \textit{supra} note 22, at 883.

\textsuperscript{34} See \textit{Shah}, \textit{supra} note 30, at 3.


\textsuperscript{36} See id.

\textsuperscript{37} See 21 C.F.R. § 312.3(b) (2008) (“Contract research organization means a person that 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”); \textit{Shah}, \textit{supra} note 30 at 6; Ken Gatter, \textit{Fixing Cracks: A Discourse Norm to Repair the Crumbling Regulatory Structure Supporting Clinical Research and Protecting Human Subjects}, 73 UMKC L. REV. 581, 618 (2005).

\textsuperscript{38} See \textit{Shah}, \textit{supra} note 30, at 6–7; Miriam Shuchman, \textit{Commercializing Clinical Trials—Risks and Benefits of the CRO Boom}, 357 NEW ENG. J. MED. 1365, 1365 (2007); Emilie Reymond, \textit{CRO Supremacy in Clinical Research Raises Concerns, Outsourcing-Pharma.com}, Oct. 3, 2007, http://www.outsourcing-pharma.com/Clinical-Development/CRO-supremacy-in-clinical-research-raises-concerns. CRO industry revenues grew from around seven billion dollars in 2001 to about $17.8 billion in 2007, and there are currently over 1000 CROs. See Reymond, \textit{supra}. Among the most profitable, Quintiles, Covance, Pharmaceutical Product Development and Charles River Laboratories are billion dollar companies, with runners-up Parexel and MDS Pharma Services worth over $500 million each. See Shuchman, \textit{supra}, at 1365. According to CenterWatch, a Boston-based information services company focusing on the clinical trials industry, CROs played a “substantial role” in sixty-four percent of Phase I, II and III clinical trials in 2003, as compared to only twenty-eight percent in 1993, and a study conducted by the Tufts Center for the Study of Drug Development found that ten of the largest firms had enrolled over 640,000 subjects in trials in 2004. See id.
more clinical trials overseas.\textsuperscript{39} This is because in addition to finding drug trial participants, CROs provide “local expertise and regulatory experience” and recruit the very doctors who perform the trials.\textsuperscript{40} Clinical trials that move abroad are generally held in poor countries with large ailing populations; in other words, developing countries where “ethical standards may be lax and the impoverished sick abundant.”\textsuperscript{41} Countries that match this description include India and others in Africa, Eastern Europe and Latin America, where the importation of clinical trials from overseas has resulted in an increase in the number of clinical investigators.\textsuperscript{42}

From a regulatory and an ethical perspective, the danger inherent in outsourcing drug trials overseas is the threat it poses to the health and safety of human test subjects.\textsuperscript{43} Although clinical research trials managed by CROs for American pharmaceutical companies are subject to FDA regulation, these regulations can be circumvented more easily when trials are conducted abroad, exposing clinical trial participants to unnecessary health and safety risks as new drugs are “speeded” to the market.\textsuperscript{44} Furthermore, as CROs do not conduct clinical trials within “the norms and restrictions” of an academic institution’s research setting, there is an increased chance of conflict between the duty of the clinician to ensure his patients’ safety and the profitability of the CRO, the clinician himself, and the pharmaceutical company sponsoring the trial.\textsuperscript{45} Not surprisingly, governments wishing to attract drug companies

\textsuperscript{39} See Shah, supra note 30, at 6–7.

\textsuperscript{40} See Finlay supra note 5; Lustgarten, supra note 13, at 70–72.


\textsuperscript{42} See Shah, supra note 30, at xi; Lustgarten, supra note 13, at 69. Between 2001 and 2003, the number of U.S. clinical investigators decreased by eleven percent, simultaneously, the number of overseas clinical investigators went up eight percent. Shah, supra note 30, at xi.

\textsuperscript{43} See Gatter, supra note 37, at 618.


\textsuperscript{45} See Gatter, supra note 37 at 618–21; Gatter, supra note 44, at 351–52. Robert Gatter explains that many of the physicians conducting research for pharmaceutical companies, as well as the research institutions where the research takes place, have a financial interest in studies’ outcomes. See Gatter, supra note 44, at 351–52. The researchers and their institutions sometimes own equity in the pharmaceutical companies they work for, but more commonly, researchers and institutions enter into licensing agreements with pharmaceutical companies over scientific discoveries. See id. In either case, researchers and their institutions benefit when a drug goes to market faster; the value of equity holdings and revenues from licensing agreements goes up, and the drug companies’ success goes partially towards funding the operating costs of the researchers’ institutions. See id. Clinical trial participants therefore risk abuse at the hands of researchers who, having a financial inter-
to conduct clinical trials within their borders have strong incentives to encourage leniency in national and local oversight of the research.\textsuperscript{46} Finally, lack of uniformity in U.S. government regulation of American pharmaceutical manufacturers’ conduct across international and domestic clinical trial sites encourages these companies to export clinical trials abroad purely to escape the more stringent safety requirements imposed on experiments conducted on U.S. soil.\textsuperscript{47}

II. CURRENT REGULATIONS AND PRACTICES AFFECTING CLINICAL RESEARCH OUTSOURCING

The U.S. Department of Health and Human Services (DHHS)’s Office of Inspector General recognized the regulatory challenges posed by international clinical drug research as early as 2001, when it released a report that identified the former Soviet Union as one of several emerging markets for clinical drug trials.\textsuperscript{48} The report found that although the FDA in 2001 oversaw significantly more foreign drug research than it had a decade earlier, investigators who had not been inspected by the agency conducted a large portion of the international drug research.\textsuperscript{49} Much of this research took place in countries where neither the local IRBs nor the boards’ host countries supplied information about the review boards’ performance and where the FDA had inadequate data regarding the parties conducting clinical drug research.\textsuperscript{50} The report also found that ethics committees responsible for ensuring human subject safety in overseas trials were too disorganized to sufficiently fulfill their obligations.\textsuperscript{51} The report set forth specific recommendations for the FDA as well as for the Office for Human Re-

\textsuperscript{46} See Gatter, supra note 44, at 351–52.
\textsuperscript{47} See Molly McGregor, Note, \textit{Uninformed Consent: The United Nations’ Failure to Appropriately Police Clinical Trials in Developing Nations}, 31 \textit{Suffolk Transnat’l L. Rev.} 103, 120 (2007). Although McGregor specifically focuses on the lack of informed consent by trial subjects, her Note suggests, as does this Comment, that the cause of this problem “lies in the failure to achieve a uniform application of the procedure.” See id.
\textsuperscript{49} See id. at i.
\textsuperscript{50} See id. at ii.
\textsuperscript{51} See Gatter, supra note 44, at 353.
search Protections, with the goal of protecting the health and safety interests of human participants in non-U.S. drug trials.\textsuperscript{52}

