

“Surplus Humanity” and the Margins of Legality: Slums, Slumdogs, and Accumulation by Dispossession

*Tayyab Mahmud**

Marooned on the outskirts of the law, more than one billion people worldwide live in urban slums and squatter settlements, mostly in the global South. Law, extra-legality, and illegality commingle in urban slums to produce spaces and subjects at the margins of legal orders and formal economies. Three enduring and inter-related features of capitalism—accumulation by dispossession, a reserve army of labor, and an informal sector of the economy—produce and sustain urban slums. The genesis and persistence of slums and slum-dwellers testify to the iron fist of the state working in concert with the hidden hand of the market in the service of accumulation of capital. Over the last thirty years, neoliberal restructuring of economies and reordering of the responsibilities of states have accentuated this process. As a result, slums in the global South have grown exponentially. An examination of public policy and pronouncements of the judiciary in India, as they related to slums and slum-dwellers, calls into question traditional understandings of the law, citizenship, and responsibilities of the state. Mainstream remedial prescriptions for housing for the urban poor increasingly rely on market forces, falling woefully short of their goal, and often accentuating the problem. The incipient right to the city provides a productive framework to re-imagine the concept of citizenship, and to guide public policy and popular action to ensure adequate housing with dignity for the urban poor and marginalized.

* Professor of Law and Director, Center for Global Justice, Seattle University School of Law. I want to thank Jaswinder Brara, Richard Delgado, Carmen Gonzalez, Hamid Khan, Victoria Kill, Henry McGee, Audrey McFarlane, Bob Menanteaux, Charles Pouncy, and Meenakshi Rishi for their thoughtful comments on earlier drafts. Research librarians at Seattle University School of Law provided invaluable assistance with this project.

*One's ideological perspective is likely to be shaped by one's housing status.*¹

—Peter Ward

*[T]here is a politics of space because space is political.*²

—Henri Lefebvre

INTRODUCTION

From Cabrini-Green in Chicago to the Mau Forest in Kenya, the housing of the poor is threatened by predatory forces unleashed by global capitalism in its neoliberal incarnation.³ Formal housing markets in the global South⁴ rarely supply more than twenty percent of new housing needs, turning people to self-built shanties, informal rentals, pirate subdivisions, or the streets.⁵ The population of slums and shantytowns on the urban peripheries often outnumbers that of the city, leading some to suggest that “[t]hese compounds are called ‘peri-urban’ but in reality, it is the city proper that is peripheral.”⁶ Planning experts warn that if this trend continues, “we will have only slums and no cities.”⁷ Urban slums are seen as warehouses of “surplus humanity,”⁸ and slum-dwellers as a “surplus population.”⁹ A

¹ PETER M. WARD, MEXICO CITY: THE PRODUCTION AND REPRODUCTION OF AN URBAN ENVIRONMENT 193 (Richard Peet ed., 1990).

² Henri Lefebvre, *Reflections on the Politics of Space*, in RADICAL GEOGRAPHY: ALTERNATIVE VIEWPOINTS ON CONTEMPORARY SOCIAL ISSUES 339, 345 (1978).

³ See generally Megan Cottrell, *At the End of her Rope: Cabrini-Green Resident Faces Eviction Tomorrow*, TRUE/SLANT (Nov. 16, 2009, 10:00 AM), <http://trueslant.com/megancottrell/2009/11/16/at-the-end-of-her-rope-cabrini-green-resident-faces-eviction-tomorrow/>; Jeffrey Gettleman, *Forest People May Lose Home in Kenyan Plan*, N.Y. TIMES, Nov. 15, 2009, at A6.

⁴ The terms “global South” and “global North” are used here not necessarily to describe distinct geographical regions, but to indicate what have been termed the “two-third” and “one-third” populations of the world that occupy broadly different positionalities within the global economy. See Eric Sheppard & Richa Nagar, *From East-West to North-South*, 36 ANTIPODE 557, 557–58 (2004).

⁵ A. S. OBERAI, POPULATION GROWTH, EMPLOYMENT AND POVERTY IN THIRD-WORLD MEGA-CITIES: ANALYTICAL AND POLICY ISSUES 13 (1993). See also ROBERT NEUWIRTH, SHADOW CITIES: A BILLION SQUATTERS, A NEW URBAN WORLD 7–9 (2005); MARK KRAMER, DISPOSSESSED: LIFE IN OUR WORLD’S URBAN SLUMS 3–4 (2006). Accurate statistics are difficult to come by because poverty estimates are often obfuscated and slum populations are under-counted. See, e.g., JONATHAN RIGG, SOUTHEAST ASIA: A REGION IN TRANSITION 119, 143–46 (1991).

⁶ K.C. Sivaramakrishnan, *Urban Governance: Changing Realities*, in PREPARING FOR THE URBAN FUTURE: GLOBAL PRESSURES AND LOCAL FORCES 225, 229 (Michael A. Cohen et al. eds., 1996).

⁷ Gautam Chatterjee, *Consensus versus Confrontation*, 8 HABITAT DEBATE 11, 11 (2002).

⁸ Mike Davis, *Planet of Slums: Urban Involution and the Informal Proletariat*, 26 NEW LEFT REV. 5, 23 (2004).

⁹ Henry Veltmeyer, *Surplus Labor and Class Formation on the Latin American Periphery*, in THEORIES OF DEVELOPMENT: MODES OF PRODUCTION OR DEPENDENCY? 212 (Ronald H. Chilcote & Dale L. Johnson eds., 1983).

global study finds that “[t]he primary direction of both national and international interventions during the last twenty years has actually increased urban poverty and slums.”¹⁰ In a world where “2.7 billion struggle to survive on less than two dollars per day,”¹¹ urban poverty may well be the “most significant, and politically explosive, problem of the . . . century.”¹²

The ongoing global recession and the popularity of the Academy Award winning film *Slumdog Millionaire*¹³ furnish a unique opportunity to reexamine the question of slums. The 2007–2009 deep recession and the global financial crisis are lifting the fog of neoliberal market ideologies that have dominated global and national public policies for over a generation.¹⁴ This has opened up the possibilities for clear-eyed analyses of how market forces and the law come together to produce questionable distributions of gain and pain. Slums and urban poverty are ripe for such an analysis.

Set in Dharavi, the infamous slum of Mumbai, *Slumdog Millionaire* is an acerbic snapshot of law and illegality tangled in a brutal drama of power and resistance in the life of slum-dwellers. We see an urban space that radically departs from the original meaning of “city,”—which is derived from *civ’tade*, *civitat-em*, and *civitas*, and “its primary sense was therefore ‘citizenship’; thence concretely ‘the body of citizens, the community.’”¹⁵ Neither does the modern “public sphere,”

¹⁰ UN-HABITAT, THE CHALLENGE OF SLUMS: GLOBAL REPORT ON HUMAN SETTLEMENTS 2003, at 6 (2003) [hereinafter UN-HABITAT, THE CHALLENGE OF SLUMS].

¹¹ *Fast Facts: The Faces of Poverty*, UN MILLENNIUM PROJECT, http://www.unmillenniumproject.org/resources/fastfacts_e.htm (last visited Sept. 22, 2010).

¹² Anqing Shi, *How Access to Urban Potable Water and Sewerage Connections Affects Child Mortality* 14 (World Bank Dev. Res. Group. Finance, Working Paper No. 2274, 2000).

¹³ *Slumdog Millionaire*—Official Site, FOX SEARCHLIGHT, <http://www.foxsearchlight.com/slumdogmillionaire/>. The term “slumdog,” borrowed from this film, can be seen as an offensive characterization of those who live in slums. I use it, as I believe the film does, by combining the words “slum” and “underdog” to signal the subordinated and marginalized state of those constrained to make slums their abode. The meaning of a slum has evolved over time, substantiating that “(spatio)legal representations are imbricated with elements of the (spatio)legal material world.” David Delaney, *Tracing Displacements: Or Evictions in the Nomosphere*, 22 ENV’T & PLAN. D: SOC’Y & SPACE 847, 851 (2004). For a critique of the deployment of the term, see generally, Alan Gilbert, *The Return of the Slum: Does Language Matter?*, 31 INT’L J. URB. & REGIONAL RES. 697, 697 (2007).

¹⁴ See generally JOSEPH E. STIGLITZ, *FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY* (2010); PAUL KRUGMAN, *THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008* (2009); RICHARD D. WOLFF, *CAPITALISM HITS THE FAN: THE GLOBAL ECONOMIC MELTDOWN AND WHAT TO DO ABOUT IT* (2010); ROBERT SKIDELSKY, *KEYNES: THE RETURN OF THE MASTER* (2009).

¹⁵ THE OXFORD ENGLISH DICTIONARY 252 (2d ed.1996).

saturated by legality, contemplate a slum like Dharavi.¹⁶ Rather, slums emerge as liminal spaces¹⁷ where law, extra-legality, and illegality are braided to produce the other side of universality—“moral and legal *no man’s land*, where universality finds its *spatial* limits.”¹⁸

This article examines the production and persistence of urban slums in order to explore and evaluate remedial strategies that could ensure adequate housing for the urban poor. This inquiry is informed by the spatial turn in social inquiry that deems spatial factors crucial to social phenomena,¹⁹ and the renewed interest in urban sociology and “the city.”²⁰ It takes cognizance of the mutually constitutive roles of law and space,²¹ and of the fact that “[w]e live in a time of porous legality or of legal porosity, multiple networks of legal orders forcing us to constant transitions and trespassings.”²² First, the article presents a picture of Dharavi to underscore the complexity and gravity of the problem of urban slums. Second, it articulates a theoretical framework to argue that urban slums are produced by

¹⁶ See JURGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 74–75 (1999). See generally HABERMAS AND THE PUBLIC SPHERE (Craig Calhoun ed., 1993); AFTER HABERMAS: NEW PERSPECTIVES ON THE PUBLIC SPHERE (Nick Crossley & John Michael Roberts eds., 2004).

¹⁷ According to Victor Turner:

The attributes of liminality or liminal *personae* (‘threshold people’) are necessarily ambiguous, since this condition and these persons elude or slip through the network of classifications that normally locate states and positions in cultural space. Liminal entities are neither here nor there; they are betwixt and between the positions assigned and arrayed by law, custom, convention, and ceremonial.

VICTOR TURNER, THE RITUAL PROCESS: STRUCTURE AND ANTI-STRUCTURE 95 (1969).

¹⁸ Denise Ferreira Da Silva, *Towards a Critique of the Socio-logos of Justice: The Analytics of Raciality and the Production of Universality*, 7 SOC. IDENTITIES 421, 422 (2001).

¹⁹ See generally DAVID HARVEY, THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE (1990); EDWARD W. SOJA, POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY (1989); SPACE & SOCIAL THEORY: INTERPRETING MODERNITY AND POSTMODERNITY (Georges Benko & Ulf Strohmayer eds., 1997); PLACE AND THE POLITICS OF IDENTITY (Michael Keith & Steve Pile eds., 1993).

²⁰ See, e.g., EDWARD W. SOJA, POSTMETROPOLIS: CRITICAL STUDIES OF CITIES AND REGIONS xi, xii (2000); ASH AMIN & NIGEL THRIFT, CITIES: REIMAGINING THE URBAN 2–4 (2002); POSTMODERN CITIES AND SPACES 1 (Sophie Watson & Katherine Gibson eds., 1995).

²¹ See generally Nicholas K. Blomley, *Text and Context: Rethinking the Law-Space Nexus*, 13 PROGRESS IN HUM. GEOGRAPHY 512 (1989); NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHIES OF POWER (1994); Desmond Manderson, *Beyond the Provincial: Space, Aesthetics, and Modernist Legal Theory*, 20 MELB. U. L. REV. 1048 (1996); Chris Butler, *Critical Legal Studies and the Politics of Space*, 18 SOC. & LEGAL STUD. 313 (2009).

²² BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION 473 (1995).

three inter-linked and enduring features of capitalism that have been accentuated by neoliberalism: accumulation by dispossession, the labor reserve army, and an informal sector of the economy. Third, using the history of slums in India as a case study, it applies this framework to demonstrate how colonial stratagems, misguided post-colonial development policies, and mandates of neoliberalism have produced and sustained slums in the global South. Fourth, it shows how material and discursive changes spawned by neoliberalism transformed India’s judiciary’s response to the problem of slums and slum-dwellers from humane treatment to hostility. Fifth, it evaluates alternative models for the eradication of urban slums in the global South, and finds the “state as developer” model²³ to be most promising. Finally, it argues that the incipient right to the city provides a productive framework to reimagine the concept of citizenship, and to guide public policy and popular action to ensure adequate housing with dignity for the urban poor and the marginalized.

I. DHARAVI: MAXIMUM SLUM IN MAXIMUM CITY

In India, the number of people living in slums grew approximately twenty-five percent in the last decade.²⁴ In Mumbai, over twenty million people cram into 169 square miles, with population density exceeding one million per square mile in some parts of the city.²⁵ With twelve million squatters and tenement-dwellers, Mumbai is also the global capital of slum-dwelling.²⁶ While real estate prices in Mumbai compete with those of Manhattan,²⁷ every second person in Mumbai lives in slums, which collectively occupy just six percent of all the land in the city.²⁸ In Mumbai, a typical tenement *chawl*—which makes up seventy-five percent of the city’s formal housing stock—is a dilapidated, one-room rental dwelling that on average crams a

²³ See *infra* notes 431–459 and accompanying text.

²⁴ Bibhudatta Pradhan, *India’s Number of Slum-Dwellers Surges as Economy Draws People to Cities*, BLOOMBERG.COM (Sept. 3, 2010, 5:06 AM), <http://www.bloomberg.com/news/2010.09.03/india-s-number-of-slum-dwellers-surges-as-economy-draws-people-to-cities.html>.

²⁵ Seamus Murphy, *Bombay: Maximum City*, VIIPHOTO.COM, http://www.viiphoto.com/detailStory.php?news_id=1086 (last visited Sept. 22, 2010).

²⁶ UN-HABITAT, *Slums of the World: The Face of Urban Poverty in the New Millennium?* annex 3 (Monitoring the Millennium Development Goal, Target 11-World-wide Slum Dweller Estimation Working Paper, Nairobi 2003).

²⁷ Gayatri Ramanathan, *Dharavi Redevelopment Plan is Robbing Us of Space: Residents*, LIVEMINT.COM (Sept. 5, 2007, 7:07 AM), <http://www.livemint.com/2007/09/05002021/Dharavi-redevelopment-plan-is.html>.

²⁸ Komal Panchamatia, *Every Second Person in Mumbai Resides in Slum: UNDP Report*, BUSINESS STANDARD (Sep. 4, 2009, 11:25 AM), <http://www.business-standard.com/india/news/every-second-person-in-mumbai-resides-in-slum-undp-report/72631/on>.

household of six people into fifteen square meters, with a latrine usually shared by six families.²⁹ Pavement and sidewalk dwellers in Mumbai reach approximately one million.³⁰ Of these, seventy percent have been in the city for at least six years, and one-third have been evicted from a *chawl* or a slum.³¹ While Mumbai's estimated annual housing deficit of 45,000 units translates into a corresponding increase in slum dwellings, 400,000 units lie empty because owners loath the mandated regime of fixed rents and the resulting propensity of tenants to become permanent occupiers.³² Homelessness and slum growth in Mumbai is directly related to job losses associated with industrial restructuring. In 1921, textile mills hired 16.2% of the males and 9.5% of the females of the city's population.³³ In 1931, the Census Commissioner stated that "[s]ave for its textile manufacture', . . . 'Bombay has really little claim to be called an industrial city. . . .'"³⁴ Until 1980, 250,000 textile mill workers lived in Mumbai; today the number has fallen below 30,000.³⁵ This is part of a broader contraction of the formal sector of the economy that has forced the urban poor to fend for themselves in the so-called informal sector.

Life in Dharavi demonstrates that, for the urban poor, housing is a verb.³⁶ Dharavi, a 175-hectar (0.67 square miles) maze of dark alleys and corrugated shacks, compacts 18,000 people per acre into 10-by-15 foot rooms stacked on top of one another.³⁷ Here, slum-dwellers juggle housing cost, tenure security, quality of shelter, distance from work, and personal safety. Even pavement-dwelling, much less an extra-legal shack, is not free; regular fees have to be paid to the police, crime

²⁹ ALAIN R.A. JACQUEMIN, URBAN DEVELOPMENT AND NEW TOWNS IN THE THIRD WORLD: LESSONS FROM THE NEW BOMBAY EXPERIENCE 89 (1999).

³⁰ Minar Pimple & Lysa John, *Security of Tenure: Mumbai's Experience*, in HOLDING THEIR GROUND: SECURE LAND TENURE FOR THE URBAN POOR IN DEVELOPING COUNTRIES 75, 76, 78 (Alain Durand-Lasserve & Lauren Royston eds., 2002).

³¹ JACQUEMIN, *supra* note 29, at 90.

³² SUKETU MEHTA, MAXIMUM CITY: BOMBAY LOST AND FOUND 117 (2004).

³³ R. CHANDAVARKAR, THE ORIGINS OF INDUSTRIAL CAPITALISM IN INDIA: BUSINESS STRATEGIES AND THE WORKING CLASSES IN BOMBAY, 1900–1940 77 (1994).

³⁴ *Id.*

³⁵ Sharit K. Bhowmik, *The Politics of Urban Space in Mumbai: 'Citizen' versus the Urban Poor*, in CONTESTED TRANSFORMATIONS: CHANGING ECONOMIES AND IDENTITIES IN CONTEMPORARY INDIA 149, 151 (Mary E. John et al. eds., 2006) [hereinafter CONTESTED TRANSFORMATIONS]. The decline of the textile industry in Mumbai resulted from the global shift of textile production to comparatively low-wage settings like Bangladesh, China, and Vietnam. See Sanjaya Lall, *India's Manufactured Exports: Comparative Structure and Prospects*, 27 WORLD DEV. 1769, 1769–70 (1999).

³⁶ John F. C. Turner, *Housing as a Verb*, in FREEDOM TO BUILD: DWELLER CONTROL OF THE HOUSING PROCESS 148, 151 (John F. C. Turner & Robert Fichter eds., 1972).

³⁷ KALPANA SHARMA, REDISCOVERING DHARAVI: STORIES FROM ASIA'S LARGEST SLUM 18 (2000).

syndicates, or both.³⁸ Furthermore, squatters are required to pay sizable amounts of money as bribes to the police, politicians, or criminal gangs to gain access to the sites, and continue to pay informal “rent” in money, loyalty, and votes.³⁹ The unavoidable costs of an un-serviced location add to the bill. Slum-dwellers who have been in the city since before 1995 pay a monthly fee to the city for a “photo-pass”—an identity card with the photograph of the head of the household on it.⁴⁰ While holders assume that this pass gives them a right of permanent residency, the small print on the back side states that the holder is an encroacher who has to pay a monthly fine.⁴¹

In Dharavi and other slums of Mumbai, death rates are fifty percent higher than in adjoining rural areas, with forty percent of the mortality being a product of infections and parasitic diseases due to contaminated water and inadequate sanitation.⁴² “Breathing the air in [Dharavi] now is the equivalent to smoking two-and-a-half packs of cigarettes a day.”⁴³ Clean water, sanitation, and toilets are rare commodities, which puts special burdens on women.⁴⁴ The few public toilets run by the municipal corporation charge for each use.⁴⁵ A study of twenty-two slums in India found nine with no latrines at all; in another ten, only nineteen served 102,000 people.⁴⁶

Dharavi is also a hub of small-scale industries, with an estimated annual turnover between \$50 and \$100 million.⁴⁷ Against all odds, Dharavi has developed into a “kind of self-sufficient, self-sustaining ‘village,’” one with a “vibrant

³⁸ Erhard Berner, *Learning from Informal Markets: Innovative Approaches to Land and Housing Provision*, in DEVELOPMENT AND CITIES: ESSAYS FROM DEVELOPMENT PRACTICE 226, 233 (David Westendorff & Deborah Eade eds., 2002) [hereinafter Berner, *Learning from Informal Markets*].

³⁹ MIKE DAVIS, PLANET OF SLUMS 38 (2006) [hereinafter DAVIS, PLANET OF SLUMS].

⁴⁰ Bhowmik, *supra* note 35, at 148.

⁴¹ *Id.*

⁴² JACQUEMIN, *supra* note 29, at 90–91.

⁴³ MEHTA, *supra* note 32, at 29.

⁴⁴ See generally UNITED NATIONS DEV. PROGRAMME, SUMMARY HUMAN DEVELOPMENT REPORT 2006: BEYOND SCARCITY: POWER, POVERTY AND THE GLOBAL WATER CRISIS (2006), available at http://hdr.undp.org/en/media/HDR2006_English_Summary.pdf.

⁴⁵ Kalpana Sharma, *Mumbai's Other Half* (Countercurrents.org, Kerala, India), Oct. 17, 2004, available at <http://www.countercurrents.org/gender-sharma171004.htm>.

⁴⁶ Chatterjee, *supra* note 7, at 12. In Mumbai “half the population doesn’t have a toilet to shit in, so they shit outside . . . that’s two and a half million kilos of shit each and every day.” MEHTA, *supra* note 32, at 127. Such lack of privacy presents particular problems for women, who often have to wait for the dark of the night to relieve themselves. See Loes Schenk-Sandbergen, *Women, Water and Sanitation in the Slums of Bangalore: A Case Study of Action Research*, in LIVING IN INDIA’S SLUMS: A CASE STUDY OF BANGALORE 187, 198 (Hans Schenk ed., 2001).

⁴⁷ Mitu Sengupta, *Slumdog Millionaire’s Dehumanizing View of India’s Poor*, COUNTERPUNCH (Feb. 20/22, 2009), <http://www.counterpunch.org/sengupta022009.html>.

community and economy,” which “has achieved a unique informal ‘self-help’ urban development over the years, without any external aid.”⁴⁸ While bereft of adequate housing, the slum-dwellers have established “close to 5000 industrial units, producing textiles, pottery and leather, and performing services like recycling, printing, and steel fabrication.”⁴⁹ The economic activity in Dharavi is “decentralized, human scale, home-based, low-tech and labor-intensive . . . pedestrianized, community-centric, and network-based A simplistic re-zoning and segregating of these activities . . . would certainly hurt this very unique urban form.”⁵⁰

Polluting, toxic, and often illegal industries find Dharavi, where “Darwin beats Keynes,” attractive.⁵¹ Sweatshops profitably mine cheap labor under the radar of regulatory oversight.⁵² Writers analogize Dante’s *Inferno* to portray the struggle for survival in slums where poverty, filth, crime, and marginalization stalk the daily life of human beings.⁵³ Slum-dwellers trade away physical security and public health for minimal shelter, and suffer environmental degradation including filthy water, polluted air, and toxic industrial waste.⁵⁴ They contend with the “garbage dump syndrome,”⁵⁵ which is “a concentration of toxic industrial activities such as metal plating, dyeing, rendering, tanning, battery recycling, casting, vehicle repair, [and] chemical manufacture.”⁵⁶ Dharavi, like most slums, is located in a disaster-vulnerable, ecologically fragile area, so that even a heavy rain can wipe out shelters.⁵⁷ An omnipresent

⁴⁸ Prakash M. Apte, *Dharavi: India’s Model Slum*, PLANETIZEN (Sept. 29, 2008, 5:00 AM), <http://planetizen.com/node/35269>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Hans Schenk, *Urban Fringes in Asia: Markets versus Plans*, in REALIGNING ACTORS IN AN URBANIZING WORLD: GOVERNANCE AND INSTITUTIONS FROM A DEVELOPMENT PERSPECTIVE 117, 131 (I. S. A. Baud & J. Post eds., 2002).

⁵² SHARMA, *supra* note 37, at xxxv, 106.

⁵³ MICHAEL TAUSSIG, LAW IN A LAWLESS LAND: DIARY OF A LIMPIEZA IN COLUMBIA 114–15 (2003); DAVIS, PLANET OF SLUMS, *supra* note 39, at 49.

⁵⁴ ELLEN BRENNAN, WOODROW WILSON INT’L CTR. FOR SCHOLARS, POPULATION, URBANIZATION, ENVIRONMENT, AND SECURITY: A SUMMARY OF THE ISSUES 12–14 (1999). See also DAVIS, PLANET OF SLUMS, *supra* note 39, at 128–29.

⁵⁵ GITA DEWAN VERMA, SLUMMING INDIA: A CHRONICLE OF SLUMS AND THEIR SAVIOURS 16 (2002); DAVIS, PLANET OF SLUMS, *supra* note 39, at 129.

⁵⁶ DAVIS, PLANET OF SLUMS, *supra* note 39, at 129.

⁵⁷ See Mohamed Hamza & Roger Zetter, *Structural Adjustment, Urban Systems, and Disaster Vulnerability in Developing Countries*, 15:4 CITIES 291, 291 (1998) (explaining that “urban areas are not disaster prone by nature; rather . . . the structural processes which accelerate rapid urbanisation . . . increase the disaster vulnerability of the mass of low-income urban dwellers”). During the twentieth century, more than one hundred million homes were destroyed by earthquakes, mostly in slums, tenements districts, and poor rural areas. DAVIS, PLANET OF SLUMS, *supra* note 39, at 126.

threat is fire, accidental or as the result of “hot demolition”—arson used by landowners to clear out squatters.⁵⁸

Recently, the Mumbai city government approved a plan, styled “Vision Mumbai,” to create a “world-class city” by 2013.⁵⁹ Dharavi, where the land occupied by the slum is estimated to be worth \$2 billion,⁶⁰ is a particular target of this plan.⁶¹ Demolitions by bulldozers, supervised by the police and with little notice to the residents, is the *modus operandi*.⁶² The dwelling of the lead child-actor in *Slumdog Millionaire* proved not to be immune to demolition.⁶³ Besides being a violation of many international conventions and covenants to which India is a party,⁶⁴ these actions betray class divides, and “the constitutive and mutually defining relations between corporeality and the metropolis.”⁶⁵ As one Dharavi resident put it:

Why wreck the homes and lives of people who have built the city and lived in it for decades? . . . Because from your luxury high-rise apartment you don’t want the humiliation of India’s poor in your line of vision as you make money and succeed. Forcing them out is the only option. You simply can’t wish them away.⁶⁶

⁵⁸ See ERHARD BERNER, DEFENDING A PLACE IN THE CITY: LOCALITIES AND THE STRUGGLE FOR URBAN LAND IN METRO MANILA 144 (1997); HANS SCHENK, *Living in Bangalore’s Slums*, in LIVING IN INDIA’S SLUMS: A CASE STUDY OF BANGALORE, supra note 46, at 17, 34.