Not surprisingly, the benefits to Western pharmaceutical coffers do not come without costs—namely health and safety risks—to their human test subjects.\textsuperscript{53} Today, the greatest obstacle to ensuring the health and safety of participants in overseas trials may be the lack of regulation over the CROs employed by Western pharmaceutical manufacturers.\textsuperscript{54} Developing, unstable countries are generally ill-equipped to oversee, much less manage, the clinical trials being held within their borders. Because there is no positive international law mandating CRO compliance with the relevant domestic laws of the clinical studies’ sponsors, the resulting “regulatory vacuum” makes it difficult for these countries to ensure the welfare of trial participants and forces them to rely on foreign data and foreign review processes.\textsuperscript{55}

American pharmaceutical companies find U.S. government support for clinical outsourcing efforts in the broad wording of relevant government regulations.\textsuperscript{56} Specifically, the U.S. regulatory scheme allows pharmaceutical companies to submit drugs for FDA approval pursuant to the Food, Drug, and Cosmetics Act even if a company’s clinical trial data are based exclusively on the results of foreign trials as long as:

\textsuperscript{52} See \textit{Rehnquist}, \textsuperscript{supra} note 48 at ii–iii. Other recommendations by bioethics committees have been aimed directly at companies conducting biomedical research. See Remigius N. Nwabueze, \textit{Ethical Review of Research Involving Human Subjects in Nigeria: Legal and Policy Issues}, 14 IND. INT’L & COMP. L. REV. 87, 88 (2003). Two entities that have issued “copious recommendations” in response to the globalization of biomedical research are Britain’s Nuffield Council of Bioethics and the United States’ National Bioethics Advisory Committee. \textit{See id.}

\textsuperscript{53} See Sarah Bahir, \textit{An International Legal System Regulating the Trade in the Pharmaceutical Sector and Services Provided by Human Subjects}, 6 \textit{Asper Rev. Int’l Bus. & Trade L.} 157, 163 (2006). Regarding the trade-offs made when U.S. companies export clinical trials, Bahir explains that “[t]he benefit to pharmaceutical companies is invaluable. Not only do they get access to a ready pool of patients unavailable elsewhere, they also reduce research costs. In return for their services, research participants receive sub-standard care, unethical treatment, and unequal opportunity to benefit from prospective treatment.” \textit{See id.}

\textsuperscript{54} See \textit{Rehnquist}, \textsuperscript{supra} note 48 at 8–15. \textit{See generally} Ford & Tomossy, \textsuperscript{supra} note 19 (discussing the factors a litigant may consider when bringing a lawsuit abroad rather than in the country where the clinical trial took place, but also noting the perceived corruptness of foreign tribunals). Ford and Tomossy report that in 2001, the U.S. National Bioethics Advisory Commission recommended that in the absence of an established system of clinical trials governance, trials should be approved by ethics committees in the host country and by an American Institutional Review Board. \textit{See Ford & Tomossy, supra} note 19.

\textsuperscript{55} \textit{See Ford & Tomossy, supra} note 19.

\textsuperscript{56} \textit{See Cekola, supra} note 16, at 131.
(1) The foreign data are applicable to the U.S. population and U.S. medical practice;
(2) [T]he studies have been performed by clinical investigators of recognized competence; and
(3) [T]he data may be considered valid without the need for an on-site inspection by FDA or, if FDA considers such an inspection to be necessary, FDA is able to validate the data through an on-site inspection or other appropriate means.57

This same regulation—21 C.F.R. § 314.106(b)—highlights the FDA’s power to self-regulate in stating that the “FDA will apply this policy in a flexible manner according to the nature of the drug and the data being considered.”58

Perhaps the most important regulation pertaining to human trials conducted both within and outside the United States to date is the DHHS policy for the protection of human subjects, referred to as the Common Rule because it binds fifteen agencies in addition to DHHS.59 Although the Common Rule explicitly states that research subject to regulation as defined in Section 46.102(e) that is neither conducted nor supported by a federal department or agency must nevertheless be reviewed and approved by an institutional review board (IRB), exceptions provided in the Common Rule, Sections 46.101(h) and (i), and the lack of oversight of clinical trials in developing countries limit the effectiveness of this administrative law.60 Developing countries often lack formal

57 See 21 C.F.R. § 314.106(b) (2009).
58 See id.
59 See Markus Schott, Medical Research on Humans: Regulation in Switzerland, the European Union and the United States, 60 Food Drug L.J. 45, 65 (2005). The policy applies to all research “involving human subjects conducted, supported or otherwise subject to regulation by any federal department or agency which takes appropriate administrative action to make the policy applicable to such research. . . . It also includes research conducted, supported, or otherwise subject to regulation by the federal government outside the United States.” See The Common Rule, 45 C.F.R. § 46 Subpart A (2009).
60 See The Common Rule, 45 C.F.R. 46.101(a)(2). The Common Rule, § 46.102(e) states: “Research subject to regulation . . . does not include research activities which are incidentally regulated by a federal department or agency solely as part of the department’s or agency’s broader responsibility to regulate certain types of activities whether research or non-research in nature.” See 45 C.F.R. § 46.102(e). The Common Rule, § 46.101(h) states: “When research covered by this policy takes place in foreign countries, procedures normally followed in the foreign countries to protect human subjects may differ from those set forth in this policy . . . In these circumstances, if a department or agency head determines that the procedures prescribed by the institution afford protections that are at least equivalent to those provided in this policy, the department or agency head may approve the substitution of the foreign procedures in lieu of the procedural requirements provided in this policy.” See 45 C.F.R. § 46.101(h) (2009). The Common Rule, § 46.101(i) states:
and systematic guidelines for the safe conduct of research on humans, but Section 46.101(h) of the Common Rule might cause the FDA to overlook a pharmaceutical company’s abuse if the agency determines a developing country’s drug trial standards to be equivalent with U.S. ones and agency heads substitute foreign procedures for the U.S. requirements.\footnote{See Nwabueze, supra note 52, at 110–11. Until October of 2008, a U.S.-based pharmaceutical company employing a CRO to conduct research trials outside the United States needed only to comply with the stricter of the host country’s national requirements or the Declaration of Helsinki’s requirement of Institutional Review Board (IRB) monitoring and approval of trials (discussed infra). See Kelleher, supra note 11, at 84–85. However, the IRB monitoring required by the Declaration of Helsinki has been accused of being a “rubber stamp” process—were a pharmaceutical company to choose to have its CRO comply with a host country’s national requirements, the FDA would be unable to verify the compliance due to a lack of power and resources. See id. at 85.} Likewise, Section 46.101(i) of the Common Rule allows department and agency heads to waive the applicability of some or all of the safety provisions of the Code because compliance with the Common Rule is not required of U.S.-based entities such as pharmaceutical companies who conduct “purely private” research.\footnote{See The Common Rule, 45 C.F.R. § 46.101(i); Schott, supra note 59, at 65.} The differences between the procedures used to protect drug trial subjects in the United States and those abroad suggest that under the FDA regulations, the protection of human subjects, and specifically foreign subjects, is only a “supplemental” government interest.\footnote{See William DuBois, Note, New Drug Research, The Extraterritorial Application of FDA Regulations, and the Need for International Cooperation, 36 Vand. J. Transnat’l L. 161, 193 (2003). In late 2007, the FDA Science Board identified the growing disparity between the agency’s many domestic responsibilities and its limited resources as a possible explanation for the FDA’s shortcomings. See U.S. Food and Drug Administration, FDA SCIENCE AND MISSION AT RISK—REPORT ON THE SUBCOMMITTEE ON SCIENCE AND TECHNOLOGY (2007), http://www.fda.gov/ohrms/dockets/ac/07/briefing/2007-4329b_02_00_index.html (follow “FDA Report on Science and Technology” hyperlink). Hurdles the FDA faces include challenges in recruiting and retaining scientific capability, inadequate information technology infrastructure, and insufficient modeling, risk assessment and analysis capabilities. See id.}