⁵⁹ See generally BOMBAY FIRST & MCKINSEY & CO., VISION MUMBAI: TRANSFORMING MUMBAI INTO A WORLD-CLASS CITY (2003), available at www.bombayfirst.org/pdf/McKinseyReport.pdf.

⁶⁰ David Harvey, *The Right to the City*, 53 NEW LEFT REV. 23, 35 (2008) [hereinafter Harvey, *The Right to the City*].

⁶¹ Henry Chu, *Where Every Inch Counts*, L.A. TIMES, Sept. 8, 2008, at A1.

⁶² Habitat Int’l Coal., *NGO Appeals Against Slum Demolitions in Mumbai*, <http://www.europe-solidaire.org/spip.php?article2242> (last visited Sept. 11, 2010).

⁶³ Hiram Lee, *Home of Slumdog Millionaire Child Actor Destroyed by Mumbai Authorities*, WORLD SOCIALIST (May 15, 2009), <http://www.wsws.org/articles/2009/may2009/slum-m15.shtml>.

⁶⁴ See International Covenant on Economic, Social, and Cultural Rights, Articles 2 & 11, Jan. 3, 1976, available at <http://www2.ohchr.org/english/law/pdf/cescr.pdf>; Committee on Economic, Social and Cultural Rights, Comments No. 4 on the right to adequate housing, and No. 7 on forced evictions, available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm>; Convention on the Rights of the Child, Articles 16, 27 and 39, available at <http://www2.ohchr.org/english/law/crc.htm>; Convention on the Elimination of All Forms of Discrimination Against Women, Article 14, available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>; Basic Principles and Guidelines on Development-based Evictions and Displacement, UN Special Rapporteur on Adequate Housing of the UN Commission on Human Rights, available at http://www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf.

⁶⁵ Elizabeth Grosz, *Body-Cities*, in THE FEMINISM AND VISUAL CULTURE READER 507, 508 (Amelia Jones ed., 2003).

⁶⁶ Dan McDougall, *Waste Not, Want Not in the £700m Slum*, GUARDIAN (Mar. 4, 2007), <http://www.guardian.co.uk/environment/2007/mar/04/india.recycling>.

An architect claims, “[t]here’s very little vision with this plan. They’re more like hallucinations.”⁶⁷ A Dharavi resident asks: “Development for whom? The government’s idea of development doesn’t include us. I’ve seen the plans. Wonderful. No room at all for ugly poor people.”⁶⁸ A companion plan adopted by the Maharashtra state government proposes to resettle slum-dwellers of Dharavi into 225 square foot flats per family, if the slum-dweller’s name appeared on the voters’ list in 1995 and he or she was an actual occupant of the dwelling.⁶⁹ Together, Lehman Brothers and HDIL, one of the largest property developers in India, were awarded a contract to implement the plan, but they abandoned it citing a liquidity crunch and lack of clarity of policy.⁷⁰ Many earlier plans met a similar fate. In all, slum upgrading plans in Mumbai promised to provide relief to three million people, but the results remain dismal.⁷¹ An expert review concluded that “the scheme for slum upgrading had fallen well short of expectations and only nine percent of recipients belonged to low-income groups”⁷² In the meantime, the global real estate price-escalation has also reached Dharavi, making even the slum beyond the reach of the destitute.⁷³ A Dharavi real estate broker explains:

Ten years ago, poor people were my only clients and huts my only properties My only line was: ‘Poor people can afford it.’ Now I sell to businessmen, investors and speculators. I tell them, ‘This place is a commercial center. It’s slap in the middle of the city. Its [*sic*] development is approved. It’s a sure thing! It’s golden! Get in now!’⁷⁴

This picture of Dharavi in Mumbai suggests that most cities of the global South are less made of glass and steel soaring toward the sky, than of crude brick, straw, scrap wood, and plastic in the midst of squalor, pollution, and excrement. It also

⁶⁷ *Id.*

⁶⁸ Alex Perry, *Life in Dharavi: Inside Asia’s Biggest Slum*, TIME (Asia), June 19, 2006, available at <http://www.time.com/time/asia/covers/501060619/slum.html>.

⁶⁹ See Slum Rehabilitation Authority, *Dharavi Redevelopment Project*, SRA.GOV, <http://www.sra.gov.in/htmlpages/Dharavi.htm> (last visited Sept. 25, 2010). See also Kalpana Sharma, *A Reprieve for Dharavi*, INFOCHANGEINDIA.ORG, <http://infochangeindia.org/Urban-India/Cityscapes/A-reprieve-for-Dharavi.html> (last visited Sept. 22, 2010) (outlining recent history of the Dharavi Redevelopment Project, including a Maharashtra government compromise increasing dwelling size to three hundred square feet and extending the voters’ list cut-off date to January 1, 2000).

⁷⁰ *Dharavi: ‘Slum’ping Developments*, ECONOMIC TIMES (Apr. 2, 2009, 12:07 AM), <http://economictimes.indiatimes.com/> (click “news” above search box; enter search term “Slum’ping developments”).

⁷¹ Greg O’Hare et al., *A Review of Slum Housing Policies in Mumbai*, 15 CITIES 269, 278 (1998).

⁷² *Id.* at 279.

⁷³ Perry, *supra* note 68.

⁷⁴ *Id.*

suggests that Dharavi, like other urban slums of the global South, is not a space invested with formal legality. Dharavi emerges as a liminal zone of a regulatory vacuum, where predatory entrepreneurs, corrupt politicians, and state functionaries operate unfettered by law or public scrutiny.

II. SLUMS, CITIES, AND CAPITALISM

A. Accumulation by Dispossession and “Surplus Humanity”

Slum-dwellers have been characterized as “outcast proletariat.”⁷⁵ They are the “disincorporated” and “un-incorporatable” of capitalism.⁷⁶ They stand “condemned to the world of the excluded, the redundant, the dispensable, having nothing to lose, not even the chains of wage-slavery. . . . [They are] the shadowy figures of the rejected, the marginal, the leftovers of capital’s arising, the wreckage and debris”⁷⁷ All this renders them “structurally and biologically redundant to global accumulation and the corporate matrix.”⁷⁸ Any productive inquiry of slums and slum-dwellers must take account of the conditions of their production. Three interlinked historical features of capitalism furnish the contours of this process: accumulation by dispossession, the reserve army of labor, and the informal economy.

David Harvey coined the term *accumulation by dispossession* to signify that accumulation facilitated by legal and extra-legal non-economic means is an enduring condition of capitalism, rather than just its historical precondition.⁷⁹ The construct signals that markets always rely on non-market forces, particularly legal orders and extra-legality, to disproportionately allocate power and resources to owners of capital.⁸⁰ The concept builds on that of primitive accumulation—appropriation of value by force—seen as the pre-history of capitalism and critical to the development of *free* labor and *free* markets.⁸¹ As a prerequisite to the desired positioning of bodies and spaces, legal and extra-legal

⁷⁵ Mike Davis, *The Urbanization of Empire: Megacities and the Laws of Chaos*, 81 SOC. TEXT 9, 11 (2004) [hereinafter Davis, *The Urbanization of Empire*].

⁷⁶ *Id.* at 11, 13 (quoting UN HUMAN SETTLEMENT PROGRAM, THE CHALLENGE OF SLUMS: GLOBAL REPORT ON HUMAN SETTLEMENTS 2003) (internal citations omitted).

⁷⁷ KALYAN SANYAL, RETHINKING CAPITALIST DEVELOPMENT: PRIMITIVE ACCUMULATION, GOVERNMENTALITY & POST-COLONIAL CAPITALISM 53 (2007).

⁷⁸ Davis, *The Urbanization of Empire*, *supra* note 75, at 11.

⁷⁹ See DAVID HARVEY, THE NEW IMPERIALISM 137–38, 145–46 (2003) [hereinafter HARVEY, THE NEW IMPERIALISM].

⁸⁰ *Id.*

⁸¹ See MICHAEL PERELMAN, THE INVENTION OF CAPITALISM: CLASSICAL POLITICAL ECONOMY AND THE SECRET HISTORY OF PRIMITIVE ACCUMULATION 13 (2000); Jim Glassman, *Primitive Accumulation, Accumulation by Dispossession, Accumulation by ‘Extra-Economic’ Means*, 30 PROGRESS HUM. GEOGRAPHY 608, 610 (2006).

coercion made capital accumulation possible.⁸² Coercion triggered the genesis of capitalism—availability of “free” labor with no other means of livelihood except their labor to be sold in a nascent “free” labor market, and the availability of capital to be deployed in the incipient manufacturing industries. Historically, the process turned on “ex-novo separation between producers and means of production.”⁸³ The key issue here involves the “*conditions, circumstances and contexts* in which this separation is enforced.”⁸⁴ Contrary to the mythologies of classical economics, this is a realm outside the market governed by *pure* economic laws—a zone where this separation is effectuated through direct extra-economic forces residing in the coercive power of the state and the law.⁸⁵ Two domains of extra-economic power were critical to this process: coercive laws that forced subsistence producers into the “free” wage labor market, and colonial plunder that made capital available for investment.

Colonialism, facilitated by an elaborate reordering of international law, filled the coffers of the fledgling mercantile class of Europe and generated the financial resources to engage the “freed” labor in production governed by profit maximization.⁸⁶ Besides direct plunder of resources in the colonies, agricultural lands in the Americas and plantation colonies in the Caribbean

⁸² As Polanyi reminded us, “[t]he road to the free market was opened and kept open by an enormous increase in continuous, centrally organized and controlled interventionism.” KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 146 (2001). Jessop adds:

[N]either capitalism as a whole nor the capital-labor relationship on which its contradictory and conflictual dynamic depends can be reproduced purely through market relations. Both require supplementary modes of reproduction, regulation and governance[,] including those provided in part through the operations of the state.

BOB JESSOP, *THE FUTURE OF THE CAPITALIST STATE* 11 (2002).

⁸³ Massimo De Angelis, *Separating the Doing and the Deed: Capital and the Continuous Character of Enclosures*, 12 *HIST. MATERIALISM* 57, 63 (2004).

⁸⁴ *Id.* at 66.

⁸⁵ Polanyi focuses on the role of state power in the commodification of land and labor, what he terms “fictitious commodities.” POLANYI, *supra* note 82, at 71. He points out that capitalism “was submerged in general social relations; markets were merely an accessory feature of an institutional setting controlled and regulated more than ever by social authority.” *Id.* at 70.

⁸⁶ For example, silver from the “New World” roughly tripled Europe’s supply. FERNAND BRAUDEL, *II CIVILIZATION AND CAPITALISM, 15TH–18TH CENTURY: THE WHEELS OF COMMERCE* 198 (Sian Reynolds trans., Univ. of Cal. Press 1992) (1979). For the relationship between colonialism and international law, see Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, in *LAWS OF THE POSTCOLONIAL* 89, 89–91 (Eve Darian-Smith & Peter Fitzpatrick eds., 1999); Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in the Nineteenth-Century International Law*, 40 *HARV. INT’L L.J.* 1, 2–5 (1999); ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 116–17 (2004); MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960*, at 98–178 (2002).

were the “ghost acres” that relieved output pressures and threats of diminishing returns that confronted European agriculture.⁸⁷ The genesis of capitalism in un-free labor is reflected in the fact that the word *capital* first came into vogue in the era of capital-intensive but slave-hungry Antillean sugar plantations.⁸⁸ The Enclosure Acts⁸⁹ and Game Laws⁹⁰ in England are examples of coercive use of law to dispossess rural farmers, hunters, and other subsistence producers, forcing them to seek a livelihood in the “free” wage market. Primitive accumulation thus entailed two interlinked processes: direct expropriation of people’s means of providing for themselves, and forcing people into wage labor.

Canonical critical political economy had relegated primitive accumulation to the pre-history of capitalism.⁹¹ However, later

⁸⁷ See NIALL FERGUSON, *THE ASCENT OF MONEY: A FINANCIAL HISTORY OF THE WORLD* 285 (2008).