In an effort to harmonize the Code of Federal Regulations with other international standards for human clinical trials, the World Health Organization (WHO) publishes guidelines known collectively as Good Clinical Research Practice (“GCP”) to meet some of the regulatory challenges of international clinical drug testing.\footnote{See Gatter, supra note 44, at 357–58; Kelleher, supra note 11, at 75–76.} The GCP Guidelines recommend that CROs establish local review boards, obtain the

\"Unless otherwise required by law, department or agency heads may waive the applicability of some or all of the provisions of this policy to specific research activities or classes of research activities otherwise covered by this policy.\" See id. § 46.101(i) (2009).
permission of government health ministries to pre-approve trials, counsel researchers against accepting excessive payments from drug manufacturers, and offer procedures for obtaining the informed consent of study participants. Although the WHO and other organizations advocate the tailoring of GCP provisions so that they sufficiently address specific conditions in individual countries, the merely advisory guidelines have not proven sufficient to prevent violations and abuses in clinical research taking place in developing nations. As thousands of test subjects are enrolled in clinical drug trials in the former Soviet Union, India, Africa, China, Latin America, and elsewhere, researchers and doctors are reporting failures in compliance with ethical standards. Without positive law governing clinical trials abroad, CROs have little incentive to regulate unethical or exploitative behavior by researchers. The result is an increased risk that the rapid testing and approval inherent in international pharmaceutical-product collaboration will negatively affect countries that host the overseas clinical trials of Western companies.

III. THE Emergence of the Former Soviet Union as Western Pharma’s New Laboratory

A. The Indian Model

Much has been written in recent years about the increase in outsourcing of clinical drug trials to India and the business strategy behind

\[\text{\textsuperscript{65} See Gatter, supra note 44, at 356–57; Kelleher, supra note 11, at 75–76; Lustgarten, supra note 13, at 72.}\]

\[\text{\textsuperscript{66} See Ford & Tomossy, supra note 19. See generally U.S. Dep’t of Health and Human Servs., Guidelines for Conduct of Research Involving Human Subjects at the National Institutes of Health (2004), available at http://ohsr.od.nih.gov/guidelines/GrayBooklet82404.pdf; World Health Organization, Handbook for Good Clinical Research Practice (GCP) (2005), available at http://www.who.int/medicines/areas/quality_safety/safety_efficacy/OMS-GCP.pdf. Organizations advocating the tailoring of GCP provisions include the Council for International Organizations of Medical Sciences, the Council of Europe, and the National Institutes of Health, among others. See Ford & Tomossy, supra note 19. Unfortunately, the situation is unlikely to improve without government intervention. See generally LaFraniere et al., supra note 17. Molly McGregor also astutely points out that WHO’s primary method of policy and guideline implementation is the Internet, a resource incapable of preventing unscrupulous pharmaceutical companies from conducting risky experimental procedures in countries where the need to secure medical aid overcomes general awareness of well-meaning guidelines. See McGregor, supra note 47, at 123–24.}\]

\[\text{\textsuperscript{67} See Shah, supra note 30, at 7; LaFraniere et al., supra note 17.}\]

\[\text{\textsuperscript{68} See Laughton, supra note 5, at 191.}\]

\[\text{\textsuperscript{69} See id.}\]
the trials’ export.\textsuperscript{70} Already a favorite outsourcing destination for software development, customer service and technology call centers, India has positioned itself to become a “global hotspot” of clinical trial outsourcing while simultaneously ensuring that it captures a portion of the value it adds to foreign companies’ global research and development models.\textsuperscript{71} Regulatory maneuverings by the Indian government further enhance the country’s attractiveness as a destination for Western clinical drug trials.\textsuperscript{72}

The second most populous country in the world after China, India has a large, diverse, underprivileged and drug-naïve patient population that offers easy recruitment of willing clinical trial participants who perceive the chance to participate in a drug trial as a “healthcare windfall.”\textsuperscript{73} The country’s inadequate healthcare infrastructure, low operating costs for Western pharmaceutical companies, and established clinical research organizations also contribute to making India an attractive destination for clinical trial outsourcing.\textsuperscript{74} Scholars are concerned about the Indian government’s ability to enforce its own regulations and oversee local ethics committees, as well as the quality of the informed consent given by researchers to trial participants.\textsuperscript{75} Simultaneously, critics fear that these tactics offer an example to countries in the former Soviet Union of how the government of an impoverished people may seek new opportunities by acquiescing to the pressures of multinational drug companies and other private organizations.\textsuperscript{76}

\textsuperscript{70} See, e.g., Samiran Nundy & Chandra M. Gulhati, \textit{A New Colonialism?—Conducting Clinical Trials in India}, 325 N. ENG. J. MED. 1633, 1634 (2005) (reporting that U.S. pharmaceutical companies stand to save up to sixty percent on the cost of drug trials by outsourcing them to India).

\textsuperscript{71} See Cekola, \textit{supra} note 16, at 126.

\textsuperscript{72} See id. at 129–30, 145.

\textsuperscript{73} See id. at 129.

\textsuperscript{74} See id.

\textsuperscript{75} See Cekola, \textit{supra} note 16, at 145; Nundy & Gulhati, \textit{supra} note 70, at 1634.