⁸⁸ See BRAUDEL, *supra* note 86, at 232. Braudel credits the 1770 publication of Anne Turgot for the first use of the word capital in the sense of bases for capitalism as a new mode of production. See ANNE ROBERT JACQUES TURGOT, *REFLECTIONS ON THE FORMATION AND THE DISTRIBUTION OF RICHES* (William J. Ashley trans., Augustus M. Kelly ed., 1898) (1770).

⁸⁹ See 6 SIR JOHN BAKER, *THE OXFORD HISTORY OF THE LAWS OF ENGLAND* 1483–1558, at 650–52 (2003).

⁹⁰ Modern Game Laws that began in England in 1671, severely restricted hunting and were part of the effort to cut off large masses of the rural people from one traditional means of their livelihood. E. P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 94, 99, 207, 261 (1975). The Waltham Black Acts of 1722 were among the earliest of the severe measures to punish poachers. *Id.* The scope of the Game Laws expanded rapidly. *Id.* As a result, by the end of the eighteenth century “[m]eat virtually disappeared from the tables of the rural poor.” PHYLLIS DEANE, *THE FIRST INDUSTRIAL REVOLUTION* 42 (1979). The British courts enforced these laws with shocking ferocity, and many poachers were executed under the Black Acts. E. P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 68 (1975). Between 1820 and 1827, in Bedfordshire, “nearly a quarter of those committed were in prison for poaching offences.” A. G. L. SHAW, *CONVICTS AND THE COLONIES* 155 (1966). Blackstone acknowledged this connection, observing: “the only rational footing, upon which we can consider it [violation of Games Laws] as a crime, is that in low and indigent persons it promotes idleness, and takes them away from their proper employments and callings...” 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 174–75 (Univ. of Chicago Press 2002) (1766). The Game Laws also prohibited the rural poor from keeping weapons, thereby diminishing their ability to resist the onslaught on their means of subsistence. Blackstone noted that “[f]or preventing of popular insurrections and resistance to the government, by disarming the bulk of the people: which last is a reason oftener meant, than avowed, by makers of forest or game laws.” 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 412 (Univ. of Chicago Press 2002) (1766). Research confirms that the level of exploitation was greatest against those who lacked access to weapons. John S. Pettengill, *Firearms and the Distribution of Income: A Neo-Classical Model*, 13 *REV. RADICAL POL. ECON.* 1, 1–10 (1981). One the earliest acts of the French Revolution was to repeal the hated Game Laws in France. Michael Perelman, *Primitive Accumulation from Feudalism to Neoliberalism*, 18 *CAPITALISM NATURE SOCIALISM* 44, 54 (2007).

⁹¹ See PERELMAN, *supra* note 81, at 2. The portrayal of primitive accumulation by critical political economists was marred by historicism, Eurocentricism, and anti-peasant prejudice of their milieu. Glassman, *supra* note 81, at 610–12.

scholarship on endemic crises of capitalism,⁹² the political economy of growth,⁹³ dependency theory,⁹⁴ world systems theory,⁹⁵ accumulation on a world scale,⁹⁶ and articulation of modes of production,⁹⁷ establishes that primitive accumulation is “a basic ontological *condition* for capitalist production, rather than just a historical precondition.”⁹⁸ As a result, “production of value that enters into the circuits of capitalist accumulation through parasitization of formally non-capitalist processes is a deeply embedded feature of capitalism.”⁹⁹ These interventions underscore the continuing role of coercive political forces in underwriting the purportedly extra-political realm of the market. They also alert us that capitalism, since its origins is a global phenomenon that often co-opts rather than displaces non-capitalist modes of production, and results in uneven development of different geographical zones within its ambit. The global geography of capitalism enables this accumulation by extra-economic means through a myriad of legal and extra-legal regimes that range from global to local, and from formal to customary. These insights highlight that primitive accumulation does not lead to complete proletarianization and that non-proletarian and semi-proletarian labor remains integral to capitalism.¹⁰⁰

⁹² Rosa Luxemburg argued that “the accumulation of capital, seen as an historical process, employs force as a permanent weapon, not only at its genesis, but further on down to the present day.” ROSA LUXEMBURG, *THE ACCUMULATION OF CAPITAL* 351 (Agnes Schwarzschild trans., Routledge 2003) (1913). Hannah Arendt emphasized that crises of capital necessitate that “the original sin of simple robbery, which centuries ago had made possible the ‘original accumulation of capital’ . . . had eventually to be repeated lest the motor of accumulation suddenly die down.” HANNAH ARENDT, *IMPERIALISM: PART TWO OF THE ORIGINS OF TOTALITARIANISM* 28 (1968). David Moore noted that colonized societies could not “protect themselves against the ravaging international trade and imperialism that destroys precapitalist communities of kinship, neighbourhoods, profession and creed . . . all forms of indigenous, organic society.” David Moore, *The Second Age of the Third World: From Primitive Accumulation to Global Public Goods?*, 25 *THIRD WORLD Q.* 87, 93 (2004).

⁹³ See generally PAUL A. BARAN, *THE POLITICAL ECONOMY OF GROWTH* (1957).

⁹⁴ See generally ANDRE GUNDER FRANK, *CAPITALISM AND UNDERDEVELOPMENT IN LATIN AMERICA* (1969).

⁹⁵ See generally IMMANUEL WALLERSTEIN, *THE CAPITALIST WORLD-ECONOMY* (1979) [hereinafter WALLERSTEIN, *THE CAPITALIST WORLD-ECONOMY*].

⁹⁶ See, e.g., SAMIR AMIN, *ACCUMULATION ON A WORLD SCALE: A CRITIQUE OF THE THEORY OF UNDERDEVELOPMENT* 38 (1974); SAMIR AMIN, *UNEQUAL DEVELOPMENT* 93 (1976).

⁹⁷ Aidan Foster-Carter, *The Modes of Production Controversy*, 107 *NEW LEFT REV.* 47, 51 (1978); Harold Wolpe, *Introduction*, in *THE ARTICULATION OF MODES OF PRODUCTION: ESSAYS FROM ECONOMY AND SOCIETY* 1, 5, 9–10 (1980).

⁹⁸ Glassman, *supra* note 81, at 615.

⁹⁹ *Id.* at 617.

¹⁰⁰ WALLERSTEIN, *THE CAPITALIST WORLD-ECONOMY*, *supra* note 95, at 276–78. As a result of articulation of dependent economies with global accumulation and coexistence of modes of production, “no matter how universal the process of proletarianization, the result is not the creation of a homogeneous proletariat.” HARVEY, *THE NEW IMPERIALISM*,

The enduring nature of accumulation by dispossession can be seen in the various forms of social capital that are required by capital but not paid by it.¹⁰¹ David Harvey initially used the phrase “accumulation by dispossession” to signify that global primitive accumulation is an enduring “spacio-temporal fix” for cyclical crises of capital.¹⁰² In this global frame, accumulation by dispossession emerges as central to the exercise of colonial and imperial domination that has moved from the background to become the dominant form of accumulation in the current neoliberal era.¹⁰³ The entire panoply of forms of value extraction by means other than commodified or “free” wage labor makes for accumulation by dispossession.

Examples drawn from various contexts should help us appreciate this enduring phenomenon. Publically funded infrastructure, subsidies for research and development, public education, and public health are canonical instances of non-market processes that sustain the market. Gendered and often racialized household labor, both productive and reproductive, is another pervasive field of such appropriation.¹⁰⁴ The history of

supra note 79, at 147. See also IMMANUEL WALLERSTEIN, *THE ESSENTIAL WALLERSTEIN* 142–43, 240, 363 (2000).

¹⁰¹ Social reproduction entails “the social processes and human relations associated with the creation and maintenance of the communities upon which all production and exchange rest.” Nancy Hartsock, *Globalization and Primitive Accumulation: The Contributions of David Harvey’s Dialectical Marxism*, in DAVID HARVEY: A CRITICAL READER 183, 183 (Noel Castree & Derek Gregory eds., 2006).

¹⁰² The cyclical crises of under-consumption, over-accumulation, and falling rates of profit, endemic to capitalism, necessitate spatial and temporal solutions. Spatio-temporal fix is “a metaphor for a particular kind of solution to capitalist crises through temporal deferral and geographical expansion.” HARVEY, *THE NEW IMPERIALISM*, *supra* note 79, at 115. The spatial fix derives from capitalism’s drive to resolve its crisis tendencies by geographical expansion and geographical restructuring. This includes developing external markets, exporting surplus capital, and expanding the labor-pool available for engagement in accumulation of capital. The temporal fix involves expropriation of resources from a commons for short-term profit where the rate of economic exploitation of a given resource exceeds its natural rate of renewal and/or the absorptive capacity of the environment. See Bob Jessop, *Spatial Fixes, Temporal Fixes and Spatio-Temporal Fixes*, in DAVID HARVEY: A CRITICAL READER, *supra* note 101, 142, 142–43.

¹⁰³ HARVEY, *THE NEW IMPERIALISM*, *supra* note 79, at 140–42, 149–50, 153, 172.

¹⁰⁴ See Claude Meillassoux, *From Reproduction to Production: A Marxist Approach to Economic Anthropology*, 1 *ECON. & SOC’Y* 93, 100–02 (1972); CLAUDE MEILLASSOUX, *MAIDENS, MEALS AND MONEY: CAPITALISM AND THE DOMESTIC COMMUNITY* xii–xiii (1981); Nona Y. Glazer, *Servants to Capital: Unpaid Domestic Labor and Paid Work*, 16 *REV. RADICAL POL. ECON.* 61, 61 (1984); Carmen Diana Deere, *Rural Women’s Subsistence Production in the Capitalist Periphery*, 8 *REV. RADICAL POL. ECON.* 9, 9 (1976); Lourdes Benería, *Reproduction, Production, and the Sexual Division of Labour*, 3 *CAMBRIDGE J. ECON.* 203, 203 (1979); J. K. GIBSON-GRAHAM, *THE END OF CAPITALISM (AS WE KNEW IT): A FEMINIST CRITIQUE OF POLITICAL ECONOMY* 33–34 (1996); ALTHA J. CRAVEY, *WOMEN AND WORK IN MEXICO’S MAQUILADORAS* 6–7 (1998); Cindy Katz, *On the Grounds of Globalization: A Topography for Feminist Political Engagement*, 26 *J. WOMEN CULTURE & SOC’Y* 1213, 1219 (2001); Cindy Katz, *Vagabond Capitalism and the Necessity of Social Reproduction*, 33 *ANTIPODE* 709, 710–13 (2001).

agricultural labor in California, saturated by the instrumental use of race, class, and nationality in immigration and land-ownership laws that consolidated agro-capital, is also a story of accumulation by dispossession.¹⁰⁵ Finally, trade regimes that entail “neoliberal rescaling of governance to escape national-scale environmental constraints,”¹⁰⁶ and new appropriation of the commons for private profit whereby “the global commons are being enclosed,”¹⁰⁷ are instances of accumulation by dispossession.

One specific result of accumulation by dispossession that is central to the production of slums is the emergence of a reserve army of labor. While dispossession destroys traditional entitlements and subsistence economies and estranges direct producers from their means of labor, all those dislocated are not absorbed in the new production process.¹⁰⁸ This unabsorbed labor may be “free,” but it is suspended between the shrinking subsistence economy and the volatile formal markets. This unabsorbed labor is the so-called surplus humanity and includes:

¹⁰⁵ Agricultural employers “used one group after another, in a vast, repetitive cycle of recruitment, employment, exploitation, and expulsion.” RICHARD A. WALKER, *THE CONQUEST OF BREAD: 150 YEARS OF AGRIBUSINESS IN CALIFORNIA* 66–74 (2004). Since the Civil War, California’s agricultural labor was recycled and displaced with the bulk furnished serially by European immigrants, the Chinese, the Japanese, Filipinos, Mexicans, and undocumented workers. *Id.* The cycle of labor rotation prevented workers from securing better wages and more rights. The extra-economic measures to orchestrate this cycle included the Chinese Exclusion Acts of 1882, 1892, and 1902, the 1917 Immigration Act, the *bracero* program, and the 1965 Immigration Reform Act. One should include here other extra-economic developments like breakdown of the late Q’ing era regime in China, the U.S. colonization of the Philippines, and the Mexican Revolution. *Id.*

¹⁰⁶ James McCarthy, *Privatizing Conditions of Production: Trade Agreements as Neoliberal Environmental Governance*, 35 *GEOFORUM* 327, 330–32 (2004). McCarthy sees this as a reinforcement of the neoliberal “regulatory takings” thesis “that completely unencumbered, asocial private property is the norm and that the state must pay its citizens for any exercise of its governance powers.” *Id.* Legal regimes of agreements, such as NAFTA, inscribe private rights to surplus value by reinforcing public responsibility for externalities generated by private appropriation. *Id.* One specific instance is global legal regimes that force governments to reimburse capital interests for any costs that environmental protection legislation may entail. *Id.* In this schema, environmental protection is construed as a barrier to trade and penalized or struck down. *Id.*

¹⁰⁷ Hartsock, *supra* note 101, at 176. At play here is the enforcement of ever-expanding intellectual property rights, depletion of global environmental commons, privatization of public assets and services, and rollback of regulatory frameworks governing the commons. HARVEY, *THE NEW IMPERIALISM*, *supra* note 79, at 146–48.

¹⁰⁸ It is the foundation of Keynesian critique of classical economics that capitalism does not produce any automatic tendency toward full employment. See JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY* (1936); Thomas I. Palley, *From Keynesianism to Neoliberalism: Shifting Paradigms in Economics*, in *NEOLIBERALISM: A CRITICAL READER* 20, 20–23 (Alfredo Saad-Filho & Deborah Johnston eds., 2005) [hereinafter Palley, *From Keynesianism to Neoliberalism*]; SKIDELSKY, *supra* note 14.

People who have lost their subsistence outside the cash economy . . . [who] are neither members of the economy, nor are they capable of living, feeling and acting as they did before they lost the support of a moral economy of subsistence. The new category of economic cripples, thus defined, may in fact survive, but they do not fully partake of the characteristics of *homo economicus* . . . any choice between alternative satisfactions, which is implied in the concept of economic need, is ruled out for them.¹⁰⁹

What do those who cannot fully partake of the characteristics of *homo economicus* do while suspended in the “imaginary waiting room of history?”¹¹⁰ They tend to their subsistence needs as best as they can by exchanging needs and capacities in networks of barter, petty trade, and casual employment under the radar of the law. The result is the emergence of a “need economy”¹¹¹—a zone outside the formal legal frames of contract and regulation, signifying “[i]nformalization within the accumulation economy.”¹¹² This is the zone of the so-called informal economy. While ostensibly “discovered” in Africa in the early 1970s,¹¹³ the informal economy has been a perennial and enduring companion of the formal capitalist economy. Its emergence was contemporaneous with the emergence of capitalism, and it endures as capitalism persists. This is the context of the emergence of a reserve army of labor—populations separated from their non-capitalist means of subsistence but not integrated into the productive circuits of wage labor on a stable basis. The reserve army

arises out of the very nature of capitalist accumulation, and the surplus population that constitutes the reserve army resides within rather than outside the domain of the capitalist mode of production. Unemployment and pauperism is the mirror image of employment . . . —an appendage that is brought into being and reproduced by the capitalist mode of production itself.¹¹⁴

Economists recognize that some measure of unemployment plays a crucial role in a market economy.¹¹⁵ They speak of the

¹⁰⁹ Ivan Illich, *Need*, in THE DEVELOPMENT DICTIONARY 88, 94 (Wolfgang Sachs ed., 1997).

¹¹⁰ DIPESH CHAKRABARTY, PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE 8 (2000).

¹¹¹ SANYAL, *supra* note 77, at 208–15.

¹¹² *Id.* at 237.

¹¹³ Martha Alter Chen, *Rethinking the Informal Economy: Linkages with the Formal Economy and Formal Regulatory Environment* 1–2 (Expert Grp. on Dev. Issues, Research Paper No. 2005/10, 2005).

¹¹⁴ SANYAL, *supra* note 77, at 54.

¹¹⁵ The unemployed serve as an instrument of economic and political control over the working class. They can serve as a backlog of strikebreakers during boom times, be expelled during downturns, and then are reabsorbed in the next upward cycle. When a capitalist economy grows rapidly and the reserve army of the unemployed is depleted,

“natural rate” of unemployment, and its offspring—the non-accelerating inflation rate of unemployment,”¹¹⁶ and the “labor force reserve.”¹¹⁷ The reserve army of labor helps to contain significant wage increases and corresponding decline of profits.¹¹⁸ This dovetails with disciplinary uses of the poor and the underclass in the market system.¹¹⁹ Formation of the reserve army is often augmented by regional inequalities, racial divides and rural-urban migration.¹²⁰ Economists of all stripes recognize that the question of employment is not simply a matter of a “free” labor market, and that public policy plays a critical role in calibrating and managing unemployment.¹²¹ Fiscal and

workers utilize their increased bargaining power to demand raises in wages and distribution of income in their favor. Profits are put under pressure. This leads to reduction in investment, a fall in employment, and a replenishment of the reserve army of the unemployed. See Robert Pollin, *The “Reserve Army of Labor” and the “Natural Rate of Unemployment”*: Can Marx, Kalecki, Friedman, and Wall Street All Be Wrong?, 30 REV. OF RADICAL POL. ECON. 1, 4 (1998); Fred Magdoff & Harry Magdoff, *Disposable Workers: Today’s Reserve Army of Labor*, 55 MONTHLY REV. 18, 21 (2004).

¹¹⁶ See WENDY CARLIN & DAVID SOSKICE, MACROECONOMICS AND THE WAGE BARGAIN: A MODERN APPROACH TO EMPLOYMENT, INFLATION AND THE EXCHANGE RATE 5 (1990); THE NATURAL RATE OF UNEMPLOYMENT: REFLECTIONS ON 25 YEARS OF THE HYPOTHESIS (Rod Cross ed., 1995).

¹¹⁷ The Labor Reserve Force is “an estimate of the deviation of the actual labor force from the labor force that would be observed if the economy was continuously at full employment.” Wayne Vroman, *The Labor Force Reserve: A Re-estimate*, 9 INDUSTRIAL RELATIONS: J. ECON. & SOC’Y 379, 379 (2008).

¹¹⁸ David M. Gordon, *Six-Percent Unemployment Ain’t Natural: Demystifying the Idea of a Rising “Natural Rate of Unemployment,”* 54 SOC. RES. 223, 233–34 (1987); David M. Gordon, *The Un-Natural Rate of Unemployment: An Econometric Critique of the NAIRU Hypothesis*, 78 AM. ECON. REV. 117, 122 (1988).

¹¹⁹ See Herbert J. Gans, *Positive Functions of the Undeserving Poor: Uses of the Underclass in America*, 22 POL. & SOC’Y. 269, 272–73 (1994); Miles S. Kimball, *Labor-Market Dynamics When Unemployment is a Worker Discipline Device*, 84 AM. ECON. REV. 1045, 1049 (1994).

¹²⁰ See Doreen Massey, *Regionalism: Some Current Issues*, 6 CAP. & CLASS 106, 114 (1978); Richard Peet, *Inequality and Poverty: A Marxist-Geographic Theory*, 65 ANNALS ASS’N. AM. GEOGRAPHERS 564, 567 (1975); Richard A. Walker, *Two Sources of Uneven Development Under Advanced Capitalism: Spatial Differentiation and Capital Mobility*, 10 REV RADICAL POL. ECON. 28, 31 (1978). For mainstream theories of rural-urban migration, see MICHAEL P. TODARO & STEPHEN C. SMITH, ECONOMIC DEVELOPMENT 335–37 (2006).

¹²¹ See KEYNES, *supra* note 108; Palley, *From Keynesianism to Neoliberalism*, *supra* note 108. Michal Kalecki was the first to clearly state, in an appropriately titled chapter, “Political Aspects of Full Employment,” that while a capitalist economy can be sustained at full employment, this is the case only if challenges to capitalists’ social and political hegemony can be contained by means of public policy. MICHAL KALECKI, SELECTED ESSAYS ON THE DYNAMICS OF THE CAPITALIST ECONOMY 138–45 (1971). The “challenge” was to devise a “solution,” even if a fascist one, to capitalism’s unemployment problem whereby workers would have jobs, but they would not be permitted to exercise the political and economic power that would otherwise accrue to them in a full-employment economy. Pollin, *supra* note 115, at 5. Even Milton Friedman, the veritable advocate of the “free market,” admitted that:

[B]y using the term “natural” rate of unemployment, I do not mean to suggest that it is immutable and unchangeable. On the contrary, many of the market characteristics that determine its level are man-made and policy-made. In the

monetary policies are the primary instruments of this calibration.¹²² Such instrumental use of policy does not mean that concessions won by the working classes are not the results of their struggles. For example, Keynesian welfare systems like the New Deal in the United States were a response to the endemic crises of capitalism and popular struggles for security of employment and a better quality of life.¹²³ As Polanyi eloquently put it: “*Laissez-faire* was planned; planning was not.”¹²⁴

Since the late 1970s, a neoliberal counter-revolution has been afoot on a global scale. This has accelerated accumulation by dispossession, enlarged the surplus army of labor, and expanded the informal sectors of economies. Neoliberalism is an ensemble of interconnected ideas and practices. It rests on a theory of capitalist market fundamentalism—markets are optimal and self-regulating, and if allowed to function without restraint, they optimally serve all economic needs, efficiently utilize all resources, and generate full employment for everyone.¹²⁵ It mandates tight fiscal and monetary policies, unbridled private property rights, unencumbered markets, and free trade.¹²⁶ It is an ideology of the market and private interests as opposed to state intervention to safeguard collective

United States, for example, legal minimum wage rates, the Walsh-Healy and Davis-Bocon Acts, and the strength of labor unions all make the natural rate of unemployment higher than it would otherwise be.

Milton Friedman, *The Role of Monetary Policy*, 58 AM. ECON. REV. 7, 9 (1968). In the absence of state intervention, employment depended on the confidence of the capital, which gave the latter

a powerful indirect control over Government policy: everything which may shake the state of confidence must be carefully avoided because it would cause an economic crisis. But once the Government learns the trick of increasing employment by its own purchases, this powerful controlling device loses its effectiveness.

KALECKI, *supra* note 121, at 139.

¹²² Calibration of unemployment has a parallel in the “[l]aw of [r]acial [t]hermodynamics,” in which law serves as a type of thermostat assuring that the system contains just the right amount of racism: too much would be destabilizing; too little would forfeit valuable pecuniary and psychic profits. Richard Delgado, *When a Story is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 105–06 (1990).

¹²³ POLANYI, *supra* note 82, at 23.

¹²⁴ *Id.* at 147.

¹²⁵ See DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 64–65 (2007); SKIDELSKY, *supra* note 14, at 105; Costas Lapavistas, *Mainstream Economics in the Neoliberal Era*, in NEOLIBERALISM: A CRITICAL READER, *supra* note 108, at 30, 30–40; Gerard Dumenil & Dominique Levy, *The Neoliberal (Counter-) Revolution*, in NEOLIBERALISM: A CRITICAL READER, *supra* note 108, at 9; William I. Robinson & Jerry Harris, *Towards a Global Ruling Class? Globalization and the Transnational Capitalist Class*, 64 SCI. & SOC’Y 11, 41 (2000); DAVID HARVEY, THE ENIGMA OF CAPITAL AND THE CRISES OF CAPITALISM 10 (2010).

¹²⁶ See Palley, *From Keynesianism to Neoliberalism*, *supra* note 108, at 25; Anwar Shaikh, *The Economic Mythology of Neoliberalism*, in NEOLIBERALISM: A CRITICAL READER, *supra* note 108, at 41, 41–49.

interests.¹²⁷ It envisages the state as limited to minimal executive and juridical functions that are necessary to secure private property rights and to support freely functioning markets.¹²⁸ By extension, neoliberalism deems globalization of free markets as the best way to extend these benefits to the whole world.¹²⁹

The neoliberal project aims to unfold a new social order across the globe to reverse the setbacks that the economic power and political hegemony of the wealth-owning classes had suffered on account of Keynesian welfare in the West, socialism in Eastern Europe, and nationalism in the global South.¹³⁰ Neoliberalism makes increasing recourse to the law to displace Keynesian welfare states through liberalization, deregulation, and privatization, and uses the discipline of expanded markets to remove barriers to accumulation that earlier democratic gains had achieved.¹³¹ To secure unfettered rights to private property and profits, it expands and deepens the logic of the market, collapses the distinctions between culture and economy, undermines state sovereignty and national autonomy, and links local and global political economies to facilitate transnational accumulation of capital.¹³² Through new regimes of trade, finance, and property rights, the sovereignty of states transfers to international institutions dominated by hegemonic states.¹³³

¹²⁷ David Harvey, *Neoliberalism as Creative Destruction*, 610 ANNALS AM. ACAD. POL. & SOC. SCI. 22, 22 (2007) [hereinafter Harvey, *Neoliberalism as Creative Destruction*].

¹²⁸ See Simon Clarke, *The Neoliberal Theory of Society*, in NEOLIBERALISM: A CRITICAL READER, *supra* note 108, at 50, 50–59; Susanne MacGregor, *The Welfare State and Neoliberalism*, in NEOLIBERALISM: A CRITICAL READER, *supra* note 108, at 142–48.

¹²⁹ See HA-JOON CHANG, BAD SAMARITANS: THE MYTH OF FREE TRADE AND THE SECRET HISTORY OF CAPITALISM 28 (2008); HA-JOON CHANG, KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE 15 (2002); Matthew Sparke, *American Empire and Globalization: Postcolonial Speculations on Neocolonial Enframing*, 24 SINGAPORE J. TROPICAL GEOGRAPHY 373, 379 (2003).