\textsuperscript{76} See Nundy & Gulhati, \textit{supra} note 70, at 1634–35. On the regulatory front, the Indian government amended its Patent Act in 2005, allowing foreign companies to patent pharmaceutical products there for the first time. See id. A second significant regulatory move was India’s 2005 amendment to the country’s Drugs and Cosmetics Rules to eliminate the requirement of a “phase lag”—a demand that pharmaceuticals test products in Phase III outside of India before testing them within India for Phase II trials. See id. at 1633–34. By embracing foreign pharmaceutical companies, India’s government earns compensation for its hospitals and doctors-turned-researchers. See id. at 1634; Cekoka, \textit{supra} note 16, at 126.
B. Western Big Pharma’s Abuse of the Former Soviet Union: The Argument Against Outsourcing Clinical Trials

Proponents of Western drug manufacturers’ clinical trials in Russia and the former Soviet Union cite savings in the cost and time required for FDA approval as two major advantages to international trials. An emerging market for clinical trial outsourcing, Russia recently came third after China and India in a global list of the most attractive low-cost locations to run clinical trials outside the United States. Fortune Magazine reported in 2005 that American-based Pfizer Corporation conducts trials in the former Soviet Union to cut three to six months off the time it takes to get a drug to market. Overseas trials in Eastern Europe as a whole are cheaper to conduct as well—in 2005, running a drug trial in the United States cost GlaxoSmithKline about $30,000 per patient—in Romania, the cost was $3,000. The combination of speed and low cost are increasing the popularity of conducting clinical trials abroad: Jean-Paul Garnier, CEO of GlaxoSmithKline, referred to globalization as “the ultimate arbitrage” for companies like his, reporting in 2005 that a third of his company’s trials were taking place in low-cost countries and that his aim was to reach a fifty percent outsourcing rate by 2007.

Russia’s centralized hospital system contributes to the pace at which clinical trial subjects are recruited. A centralized healthcare system means that patients are conveniently hospitalized together according to symptoms and conditions, facilitating the process by which drug trial administrators identify and engage patients meeting the qualifications of their research studies. Hospitals in the former Soviet

78 See id.
79 See Lustgarten, supra note 13, at 69.
80 See id. The former Soviet Union presents significant cost saving opportunities to foreign pharmaceutical companies largely because they are able to conduct clinical trials there earlier in the drug development cycle. See id. Striking examples of this were reported in the media as early as 2000, when the Washington Post reported that California-based Maxim Pharmaceuticals Inc. was barred from testing a new drug on Americans with liver disease until further animal testing was completed, but the company tested in Russia instead and avoided a delay that could have cost millions of dollars. See Flaherty et al., supra note 35.
81 See Lustgarten, supra note 13, at 69.
82 See id. at 87.
83 See REHNQUIST, supra note 48, at 8; Lustgarten, supra note 13, at 87. The 2001 Inspector General report notes a study in Poland where “the recruitment was so fast that
Union provide CROs with eager drug trial participants and represent a boon in the large number of treatment-naïve candidates who have not built up resistance to new drugs, largely because of their infrequent use of antibiotics. Because many of the patients in these hospitals are in the advanced stages of their disease, these patients provide researchers with the ideal baseline for scientific study.

As might be expected, the chance that clinical trial participants will endure abuse at the hands of unsympathetic or overextended researchers is high, with each stage of a clinical trial presenting its own challenges. During the planning phase, CROs must ensure that the research personnel have the requisite scientific background and experience, are not overburdened by other studies, and can effectively communicate with the researchers they employ. Further risks to drug trial participants result from CROs’ failure to emphasize the importance of obtaining safe, and not simply speedy, clinical trial results. Because it is not clear whether CROs are accountable to the FDA directly or through the pharmaceutical companies sponsoring the drug trials, CROs report problems to the drug companies they work for rather than to federal regulatory agencies.

forty extra patients were enrolled at the sponsor’s request before some of the Western countries, still awaiting Ethics Committee’s approvals, had even started.” See Rehnquist, supra note 48, at 8.

84 See Lustgarten, supra note 13, at 70.
85 See id.
86 See Barnes, supra note 77; Reymond, supra note 38.
87 See Kristy Barnes, Managing Clinical Risk in Eastern Europe, OUTSOURCING-PHARMA.COM, Nov. 8, 2006, http://www.outsourcing-pharma.com/Clinical-Development/Managing-clinical-risk-in-Eastern-Europe. Dr. Albertas Valavicius, manager of Clinical Operations for Parexel International, a CRO based in Waltham, Massachusetts, explains that “[l]anguage issues can be problematic and paperwork needs to always be checked carefully, as well as the level of understanding of protocol etc. that staff members have.” See id. Additionally, the requisite equipment, including computers, email, fax, freezers, cupboards and touch phones, is not always available, and CROs may find themselves missing vital materials unless they have allocated additional funds for their replacement. See id. Furthermore, “[e]ven when equipment is provided by the sponsor, it often has a nasty habit of disappearing during the course of the study.” See id.
88 See Shuchman, supra note 38, at 1365. The Tufts Center for the Study of Drug Development found that CROs meet their deadlines by breaking the parts of each study (such as finding investigators and enrolling patients) into discrete steps. See id. at 1367. This process has been criticized as being a “commodification” of clinical research and has been accused of shifting researchers’ focus from the “totality of knowledge required to determine whether a drug is worth pursuing further” to data and hard deliverables. See id.
89 See id. at 1366.
In turn, the drug companies are delinquent in contacting regulatory authorities regarding health risks discovered with their products. For its part, the FDA’s oversight of international CRO activity is minimal at best, even for drugs manufactured by American pharmaceutical companies that need FDA approval to market and sell the drugs in the United States. In the former Soviet Union, CRO trial sites are springing up rapidly because the economically marginalized citizens are eager to act as trial subjects, transactional costs are low, and government oversight of CROs and the Western pharmaceutical manufacturers who employ them is limited.

C. The Benefit to the Former Soviet Union of Importing Drug Trials from the United States: The (Limited) Argument Favoring Clinical Trials Outsourcing

The potential for multi-million dollar savings by American pharmaceutical companies conducting trials in the former Soviet Union underscores the disparities between the situations of clinical trial participants in the United States and the former Soviet Union. However, those in favor of outsourcing drug testing argue that increased patient

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90 See id.

91 See generally Rehnquist, supra note 48. The report criticized the FDA for failing to track not only the number of investigators and patients participating in international clinical trials, but also the number of international clinical sites at which American pharmaceutical companies were conducting research. See id. at 20. Although the FDA requires that international trial sites be open for spot inspection, very few inspections actually take place; in 2004, when over 500 trials were conducted at approximately 3000 Russian sites, only 100 total FDA inspections took place overseas. See Lustgarten, supra note 13, at 72. Of the Russian sites that were inspected, over thirty percent failed to follow protocol, and one in twelve international sites was identified as having failed to report adverse patient reactions. See id. This is not to say that the FDA is able to assure sufficient human-subject protection in its policing of U.S.-based trials. See id. Between 2000 and 2005, the FDA disqualified only twenty-six investigators and discounted their data only twice despite finding “serious problems” 348 times within that period. See Gardiner Harris, Report Assails F.D.A. Oversight of Clinical Trials, N.Y. Times, Sept. 28, 2007, at A1.

92 See Lustgarten, supra note 13, at 72. Because the salaries of researchers conducting clinical trials in the former Soviet Union are “lavish” by local standards—a trials investigator in Russia can make ten times his salary recruiting patients instead of working as a state hospital employee—working for Western pharmaceutical companies is an attractive option for scientists. See id. An inherent danger already documented is the bribing of doctors in state hospitals and clinics for access to patients meeting pharmaceutical company’s research study criteria. See id. Nevertheless, the December 2000 “Body Hunters” series in the Washington Post found that governments of developing countries remain eager to host pharmaceutical trials in order to infuse their health care systems with money. See Gatter, supra note 44, at 353.

93 See Lustgarten, supra note 13, at 68–70.
access to medicine and free examinations of trial participants in developing nations are satisfactory compensation for the risks assumed by trial subjects.\textsuperscript{94} Besides soliciting drug trial volunteers in the former Soviet Union, Western pharmaceutical companies also target scientists to perform the actual clinical trials.\textsuperscript{95} Proponents of the export of clinical trials view the international collaboration between Russian scientists and American pharmaceutical companies as a “win-win,” citing the combination of skilled Russian scientists eager to work for Western pharmaceutical companies and the countries’ history of scientific collaboration as rendering the former Soviet Union a natural choice for hosting the trials.\textsuperscript{96}

Organizations offering to facilitate collaboration between American pharmaceutical companies, scientists, and clinical test subjects in the former Soviet Union include the Civilian Research and Development Foundation (CRDF), a nonprofit “public-private partnership” established in 1995 and authorized by the U.S. Congress and National Science Foundation.\textsuperscript{97} The CRDF, which is based in Arlington, Virginia

\textsuperscript{94} See id. at 69–70. Western pharmaceutical companies do occasionally conduct clinical trials on underprivileged populations for drugs being developed primarily to combat those populations’ health concerns; in a project organized by the U.S. Civilian Research & Development Foundation’s GAP Services program, the Centers for Disease Control and Prevention, the World Health Organization, the U.S. Agency for International Development and their Russian partners implemented a program to combat tuberculosis, now re-emerging in Russia and other parts of the world in highly infectious, drug-resistant strains. See The U.S. Civilian Research & Development Foundation, Tackling the Threat of TB in Russia, http://www.crdf.org/stories/stories_show.htm?doc_id=298102 (last visited Apr. 9, 2009). Of course, drug trials simultaneously comprise an integral part of pharmaceutical companies’ international market development strategy; by conducting drug research in regions that are gaining purchasing power, American pharmaceutical companies begin to develop markets for the drugs should they meet FDA approval. See Rehnquist, supra note 48, at 8.

\textsuperscript{95} See Finlay, supra note 5.

\textsuperscript{96} See id. After the fall of the Iron Curtain, tens of thousands of Soviet weaponeers found themselves the unemployed targets of headhunters representing opportunities in Iran, North Korea, and terrorist organizations, all of whom offered lucrative compensation. See id. To prevent these scientists from becoming employed by countries antagonistic to the United States, the U.S. government in the 1990s began a national security campaign to “redirect” these highly trained and relatively inexpensive scientists and technicians to more peaceful pursuits, appropriating over $1 billion in research grants to former nuclear, biological and chemical and missile scientists between 1994 and 2006. See id. Today, government-sponsored “redirection” programs are losing momentum as the U.S. economy continues its economic downturn. See id. By employing large numbers of the former Soviet Union’s research scientists to conduct clinical drug trials, American pharmaceutical companies are, in a sense, taking on the responsibility that the U.S. government’s “redirection” programs once shouldered. See id.

\textsuperscript{97} See generally The Civilian Research and Development Foundation, supra note 94.
with offices in Moscow, Kiev, and the Republic of Kazakhstan, promotes international scientific and technical collaboration and the sustainability of Eurasian science and technology communities through grants, technical resources, and training. A basic tenet of the CRDF is non-proliferation, and the organization’s stated vision is “to promote peace and prosperity through international science collaboration.” An organization complementing the work of the CRDF is the United States Industry Coalition (USIC), a nonprofit made up of American businesses, associations, and research institutions that facilitates technology commercialization for the U.S. Department of Energy’s Global Initiatives for Proliferation Prevention program through redirection of weapons of mass destruction personnel towards sustainable civilian employment. USIC reports that it has facilitated business ventures worth hundreds of millions of dollars and created thousands of non-military jobs in the former Soviet Union.

IV. Customary International Law Regulating Human Clinical Testing

The lack of positive international law mandating universal protocols in human drug testing and the FDA’s ability to sanction pharmaceutical companies’ circumvention of drug trial regulations under the Common Rule does not preclude an existing international customary regime from governing clinical trials. Such a regime exists already in the Nuremberg Code, a canon intended to define “universal ethical principles that would govern all medical research in the future.” This section analyzes two alternative sources of customary international law—the Nuremberg Code (the “Code”) and the Declaration of Helsinki—and argues that the Nuremberg Code provides a sound, ethical

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98 See id.; see also Finlay, supra note 5 (highlighting the work of the CRDF).
100 See Finlay, supra note 5; United States Industry Coalition: Overview, http://www.usic.net/about/index.cfm?cid=1 (last visited Apr. 9, 2009).
101 See generally United States Industry Coalition: Overview, supra note 100.
103 See Schott, supra note 59, at 47. Schott refers to the Nuremberg Code as “the first international legal document” among authorities setting forth ethical standards for international clinical testing. See id.
procedure that should be followed by Western pharmaceutical companies engaged in exporting clinical drug trials to less-developed countries.

The Nuremberg Code consists of ten directives for human medical experimentation.\textsuperscript{104} American judges set forth the Code in 1947, to-


The Nuremberg Code states:

1. The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment.

The duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity.

2. The experiment should be such as to yield fruitful results for the good of society, unprocurable by other methods or means of study, and not random and unnecessary in nature.

3. The experiment should be so designed and based on the results of animal experimentation and a knowledge of natural history of the disease or other problem under study that the anticipated results will justify the performance of the experiment.