¹³⁰ See DANIEL YERGIN & JOSEPH STANISLAW, THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND THE MARKETPLACE THAT IS REMAKING THE MODERN WORLD 10 (1998); Harvey, *Neoliberalism as Creative Destruction*, *supra* note 127, at 32.

¹³¹ For an articulation of the case for neoliberal global political economy and related accounts of the law, see ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 237 (1984); Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 401 (2000).

¹³² See Boaventura De Sousa Santos, *Law: A Map of Misreading. Towards a Postmodern Conception of Law*, 14 J. LAW & SOC'Y 279, 293–94 (1987); A. CLAIRE CUTLER, PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY 244–46 (2003); WILLIAM I. ROBINSON, A THEORY OF GLOBAL CAPITALISM: PRODUCTION, CLASS, AND STATE IN A TRANSNATIONAL WORLD 101–03 (2004); William I. Robinson, *Capitalist Globalization and the Transnationalization of the State*, in HISTORICAL MATERIALISM AND GLOBALIZATION 210, 211–12 (Mark Rupert & Hazel Smith eds., 2002).

¹³³ See B. S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUROPEAN J. INT'L L. 1, 12–13 (2004). The exponential rise of extra-territorial jurisdiction in unilateral and multilateral forms has become an avenue to

The hidden hand of the market continues to work in concert with the iron fist of the state in the service of accumulation by dispossession. Explosive growth of slums and slum-dwellers is a direct result.

Neoliberalism does not displace the state as much as it reformulates it and restructures its options.¹³⁴ The neoliberal project is to turn the “nation-state” into a “market-state,”¹³⁵ one with the primary agenda of facilitating global capital accumulation unburdened by any legal regulations aimed at assuring the welfare of citizens. Social formations in the global South, situated in an asymmetrical relationship with global capitalism, are a particular target of this project. The neoliberal

govern matters beyond international territorial boundaries by reaching deeply inside domestic jurisdiction of states and enforcing the neoliberal agenda upon reluctant states in the global South. The United States, for example, increasingly uses certification mechanisms “to create law for other States and to monitor its observance, while the United States itself remains unbound and unmonitored.” Nico Krisch, *More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 135, 160–61 (Michael Byers & Georg Nolte eds., 2003). This combines with “substantivism” in U.S. courts where “a choice-of-law methodology . . . is to select the better law in any given case.” Hannah L. Buxbaum, *Conflict of Economic Laws: From Sovereignty to Substance*, 42 VA. J. INT’L L. 931, 957 (2002). This results in “over-application of U.S. law” in international disputes, and acts “as a lever of forcing convergence . . . outside the political process that generally structures the harmonization movement.” *Id.* at 966, 972. See also JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 475–77 (2000) (showing how this has impacted the fields of banking, securities regulation, civil aviation, cyber law). The multilateral form is exemplified by the WTO’s compulsory jurisdiction over disputes that lie within its extensive regimes which opens the door for unilateral prescriptions and measures related to trade and environmental policies of states in the global South. See, e.g., World Trade Org., Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of DSU by Malaysia* (Oct. 22, 2001). See also B.S. Chimni, *WTO and Environment: Legitimation of Unilateral Trade Sanctions*, ECO. & POL. WEEKLY 133, 133–38 (2002) [hereinafter Chimni, *WTO and Environment*]; B. S. Chimni, *India and Ongoing Review of WTO Dispute Settlement System*, 37 ECON. & POL. WEEKLY 264, 265 (1999). Increasingly, courts of the global South are deemed unsuitable for adjudicating claims against multinational corporations, thus creating “new national frontiers of responsibility for the conduct of global capital.” Upendra Baxi, *Mass Torts, Multinational Enterprise Liability and Private International Law*, 276 RECUEIL DES COURS 297, 312 (1999). See also Hu Zhenjie, *Forum Non Conveniens: An Unjustified Doctrine*, 48 NETH. INT’L L. REV. 143, 159 (2001); Michael Anderson, *Transnational Corporations and Environmental Damage: Is Tort Law the Answer?*, 41 WASHBURN L.J. 399, 402 (2002).

¹³⁴ Many perceptive observers reject the “state shrinking and declining” argument as political posturing of neo-liberals. In particular, they point to the expansion of the coercive apparatuses of the state and the shift of the state from a managerial mode befitting the Fordist era toward a neoliberal entrepreneurial mode. See, e.g., David Harvey, *From Managerialism to Entrepreneurialism: The Transformation in Urban Governance in Late Capitalism*, 71 (B) GEOGRAFISKA ANNALER (SPECIAL ISSUE) 3, 9 (1989).

¹³⁵ Anthony Carty, *Marxism and International Law: Perspectives for the American (Twenty-First) Century?*, in INTERNATIONAL LAW ON THE LEFT: RE-EXAMINING MARXIST LEGACIES 169, 170 (Susan Marks ed., 2008) [hereinafter INTERNATIONAL LAW ON THE LEFT].

regimes, with their bedrock principles of private property rights and free trade, are a coercive mechanism to get states in the global South to adopt neoliberal economic and social policy frames conducive to global capital.¹³⁶ The enabling mechanism is “[t]he extension of the normative force of international standards by the device of conditionality.”¹³⁷ These regimes advance particular understandings of development and poverty that “disregard[] the social context of provision, the lived experiences of the poor and dismiss[] and/or reinforce[] the way in which deprivations are constituted.”¹³⁸ The mandate is to privatize public assets, roll back social services, and allow unbridled mobility of capital.¹³⁹ Now “[s]trait-jacketed within the global logic of capital and market and the global regime of property rights,” states in the global South “can no longer act as developmental states and engage in management of poverty on their own.”¹⁴⁰ Instead, non-state actors representing interests of global capital play an active role in designing legal orders that circumscribe state sovereignty and autonomy.¹⁴¹ Mandates of privatization make education, health, infrastructure, utilities, housing, and a range of state enterprises available for private appropriation.¹⁴² By its insistence on the rollback of the state,

¹³⁶ These regimes include the WTO multilateral agreements including the Agreement on Trade Related Intellectual Property Rights (TRIPS), the Agreement on Trade Related Investment Measures (TRIMS), the General Agreement on Trade in Services (GATS), the Agreement establishing the Multilateral Investment Guarantee Agency (MIGA), and bilateral investment protection treaties (BITS). Together these regimes provide global capital ease of entry and investment, protection from national performance requirements, protection of expansive intellectual property rights, generous compensation in case of expropriation, insurance against non-economic risks, and mechanisms to avoid national laws and dispute resolution fora. See Chimni, *WTO and Environment*, *supra* note 133, at 138.

¹³⁷ Vaughan Lowe, *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* 207, 212 (Michael Byers ed., 2000).

¹³⁸ Richard Higgott & Heloise Weber, *GATS in Context: Development, an Evolving lex marcatoria and the Doha Agenda*, 12 REV. INT'L POL. ECON. 435, 436 (2005).

¹³⁹ For a detailed account of how the interests of the global South are jeopardized by concentration of finance capital and monetary regimes of the IMF, see JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 89–104 (2003).

¹⁴⁰ SANYAL, *supra* note 77, at 77.

¹⁴¹ See generally *GLOBAL LAW WITHOUT A STATE* xiv–xv (Gunther Teubner ed., 1997). The exponential expansion of international commercial arbitration has created a space for private justice to serve global capital at the expense of the state. See Buxbaum, *supra* note 133, at 938–39.

¹⁴² *GLOBAL LAW WITHOUT A STATE*, *supra* note 141, at 147–49, 159–60. See also David A. McDonald, *Environmental Racism and Neoliberal Disorder in South Africa*, in *THE QUEST FOR ENVIRONMENTAL JUSTICE: HUMAN RIGHTS AND THE POLITICS OF POLLUTION* 255, 270–74 (Robert D. Bullard ed., 2005); Daniel R. Faber & Deborah McCarthy, *Neo-liberalism, Globalization and the Struggle for Ecological Democracy: Linking Sustainability and Environmental Justice*, in *JUST SUSTAINABILITIES: DEVELOPMENT IN AN UNEQUAL WORLD* 38, 40, 51 (Julian Agyeman et al. eds., 2003).

privatization becomes "[t]he [c]utting [e]dge of [a]ccumulation by [d]ispossession."¹⁴³

Rapid urban growth triggered by globalized economic circuits, along with diminished state capacities and resulting civil strife, is the recipe for mushrooming slums in the global South.¹⁴⁴ The unprecedented urban expansion fueled by deregulated financial capital produced another bout of "[c]reative [d]estruction"¹⁴⁵ where the marginalized and underprivileged bear the brunt. Destruction of traditional rural economies, restructuring of the agricultural sector, and deeper penetration of market forces into rural societies, accelerated migration of uprooted rural farmers to urban areas.¹⁴⁶ As interests of global finance capital took precedence over survival needs of the poor, the impact on the vulnerable was quick, and the "main single cause of increases in poverty and inequality during the 1980s and 1990s was the retreat of the state."¹⁴⁷ A United Nations Human Development Report found that "[a]n unprecedented number of countries saw development slide backwards in the 1990s. In forty-six countries people are poorer today than in 1990. In twenty-five countries more people go hungry today than a decade ago."¹⁴⁸ While "burdens of survival" increased for all poor, "those of women are even greater."¹⁴⁹

¹⁴³ HARVEY, THE NEW IMPERIALISM, *supra* note 79, at 157–58.

¹⁴⁴ For a detailed study of rapid urbanization over the last thirty years, see Frederick van der Ploeg & Steven Poelhekke, *Globalization and the Rise of Mega-Cities in the Developing World*, 1 CAMBRIDGE J. REGIONS, ECON. & SOC'Y. 477, 484–85 (2008).

¹⁴⁵ See JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 82–84 (4th ed. 1952).

¹⁴⁶ See LORI ANN THRUPP WITH GILLES BERGERON & WILLIAM F. WATERS, BITTERSWEET HARVESTS FOR GLOBAL SUPERMARKETS: CHALLENGES IN LATIN AMERICA'S AGRICULTURAL EXPORT BOOM 1–5 (1995); JOHN MADELEY, HUNGRY FOR TRADE: HOW THE POOR PAY FOR FREE TRADE 2–4 (2000); Terence J. Byres, *Neoliberalism and Primitive Accumulation in Less Developed Countries*, in NEOLIBERALISM: A CRITICAL READER, *supra* note 108, at 83, 83–90; JAN BREMAN, FOOTLOOSE LABOUR: WORKING IN INDIA'S INFORMAL ECONOMY 1–2 (1996); JAN BREMAN & ARVIND N. DAS, DOWN AND OUT: LABOURING UNDER GLOBAL CAPITALISM 8 (2000); JAN BREMAN, WAGE HUNTERS AND GATHERERS: SEARCH FOR WORK IN THE URBAN AND RURAL ECONOMY OF SOUTH GUJARAT 8–9 (1994); Carmen G. Gonzalez, *Genetically Modified Organisms and Justice: The International Environmental Justice Implications of Biotechnology*, 19 GEO. INT'L ENVTL. L. REV. 583, 602 (2007).

¹⁴⁷ UN-HABITAT, THE CHALLENGE OF SLUMS, *supra* note 10, at 43.

¹⁴⁸ UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2004 132 (2004).

¹⁴⁹ See Sumati Nair & Preeti Kirbat with Sarah Sexton, *A Decade After Cairo: Women's Health in a Free Market Economy*, THE CORNER HOUSE (June 16, 2004), <http://www.thecornerhouse.org.uk/resource/decade-after-cairo>; U. Kalpagam, *Coping with Urban Poverty in India*, 17 BULL. OF CONCERNED ASIAN SCHOLARS 18 (1985); Fantu Cheru, *Debt, Adjustment and the Politics of Effective Response to HIV/AIDS in Africa*, 23:2 THIRD WORLD Q. 299, 300–01 (2002); Jeemol Unni, *Gender and Informality in Labor Market in South Asia*, 36:26 ECO. & POL. WKLY. 2360, 2360–63 (2001).

Liberalization and deregulation of economies have also accelerated urban occupational marginality, with the result that those engaged in the informal sector now constitute two-fifths of the economically active population of the developing countries.¹⁵⁰ “The International Labour Organization estimates that informal workers comprise over half the workforce in Latin America, over 70 per cent in Sub-Saharan Africa and over 80 per cent in India”¹⁵¹ Across the global South, mega-slums “have become a dumping ground for a surplus population working in unskilled, unprotected and low-wage informal service industries and trade.”¹⁵² Rural and urban areas are being sutured in production networks to accelerate siphoning of value.¹⁵³ As outsourcing and flexible production shrink the regulated formal economy, the informal shadow economy becomes the only hope and source of livelihood for the urban poor. The explosive expansion of the unregulated informal sector, with its particular burdens on women is “a direct function of liberalization.”¹⁵⁴ Over the last twenty years, both the informal economies and the number of slum-dwellers have grown exponentially.¹⁵⁵ In India, as in most of the global South, significant employment growth has resulted from subcontracting at a global scale and the use of casual or

¹⁵⁰ UN-HABITAT, *THE CHALLENGE OF SLUMS*, *supra* note 10, at 46, 103–04 (2003). Note here that many working in the informal sector are a hidden workforce of the formal economy. Outsourcing and subcontracting networks enable the value created by the informal sector to be funneled into the profit margins of the formal sector, while any expectation of “upward mobility” in the informal sector remains a “myth inspire by wishful thinking.” JAN BREMAN, *THE LABOURING POOR IN INDIA: PATTERNS OF EXPLOITATION, SUBORDINATION, AND EXCLUSION* 173–74 (2003).