4. The experiment should be so conducted as to avoid all unnecessary physical and mental suffering and injury.

5. No experiment should be conducted where there is an a priori reason to believe that death or disabling injury will occur; except, perhaps, in those experiments where the experimental physicians also serve as subjects.

6. The degree of risk to be taken should never exceed that determined by the humanitarian importance of the problem to be solved by the experiment.

7. Proper preparations should be made and adequate facilities provided to protect the experimental subject against even remote possibilities of injury, disability, or death.

8. The experiment should be conducted only by scientifically qualified persons. The highest degree of skill and care should be required through all stages of the experiment of those who conduct or engage in the experiment.

9. During the course of the experiment the human subject should be at liberty to bring the experiment to an end if he has reached the physical or mental state where continuation of the experiment seems to him to be impossible.
together with the verdicts of the Nuremberg “Doctors’ Trial”—the first of twelve trials against Nazi officials in which medical doctors, who carried out horrific, unethical medical experiments on humans, were found guilty of committing war crimes and crimes against humanity.\footnote{105}

Today, the Nuremberg Code is widely regarded as the preeminent source of law and ethics on human testing.\footnote{106} It has been labeled the “most accepted” and the “most cited” code of medical ethics.\footnote{107} Unlike the FDA regulations and the Declaration of Helsinki, the Nuremberg Code places the responsibility of ensuring ethical medical experimentation directly in the hands of researchers.\footnote{108} This is because the provisions of the Nuremberg Code are directed at scientists and researchers rather than at the institutions they represent.\footnote{109} Furthermore, the Code does not require that research be monitored and approved by independent parties.\footnote{110}

Opening with the declaration that “[t]he voluntary consent of the human subject is absolutely essential,” the Nuremberg Code prioritizes the welfare of test subjects and emphasizes the need for their informed

10. During the course of the experiment the scientist in charge must be prepared to terminate the experiment at any stage, if he has probable cause to believe, in the exercise of the good faith, superior skill, and careful judgment required of him, that a continuation of the experiment is likely to result in injury, disability, or death to the experimental subject.

\footnote{105}{See Schott, \emph{supra} note 59, at 46; William E. Seidelman, \emph{Nuremberg Lamentation: For the Forgotten Victims of Medical Science}, 313 \emph{Brit. Med. J.} 1463, 1463 (1996); Laughton, \emph{supra} note 5, at 184.}

\footnote{106}{See Bartha Maria Knoppers & Madelaine Saginur, \emph{Bio-banking}, in \emph{The Cambridge Textbook of Bioethics} 167 (Peter A. Singer & A.M. Viens eds., 2008); Sharon Perley et al., \emph{The Nuremberg Code: An International Overview}, in \emph{The Nazi Doctors and the Nuremberg Code: Human Rights in Human Experimentation} 149, 149 (George J. Annas & Michael A. Grodin eds., 1992); Laughton, \emph{supra} note 5 at 184–85.}

\footnote{107}{See Laughton, \emph{supra} note 5, at 184 (citing Joel Levi, \emph{Medicine, The Holocaust, and The Doctors’ Trial, in Bioethical and Ethical Issues Surrounding the Trials and the Code of Nuremberg: Nuremberg Revisited} 111, 116 (Jacques J. Rozenberg ed., 2003)). Like the Nuremberg Code and other international codes and agreements, the Hippocratic Oath assigns the task of making decisions regarding human experiments to the clinician. See \emph{id.} at 182. In taking the Hippocratic Oath, physicians pledge to provide care for the benefit of their patients; however, the exact benefit to be derived by the patient is to be determined by the physician. See \emph{id.}}

\footnote{108}{See Cekola, \emph{supra} note 16, at 144.}

\footnote{109}{See \emph{id.}}

\footnote{110}{See \emph{id.} Specifically, the Nuremberg Code states in the second paragraph of Provision 1 that “the duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity.” Nuremberg Code, \emph{supra} note 104, ¶ 1.}
To further protect their safety and welfare, the Code forbids the waiver of its principles by trial participants and requires: 1) [p]roper preparations and facilities to be in place such that the subject is protected from “against even [a] remote possibility of injury, disability, or death”; 2) a valid research design to procure beneficial results that cannot be obtained by any other methods or means of study; 3) that the experimental design be “based on the results of animal experimentation and a knowledge of the natural history of the disease or clear problem under study”; 4) the avoidance of “all unnecessary physical and mental suffering and injury” and the absence of any “a priori reason to believe that death or disabling injury” would result from experimentation; 5) benefits that outweigh trial-related risks; 6) the presence of a qualified researcher who is prepared to terminate an experiment if it “is likely to result in the injury, disability, or death of the experimental subject”; and 7) the subject’s ability to end the experiment should he reach a physical or mental state where he is unable or unwilling to continue.

In spite, or perhaps because of its humanitarian aims, the Nuremberg Code has not been universally embraced by the international community. The United States has neither ratified nor adopted the Nuremberg Code. Instead, U.S. federal regulations depart from the Code’s emphasis on the researcher’s authority in that they place responsibility with research institutions and IRBs rather than with the researchers themselves. As a result, whether clinical trial participants

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111 See Nuremberg Code, prin. 1, supra note 104. Merely obtaining the informed and voluntary consent of a test subject is insufficient under the Code, however, because the Code requires that all of its principles relating to the welfare of subjects be satisfied even before the subjects’ consent is sought. See George J. Annas, The Changing Landscape of Human Experimentation Nuremberg, Helsinki and Beyond, 2 Health Matrix 119, 121 (1992).

112 See Nuremberg Code, supra note 104, ¶¶ 2–10. The provisions in paragraphs 5 and 9 are of special importance because no subsequent assertion of ethical standards to be observed in human clinical trials contains them. See Annas, supra note 111, at 121; Schott, supra note 59, at 47.


115 See Laughton, supra note 5, at 194.
will suffer violations of the rights enumerated in the Code depends on the ethics of the researcher performing the trial—a researcher whose priority may often be to achieve specific scientific results.\textsuperscript{116}

The Code lacks the force of positive law and has never served as the sole basis for damages awards or the discipline of a scientist or researcher.\textsuperscript{117} However, it is recognized as “an authoritative statement of the fundamental rights of research subjects in all nations,” and is produced as part of international criminal trials.\textsuperscript{118} In fact, courts in the United States have allowed the Code to be introduced as evidence of ethical principles existing in customary international law.\textsuperscript{119}

A combination of the Nuremberg Code’s lack of legal force and medical researchers’ concern that the Code is too “legalistic” and therefore insufficiently supportive of scientific progress led researchers to create a separate set of ethical standards after the Second World War.\textsuperscript{120} In July of 1964, the World Medical Association (WMA) incorporated as a non-profit educational and scientific organization in the State of New York, thus establishing the legal and financial status of the WMA in the United States.\textsuperscript{121} That same year, the WMA adopted the

\begin{itemize}
  \item \textsuperscript{116} See id. at 193 (citing Nuremberg Code, \textit{supra} note 104, ¶¶ 1, 10 (“assigning to the researcher both the responsibility of obtaining informed consent and of determining when the experiment should be terminated”)).
  \item \textsuperscript{118} See Annas, \textit{supra} note 117 at 201; Nicholas A. Christakis & Robert J. Levine, \textit{Multinational Research, in 3 Encyc. of Bioethics 1780 (Warren Thomas Reich ed., 1995).
  \item \textsuperscript{119} See Abdullahi v. Pfizer, Inc., No. 01 Civ. 8118, 2002 WL 31082956 at *3 (S.D.N.Y. Sept. 17, 2002); Grimes v. Kennedy Krieger Inst., 782 A.2d 835, 849 (Md. 2001). In its discussion of the Nuremberg Code, the \textit{Grimes} court stated that “the Nuremberg Code, at least in significant part, was the result of legal thought and legal principles, as opposed to medical or scientific principles, and thus should be the preferred standard for assessing the legality of scientific research on human subjects. Under it, duties to research subjects arise.” See Grimes, 782 A.2d at 835. The court also stated that the Code was meant to be applied internationally and never expressly rejected in the United States. See id. at 849. In \textit{Abdullahi}, the court allowed the introduction of both the Declaration of Helsinki and the Nuremberg Code as evidence of principles of customary international law, but concluded that neither was “sufficiently universal” to establish a claim. See \textit{Abdullahi}, 2002 WL 31082956, at *5; Laughton, \textit{supra} note 5, at 197.
  \item \textsuperscript{120} See Laughton, \textit{supra} note 5, at 194–97.
  \item \textsuperscript{121} See The World Medical Association, About the WMA, http://www.wma.net/e/about/index.htm (last visited Apr. 9, 2009). The WMA’s stated purpose is to “serve humanity by endeavoring to achieve the highest international standards in Medical Education, Medical Science, Medical Art and Medical Ethics, and Health Care for all people in the world.” Id.
Declaration of Helsinki, its best-known policy statement.\textsuperscript{122} The Declaration of Helsinki is less trial participant-focused than the Nuremberg Code and is regarded by some as the definitive statement of medical ethics regarding medical research, in part because it was signed by the United States and incorporated into the FDA’s regulations for overseas clinical research in 1975.\textsuperscript{123}

The FDA’s position vis à vis the Declaration has changed, however, and the agency replaced the Declaration’s principles with a requirement of Good Clinical Practice in its regulation of the acceptance of non-IND (Investigational New Drug) foreign clinical studies.\textsuperscript{124} Some have argued that this move indicates that the FDA views ethical considerations as “expendable” when trial subjects live in the developing world, warning that the FDA’s rejection of the Declaration’s principles increases the potential of ethical violations in international trials.\textsuperscript{125} Although the FDA’s rejection of the Declaration’s principles deals a significant blow to the framework ensuring American pharmaceutical companies’ ethical conduct overseas, it must be noted that the Declaration, unlike the


\textsuperscript{123} See Declaration of Helsinki, supra note 122; SHAH, supra note 30, at 76; Nuffield Discussion Paper, supra note 122, at 65; Laughton, supra note 5, at 194.

\textsuperscript{124} See Human Subject Protection; Foreign Clinical Studies Not Conducted Under an Investigational New Drug Application, 73 Fed. Reg. 82, 22800 (Apr. 28, 2008) (to be codified at 21 C.F.R. pt. 312). In collaboration with WHO, the Council for International Organizations of Medical Sciences (CIOMS) published its own ethical guidelines in 2002. See COUNCIL FOR INT’L ORG. OF MEDICAL SCI., INTERNATIONAL ETHICAL GUIDELINES FOR BIOMEDICAL RESEARCH INVOLVING HUMAN SUBJECTS (2002), http://www.cioms.ch/frame_guidelines_nov_2002.htm. The CIOMS Guidelines were intended to address the special circumstances that arise when applying the Declaration of Helsinki to research undertaken in developing countries and were revised in 1991, 1993 and in 2002. See Nuffield Discussion Paper, supra note 122, at 4. The CIOMS Guidelines approvingly reference the Declaration, in essence capturing the notion that “on the whole [the 1964 Declaration of Helsinki] corrects what in the Nuremburg Rules was circumstantial, related to Nazi crimes, and places these Rules more correctly in the context of generally accepted medical traditions.” See Annas, supra note 111, at 123 (citing W. Refshauge, The Place for International Standards in Conducting Research for Humans, 55 BULL. WORLD HEALTH ORG. 133, 137 (1977)). However, as of October 2008, the FDA removed references to the Declaration of Helsinki from § 312.120. See 73 Fed. Reg. 82, 22800–01.

Code, always prioritized the protection of the scientific process over the health and safety of clinical trial participants.\(^{126}\) Whereas the Code holds a trial subject’s voluntary consent “absolutely essential,” the Declaration asks that a trial participant give his voluntary consent “if at all possible.”\(^{127}\) Furthermore, the Declaration’s encouragement of peer review of research protocols implies that a subject need not give informed consent to participate in medical research if the physician submits his reasons for not obtaining consent to an independent review committee.\(^{128}\) Finally, the Declaration only feebly protects subjects’ interests in stating that independent review committees “must take into consideration the laws and regulations of the country or countries in which the research is to be performed as well as applicable international norms and standards.”\(^{129}\)

Critics of the Declaration accuse it of “marginalizing” the Code, and view its true goal as replacing the Code’s human rights-based agenda with a comparatively “lenient medical ethics model that permits paternalism.”\(^{130}\) Some of the Declaration’s most vehement opponents have an even more radical outlook; they view the Declaration as a continuation of the legacy of Nazism with the Code itself as the victim.\(^{131}\) Though some hold the Declaration to be the more authoritative source of customary international law, the combination of its recent rejection by the FDA and its failure to advocate to the fullest for the protection of trial participants renders it the inferior source of protection clinical trial participants.\(^{132}\) Therefore it is the Nuremberg Code that should be accepted by the United States as the customary international standard to be implemented in regulating U.S. pharmaceutical companies’ export of clinical drug trials.\(^{133}\)

\(^{126}\) See Khan, supra note 22, at 887–89; Laughton, supra note 5, at 195–96.