¹⁵¹ Jan Breman, *Myth of the Global Safety Net*, 59 *NEW LEFT REV.* 29, 29 (2009).

¹⁵² UN-HABITAT, *THE CHALLENGE OF THE SLUMS*, *supra* note 10, at 46. Women make up ninety percent of the workers in Free Trade Zones, notorious for dismal working conditions, low wages, and absence of workers’ rights. *Id.* at 40; WOMEN’S EDGE COALITION, *THE EFFECTS OF TRADE LIBERALIZATION ON JAMAICA’S POOR: AN ANALYSIS OF AGRICULTURE AND SERVICES* 31 (2004). Privatization and erasure of trade barriers led to widespread deindustrialization and decimation of formal-sector jobs that traditionally employed men. This has increasingly forced poor women into unregulated and low-paying informal sector as pieceworkers, vendors, and providers of low-end services. See Caroline O. N. Moser, *Adjustment from Below: Low-Income Women, Time and the Triple Role in Guayaquil, Ecuador*, in *‘VIVA’: WOMEN AND POPULAR PROTEST IN LATIN AMERICA* 173, 180–82 (Sarah A. Radcliffe & Sallie Westwood eds., 1993); Nazneen Kanji, *Gender, Poverty and Economic Adjustment in Harare, Zimbabwe*, 7 *ENV’T & URBANIZATION* 37, 37, 39, 46–48 (1995).

¹⁵³ See PETER J. TAYLOR, *WORLD CITY NETWORK: A GLOBAL URBAN ANALYSIS* 60–61 (2004); John Friedmann, *Where We Stand: A Decade of World City Research*, in *WORLD CITIES IN A WORLD-SYSTEM* 21, 21, 33, 41 (Paul L. Knox & Peter J. Taylor eds., 1995); Julie Skurski & Fernando Coronil, *Country and City in a Postcolonial Landscape: Double Discourse and the Geo-Politics of Truth in Latin America*, in *VIEWS BEYOND THE BORDER COUNTRY: RAYMOND WILLIAMS AND CULTURAL POLITICS* 231, 232–33 (Dennis L. Dworkin & Leslie G. Roman eds., 1993).

¹⁵⁴ UN-HABITAT, *THE CHALLENGE OF SLUMS*, *supra* note 10, at 40.

¹⁵⁵ *Id.* at 6, 11.

self-employed workers” in the informal sector.¹⁵⁶ By curtailing the already anemic role of the state in housing supply, neoliberal policies have proven to be “an inevitable recipe for the mass production of slums.”¹⁵⁷ Analysts also find that “mega-slums are . . . functional to neoliberal global capitalism and a product not just of its turmoil but of its turmoil as organized by its banking and financial market system.”¹⁵⁸ As the warehouses of workers of the informal sector, mega-slums facilitate “flexible production,” a hallmark of neoliberal global economy.

If accumulation through dispossession—an enduring ontological feature of capitalism—and its byproducts, the reserve army of labor and the informal sector, produce and sustain modern urban slums and slum-dwellers, what accounts for the genesis of the spatial zones of their existence?

B. Cities of Capital and Liminal Zones

The spatial production of slums is a symbiotic companion of urbanization under capitalism that has followed two models, unplanned and planned growth, with differing measures of overlap. Historically, the unplanned urban growth model unfolded parallel with industrialization and produced spaces where labor and capital came together and goods and services circulated rapidly. The process was far from orderly. The “creative destruction” of capitalism forced rapid relocations of habitation as rural populations moved to emerging centers of extraction, manufacturing, and commerce.¹⁵⁹ As urban centers grew in a *laissez faire* regime, so did slums as the abode of the destitute and the lumpenproletariat—the surplus humanity.¹⁶⁰ Dublin,¹⁶¹ Manchester,¹⁶² London,¹⁶³ and Naples¹⁶⁴ furnished

¹⁵⁶ Patralekha Chatterjee, *Shadow Lives: Urban India's Informal Economy*, 5 HABITAT DEBATE 19, 20 (1999).

¹⁵⁷ UN-HABITAT, THE CHALLENGE OF SLUMS, *supra* note 10, at 11.

¹⁵⁸ Christopher Rude, *The Role of Financial Discipline in Imperial Strategy*, in THE EMPIRE RELOADED 82, 105 n.10 (Leo Panitch & Colin Leys eds., 2004).

¹⁵⁹ SCHUMPETER, *supra* note 145, at 83; Josef Gugler, *Introduction*, in CITIES IN THE DEVELOPING WORLD 109, 109 (1997).

¹⁶⁰ The first published definition of a slum in 1812 held it synonymous with “racket” or “criminal activity.” JACINTA PRUNTY, DUBLIN SLUMS 1800–1925: A STUDY IN URBAN GEOGRAPHY 2 (1998). By late nineteenth century, a slum was characterized as an area of “dirty back streets, especially such streets as are inhabited by a squalid and criminal population.” CARROLL D. WRIGHT, THE SLUMS OF BALTIMORE, CHICAGO, NEW YORK, AND PHILADELPHIA 11–13 (1970). The definition adopted by the United Nations is restricted to the “physical and legal characteristics of the settlement,” and eschews the more difficult-to-measure “social dimensions.” UN-HABITAT, THE CHALLENGE OF SLUMS, *supra* note 10, at 12–13.

¹⁶¹ See PRUNTY, *supra* note 160.

¹⁶² See STEVEN MARCUS, ENGELS, MANCHESTER, AND THE WORKING CLASS 3, 10–11, 184–85 (1974).

early examples of this model of urban growth and the emergence of slums.

Planned urbanization proves particularly attractive to finance capital because this unavoidably state-sponsored and debt-financed activity gives speculative capital security of accumulation without getting directly involved with the politically volatile terrain of industrial production. The first prototype of planned urban development under capitalism was furnished by the rebuilding of Paris in the 1850s and 1860s under Georges-Eugene Haussmann.¹⁶⁵ As a consequence of state-sponsored urban reconstruction, Paris emerged as a center of commerce and bourgeois life, and its emerging slums were removed from the heart of the city to its outer rim.¹⁶⁶ While Haussmann's designs "transform[ed] the capital city into the city of capital,"¹⁶⁷ they also demonstrated that "the root cause of urban slumming seems to lie not in urban poverty but in urban wealth."¹⁶⁸

The Haussmann model was replicated in the United States after World War II; first in New York under Robert Moses, and then in most metropolitan areas.¹⁶⁹ While predominantly white middle classes, ensconced in debt-financed suburbia, turned to the pursuit of individual accumulation, protection of property, and so-called family values, the darker under-classes and the marginalized had to contend with removals, blighted inner-city ghettos, and inhuman public housing projects. This phase of finance capital's deployment in urban reordering ended with the property-market crash of 1973, and bankruptcy of New York City in 1975, with global repercussions.¹⁷⁰ The recipe of neoliberalism

¹⁶³ GARETH STEDMAN JONES, *OUTCAST LONDON: A STUDY IN THE RELATIONSHIP BETWEEN CLASSES IN VICTORIAN SOCIETY* 209–10 (1971).

¹⁶⁴ FRANK M. SNOWDEN, *NAPLES IN THE TIME OF CHOLERA, 1884–1911* 38–40 (1995).

¹⁶⁵ For a detailed account, see MICHEL CARMONA, *HAUSSMANN: HIS LIFE AND TIMES, AND THE MAKING OF MODERN PARIS* 149, 151–52, 155–56 (2002).

¹⁶⁶ See *id.* at 9, 432–39; DAVID HARVEY, *PARIS, CAPITAL OF MODERNITY* 95–99 (2003).

¹⁶⁷ Derek Gregory, *Introduction: Troubling Geographies*, in DAVID HARVEY: A CRITICAL READER, *supra* note 101, at 13.

¹⁶⁸ VERMA, *supra* note 55, at xix.

¹⁶⁹ See Kenneth T. Jackson, *Robert Moses and the Rise of New York: The Power Broker in Perspective*, in ROBERT MOSES AND THE MODERN CITY: THE TRANSFORMATION OF NEW YORK 67, 70–71 (Hilary Ballon & Kenneth T. Jackson eds., 2007). In the process, the scale and scope of urbanization was transformed by re-engineering not just existing cities but whole metropolitan regions through suburbanization, highway systems, and infrastructural transformations. Finance capital found a new outlet in public and private debt, while urban geography and demography reconfigured class and race divides.

¹⁷⁰ See ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* 615–16, 618–19, 795, 899–900, 902–04 (1974); Roger E. Alcala & Helen Bodian, *New York's Fiscal Crisis & the Economy*, in *THE FISCAL CRISIS OF AMERICAN CITIES* 30, 30–33 (Roger E. Alcala & David Mermelstein eds., 1977).

emerged, in good measure, in response to this crisis of finance capital.¹⁷¹

The reconfigurations of Paris and New York City furnished two alternative models of urban development for the modern city across the global North: the "donut-shaped" American cities, with mostly poor people of color and immigrants "concentrated in derelict cores and inner-city," and "European 'saucer' cities, with immigrant and unemployed populations marooned in high-rise housing on urban outskirts."¹⁷² In the global South, urban growth has been a hybrid of both these models, turning urban real estate into a high-profit sector "where political corruption, capitalist development, and international finance [intersect]."¹⁷³ Concentration of real-estate ownership and slum growth are the dominant result.¹⁷⁴ In this progression, "[t]he word 'infrastructure' is the new code word for the unceremonious clearance of the fragile shelters of the poor."¹⁷⁵ As a result, fringes of mega-cities in the global South are "marked by unrelenting cycles of settlement, eviction, and resettlement."¹⁷⁶ Counterintuitive as it may be, the poor in most mega-cities of the global South have come to dread high-profile international events like conferences, festivals, and visits by dignitaries, as the attendant "clean-up" and "beautification" drives target slums and slum-dwellers.¹⁷⁷ Hiding poverty behind Potemkin-like facades tends to graduate into sustained policy.¹⁷⁸ Given these machinations, "[t]o date,

¹⁷¹ See WILLIAM K. TABB, *THE LONG DEFAULT: NEW YORK CITY AND THE URBAN FISCAL CRISIS* 120, 122–24 (1982); Lapavitsas, *supra* note 125, at 30–33.

¹⁷² DAVIS, *PLANET OF SLUMS*, *supra* note 39, at 31.

¹⁷³ Caglar Keyder, *The Housing Market from Informal to Global*, in ISTANBUL: BETWEEN THE GLOBAL AND THE LOCAL 143, 153 (Caglar Keyder ed., 1999).

¹⁷⁴ For example, in sixteen Southeast Asian cities fifty-three percent of the land is owned by the top five percent of landowners. HANS-DIETER EVERS & RÜDIGER KORFF, *SOUTHEAST ASIAN URBANISM: THE MEANING AND POWER OF SOCIAL SPACE* 180 (2000). In India, three-quarters of urban space is owned by "6% of urban households," and ninety-one people control the majority of all vacant land in Mumbai. ROBERT-JAN BAKEN & JAN VAN DER LINDEN, *LAND DELIVERY FOR LOW INCOME GROUPS IN THIRD WORLD CITIES* 13 (1992). For the drain on national savings, see KWADWO KONADU-AGYEMANG, *THE POLITICAL ECONOMY OF HOUSING AND URBAN DEVELOPMENT IN AFRICA: GHANA'S EXPERIENCE FROM COLONIAL TIMES TO 1998* 120–23 (2001); JEFFREY A. NEDOROSCIK, *CITY OF THE DEAD: A HISTORY OF CAIRO'S CEMETERY COMMUNITIES* 42 (1997).

¹⁷⁵ JEREMY SEABROOK, *IN THE CITIES OF THE SOUTH: SCENES FROM A DEVELOPING WORLD* 267 (1996).

¹⁷⁶ Ananya Roy, *The Gentleman's City: Urban Informality in the Calcutta of New Communism*, in *URBAN INFORMALITY: TRANSNATIONAL PERSPECTIVES FROM THE MIDDLE EAST, LATIN AMERICA, AND SOUTH ASIA* 147, 159 (Ananya Roy & Nezar AlSayyad eds., 2004) [hereinafter *URBAN INFORMALITY*].

¹⁷⁷ See BEN OMIYI, *THE CITY OF LAGOS: TEN SHORT ESSAYS* 48 (1995); Erhard Berner, *Poverty Alleviation and the Eviction of the Poorest*, 24 *INT'L J. URB. & REG'L RES.* 557, 559 (2000).