\(^{127}\) See Laughton, supra note 5, at 195. Furthermore, the Declaration delineates circumstances under which researchers may conduct clinical trials without obtaining patients’ informed consent. See Annas, supra note 111, at 123. For instance, the Declaration (unlike the Code) allows a trial subject’s proxy to give consent on behalf of the patient where the patient is legally or physically incapacitated. See Laughton, supra note 5, at 195.

\(^{128}\) See Annas, supra note 111, at 123. Some detractors of the Declaration believe that “[t]he Declaration of Helsinki . . . undermined the primacy of subject consent in the Nuremberg [C]ode and replaced it with the paternalistic values of the traditional doctor-patient relationship.” See Seidelman, supra note 105, at 1465.


\(^{130}\) See Annas, supra note 111, at 122.

\(^{131}\) See Seidelman, supra note 105, at 1465.

\(^{132}\) See id. at 1465–66; Wollensack, supra note 102, at 769–71.

\(^{133}\) See Wollensack, supra note 102, at 769–71.
V. The Solution: The United States Must Recognize the Nuremberg Code as International Customary Law Regulating Human Clinical Testing

Clinical trial participants in developing countries who fall victim to unethical treatment in international scientific investigations must have recourse under customary international law.134 Ideally, such victims would be able to establish a cause of action by demonstrating the violation of one or several of the principles of the Nuremberg Code, a cause of action that would allow the victim to hold accountable the researcher conducting the drug trial as well as the pharmaceutical company sponsoring the trial and the CRO overseeing the researcher’s activities.135 To better understand why this solution is the most viable, competing ideas must be examined.136

One way to ensure the health and safety of clinical research subjects is to centralize the review of clinical trials.137 Supporters of this solution claim it will enable the concentration of scientific expertise as well as improve the efficiency of the review process.138 However, it is uncertain whether a centralized process would be more efficient, especially because it is unclear who would manage the centralizing—a federal agency, a private entity subject to federal oversight, or something in between.139 Criticisms of this solution focus on the difficulty of incorporating regional and institutional variations into the regulation process, as well as the risk that a centralized authority may increase the chance of self-interested behavior on the part of researchers, leading to an even more adversarial relationship between clinical researchers and regulations.140

Because of these concerns, Professor Ken Gatter suggests that “fine-tuning and better enforcement of existing regulations will not remedy the underlying structural instability resulting from the conflicting norms.”141 Rather than instituting a new system of government oversight, opponents of a centralized system, such as Professor Robert Gat-

134 See id.
135 See Gatter, supra note 44, at 351–52; Wollensack, supra note 102, at 769–71.
136 See Wollensack, supra note 102, at 769–71.
137 See id.
138 See Gatter, supra note 37, at 620.
139 See id.
140 See id.
141 See id. at 623. The specific conflicting norms Professor Ken Gatter refers to are “informed consent with its normative basis in autonomy, the research community with its utilitarian normative structure; and the fiduciary model of the therapeutic clinical setting.”
ter, suggest that conflicts of interest in human research may be avoided by researchers’ self-regulation and only minimal prohibitions; the concern is that an extensive system of prohibiting financial conflicts would only lead to strategic behavior to evade them. Another proposed solution is for Congress to establish a voluntary plaintiff’s forum in the United States under the Alien Tort Statute (ATS). Proponents of this approach suggest that Congress could choose to recognize either of two international doctrines, the International Covenant on Civil and Political Rights or the Nuremberg Code, to create a right of action under the ATS.

A solution that subscribes to Robert Gatter’s theory and harnesses the benefits of the ATS while avoiding the criticisms directed at the concept of a centralized review system is for the United States to recognize the Nuremberg Code as customary international law, permitting plaintiffs a cause of action against American pharmaceutical companies when their rights under the Code are violated. However, unlike Wollensack’s proposal to create the forum within the United States, the ideal solution would not require the specific designation of a particular venue for the forum. A U.S.-based forum would place unnecessary hardship on injured clinical drug trial participants who would, for the most part, be unable to travel to the United States to appear in court. Instead, an acceptable forum should be deemed to be any country where a pharmaceutical company conducts its clinical research—after all, the final decision to carry out research in a host country is always the pharmaceutical company’s to make.

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142 See id. at 623, 626. Professor Robert Gatter also warns that as long as some countries willingly ignore ethical guidelines to obtain the short-term financial benefits that come with hosting human trials, even a coalition of countries cooperating to strengthen domestic drug laws will be unlikely to protect human drug trial participants. See Gatter, supra note 44, at 363–64.

143 See Alien Tort Claims Act, 28 U.S.C. § 1350 (2000); Wollensack, supra note 102, at 769.


145 See Wollensack, supra note 102, at 769.

146 See id. at 769–71.

147 But see id.

148 See id.
Conclusion

Despite the Nuremberg Code’s shortcomings, the standards it sets forth provide a viable solution to prevent the unethical treatment of clinical trial participants by CROs employed by American pharmaceutical companies.\textsuperscript{149} This is because the existing customary international law presented by the Code places the onus of ensuring ethical treatment of trial participants on the very clinicians performing the trials.\textsuperscript{150} The Code’s principles are clear, succinct, and humanitarian in nature, and the Code is already perceived as constituting an international customary regime.\textsuperscript{151} This solution is not inappropriately bold, as the Nuremberg Code’s principles already “set the framework for United States federal regulations as well as . . . international guidelines.”\textsuperscript{152} The citizens of the former Soviet Union, like all participants in drug trials, deserve not only a means of asserting their right to ethical treatment, but also a clear statement of what that ethical treatment should be.\textsuperscript{153} By acknowledging the Nuremberg Code as customary international law and not merely a set of guidelines, the United States government would shift the burden of regulating drug trials to researchers, and would simultaneously make American pharmaceutical companies and the CROs they employ accountable for the research protocols they write.\textsuperscript{154} Adoption of the Code as customary international law would provide a right of recourse to clinical trial participants in the former Soviet Union and around the world, thus ensuring the drug test subjects of American Big Pharma the protections of the Nuremberg Code.\textsuperscript{155}

\textsuperscript{149} See id.

\textsuperscript{150} See Cekola, supra note 16, at 144.


\textsuperscript{152} See Wollensack, supra note 102, at 749 (citing Michael A. Grodin, Historical Origins of The Nuremberg Code, in The Nazi Doctors and the Nuremberg Code: Human Rights in Human Experimentation, supra note 106, at 121, 139).

\textsuperscript{153} See Gatter, supra note 37, at 623–27.

\textsuperscript{154} See Gatter, supra note 44, 351–52; Wollensack, supra note 102, at 769–71.

\textsuperscript{155} See Wollensack, supra note 102, at 769.