¹⁷⁸ See ANN-MARIE BROUDEHOUS, *THE MAKING AND SELLING OF POST-MAO BEIJING* 162 (2004); MONIQUE SKIDMORE, *KARAOKE FASCISM: BURMA AND THE POLITICS OF FEAR* 84–85, 159–60 (2004).

states have been far more effective in the destruction of mass housing than in its construction.”¹⁷⁹

Parallel with the neoliberal reordering of global production and accumulation, cities are becoming a primary arena of the convergence between the domains of economy and culture.¹⁸⁰ Accordingly, a confluence of reconfiguration of urban space and commodification of symbolic forms is underway.¹⁸¹ A remarkable feature of post-Fordist production systems is the increasing significance of production and consumption of cultural products.¹⁸² In the new economic geography of capital accumulation, Fordist mass production is increasingly moved to low wage areas, usually away from urban centers, both globally and nationally.¹⁸³ As a result, the city becomes exclusively a zone of the service and consumption economy, and urban space itself turns into a cultural commodity to be consumed along market principles.¹⁸⁴ Skills suitable for the service sector and/or the capacity to consume what this space has to offer become the only grounds for eligibility to be in the city. Deindustrialization and flight of the ineligible often leave in their wake “dead zones” that become “developers’ utopias” or “privatopias.”¹⁸⁵ The ineligible who choose to stay back are eventually confined to the informal economy and deprived of secure shelter. The commodification of urban space, with culture and aesthetics at a premium, disciplines the ineligible and the dispossessed through a range of legal and architectural measures. These include “secure architecture,” “zero tolerance policing,” and “preemptive crime control,” in the neoliberal “post-justice” city.¹⁸⁶

¹⁷⁹ Berner, *Learning from Informal Markets*, *supra* note 38, at 295.

¹⁸⁰ For transformative impacts of neoliberal globalization on urban spaces around the world, see Swapna Banerjee-Guha, *Introduction*, in ACCUMULATION BY DISPOSSESSION: TRANSFORMATIVE CITIES IN THE NEW GLOBAL ORDER 1, 1–5 (Swapna Banerjee-Guha ed., 2010) [hereinafter ACCUMULATION BY DISPOSSESSION]; William Sites, *Primitive Globalization? State and Locale in Neoliberal Global Engagement*, 18 SOC. THEORY 121, 128 (2000).

¹⁸¹ For a thoughtful survey, see generally Allen J. Scott, *Capitalism, Cities, and the Production of Symbolic Forms*, 26 TRANSACTIONS OF THE INST. BRIT. GEOGRAPHERS 11 (2001), available at <http://onlinelibrary.wiley.com/doi/10.1111/1475-5661.00003/abstract>.

¹⁸² *Id.* at 16.

¹⁸³ Douglas S. Massey, *Social Structure, Household Strategies, and the Cumulative Causation of Migration*, 56 POPULATION INDEX 3, 14–17 (1990), available at <http://www.jstor.org/stable/3644185>.

¹⁸⁴ See generally Timothy A. Gibson, *Selling City Living: Urban Branding Campaigns, Class Power and the Civic Good*, 8 INT’L J. CULTURAL STUD. 259 (2005).

¹⁸⁵ Gordon MacLeod et al., *Negotiating the Contemporary City: Introduction*, 40 URB. STUD. 1655, 1656 (2003) (citation omitted). See also Henry W. McGee, Jr., *Seattle’s Central District, 1990–2006: Integration of Displacement?*, 39 URB. LAW. 167, 169–71 (2007).

¹⁸⁶ See Don Mitchell, *Postmodern Geographical Praxis? The Postmodern Impulse and the War Against Homeless People in the ‘Post-justice’ City*, in POSTMODERN GEOGRAPHY: THEORY AND PRACTICE 57, 77, 82 (Claudio Minca ed., 2001); Don Mitchell, *The Annihilation*

In the midst of all of this, urban groups do manage to contrive cultural, economic, and political “spaces of escape,” or “counter spaces.”¹⁸⁷ Farmers markets, alternative lifestyle enclaves, and the “underground economy” are some examples of this phenomenon that engender “new identities and practices that disturb established histories.”¹⁸⁸ The resistive mode of these counter spaces can and does take overt political forms as demonstrated by the anti-WTO protests in Seattle in 1999, and replicated in many major cities around the world.¹⁸⁹ This phenomenon is of particular significance for policy and engagement options related to slums and slum dwellers.

Having laid out a theoretical framework of the historical evolution of urban slums, we turn to the issue of slums and slum-dwellers in India.

III. SLUMS, COLONIALISM, AND POSTCOLONIALITY

A. The Colonial Legacy

The roots of urban slums in the global South go back to colonial policies aimed at reconfiguring existing cities, or establishing new ones, in forms suitable for assertion of control and incorporation of selected sections of the native society into administrative and productive ensembles sutured with the economies of empire.¹⁹⁰ In India, British colonial designs

of *Space by Law: The Roots and Implications of Anti-Homeless Laws in the United States*, 29 ANTIPODE 303, 305–06, 316–17 (1997); Jamie Peck, *Geography and Public Policy: Mapping the Penal State*, 27 PROGRESS HUM. GEOGRAPHY 222, 225, 228 (2003) (citation omitted); MacLeod et al., *supra* note 185, at 1665.

¹⁸⁷ MacLeod, et al., *supra* note 185, at 1657.

¹⁸⁸ James Holston, *Spaces of Insurgent Citizenship* (1995), reprinted in MAKING THE INVISIBLE VISIBLE: A MULTICULTURAL PLANNING HISTORY 37, 48 (Leonie Sandercock ed., 1998). See also SUDHIR ALLADI VENKATESH, OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR 17 (2006); Regina Austin, “An Honest Living”: *Street Vendors, Municipal Regulation, and the Black Public Sphere*, 103 YALE L.J. 2119, 2120–23 (1994). See generally Regina Austin, “A Nation of Thieves”: *Securing Black People’s Right to Shop and to Sell in White America*, 1994 UTAH L. REV. 147 (1994).

¹⁸⁹ See, e.g., NAOMI KLEIN, NO LOGO: NO SPACE, NO CHOICE, NO JOBS (10th ed., 2009); GLOBALIZATION AND THE POLITICS OF RESISTANCE 3 (Barry K. Gills ed., 2000); DAVID FEATHERSTONE, RESISTANCE, SPACE AND POLITICAL IDENTITIES: THE MAKING OF COUNTER-GLOBAL NETWORKS 2, 121 (2008).

¹⁹⁰ For fruitful engagements with the question, see Ronald J. Horvath, *In Search of a Theory of Urbanization: Notes on the Colonial City*, 5 E. LAKES GEOGRAPHER 69, 75 (1969); ANTHONY D. KING, COLONIAL URBAN DEVELOPMENT: CULTURE, SOCIAL POWER, AND ENVIRONMENT 281–84 (1976); ANTHONY D. KING, URBANISM, COLONIALISM, AND THE WORLD-ECONOMY: CULTURAL AND SPATIAL FOUNDATIONS OF THE WORLD URBAN SYSTEM (1990); JAN MORRIS, STONES OF EMPIRE: THE BUILDINGS OF BRITISH INDIA 62–71 (1994). It is useful to note here that ancient cities of India dating 2500 B.C., particularly those in the Indus Valley, show detailed and functional urban planning including elaborate sanitation systems. See VINCENT A. SMITH, THE OXFORD HISTORY OF INDIA 28–32 (Percival Spear ed., 3rd ed. 1958).

reconfigured selected urban areas to serve these ends.¹⁹¹ A defining feature of the designed colonial cities was the spatial divide between the centers of gravity of colonial presence and the native quarters. Zoning and institutionalized governance whose jurisdiction is coextensive with the territory of the city, the hallmarks of a modern city, were but rarely extended to the native quarters.¹⁹² Natives not recruited into colonial security, administrative, and commercial regimes, remained at or beyond the spatial and social margins of reconfigured urban areas.¹⁹³ Colonizers' fears of racial contamination, dilution of imagined tribal and ethnic divides, and the threat of anti-colonial solidarities resulted in restrictions on urban land ownership, pass laws, vagrancy ordinances, criminalization of urban migration, and racially zoned areas.¹⁹⁴ When vigorously enforced encroachment laws targeted squatting and street vending, municipal authorities removed so-called "plague spots" from better residential and commercial areas, thereby enforcing restrictive zoning around areas where the colonizers and gradually enfranchised native elites lived.¹⁹⁵ A policy of neglect toward even minimal water and sanitation needs of native neighborhoods graduated into a *de facto* housing policy of reliance on local elites who built overcrowded and unsanitary, but highly profitable, tenements that still house a bulk of urban dwellers.¹⁹⁶ For the story of Dharavi, it is important to note that Mumbai, historically a coastal fishing village, emerged as an urban center under colonial rule; a development rooted in the colonial control of opium production and trade.¹⁹⁷ The new city was carefully segregated to separate colonial masters, the native

¹⁹¹ See generally MARIAM DOSSAL, *IMPERIAL DESIGNS AND INDIAN REALITIES: THE PLANNING OF BOMBAY CITY, 1845–1875* (1991); WILLIAM J. GLOVER, *MAKING LAHORE MODERN: CONSTRUCTING AND IMAGINING A COLONIAL CITY* (2008); NARAYANI GUPTA, *DELHI BETWEEN TWO EMPIRES, 1830–1931* (1981); YASMIN LARI & MIHAIL S. LARI, *THE DUAL CITY: KARACHI DURING THE RAJ* 58 (1996).

¹⁹² LARI & LARI, *supra* note 191, at 60–68 (1996).

¹⁹³ KING, *supra* note 190, at 37–39.

¹⁹⁴ See, e.g., Swati Chattopadhyay, *Blurring Boundaries: The Limits of "White Town" in Colonial Calcutta*, 59 J. SOC'Y ARCHITECTURAL HISTORIANS 154, 157, 172–73 (2000); Narayani Gupta, *Military Security and Urban Development: A Case Study of Delhi 1857–1912*, 5 MOD. ASIAN STUD. 61, 64–66 (1971); A. J. Christopher, *Urban Segregation Levels in the British Overseas Empire and Its Successors, in the Twentieth Century*, 17 TRANSACTIONS INST. BRIT. GEOGRAPHERS 95, 95–102 (1992).

¹⁹⁵ See NANDINI GOOPTU, *THE POLITICS OF THE URBAN POOR IN EARLY TWENTIETH-CENTURY INDIA* 74, 82–88 (2001).

¹⁹⁶ See *id.* at 91–102.

¹⁹⁷ See AMAR FAROOQUI, *OPIUM CITY: THE MAKING OF EARLY VICTORIAN BOMBAY* xi–xiii (2006).

rich and emerging middle classes, and the dispossessed natives.¹⁹⁸

B. Postcolonial Developmental State

After decolonization in the global South, postcolonial elites inherited and often reinforced the physical footprints and exclusionary geographies of segregated colonial cities.¹⁹⁹ They became the custodians of the colonial designs of urban exclusion and social divides, and rushed to embrace trickle-down development models that were ubiquitous in the 1950s and 1960s, whereby “the poor were denied a place in civic life and urban culture, and were seen as an impediment to progress and betterment of society.”²⁰⁰ Postcolonial growth of slums in India was first triggered by the greatest mass migration in recorded history following the partition of colonial India, which drove millions into urban slums of India.²⁰¹ The slum-based refugees quickly became dependent on corrupt political party machines, and slum growth became notoriously synchronized with election cycles.²⁰² Subsequently, the fate of the slums reflected different development models put in place and cycles of growth and stagnation.

In India, as elsewhere, economic development entails reallocation of resources and is thus a “conflictual process.”²⁰³ The critical role of the state in allocating and channeling resources sets the parameters of political economy.²⁰⁴ In India, the national capitalists, the rich farmers, and the bureaucracy, instituted a “one-party democracy” under the umbrella of the Congress Party,²⁰⁵ and claimed the moral high ground of national

¹⁹⁸ Navtej Nainan, *Building Boomers and Fragmentation of Space in Mumbai*, 45 ECON. & POL. WKLY. 29, 29–32 (2008).

¹⁹⁹ A study of the slums of Mumbai finds that “the inequalities that defined Bombay as a colonial port town have continued. Investment is always available to beautify the already well-endowed parts of the city. But there is no money to provide even basic services to the poorer areas.” SHARMA, *supra* note 37, at 8.

²⁰⁰ GOOPTU, *supra* note 195, at 421.

²⁰¹ Over seventeen million migrated as a result of the partition. Mumbai’s population that had grown at less than two percent in the last decades of colonial rule, doubled in less than ten years after partition. Sujata Patel, *Bombay’s Urban Predicament*, in BOMBAY: METAPHOR FOR MODERN INDIA XIII, XVI (Sujata Patel & Alice Thorner eds., 1995). See also OSKAR VERKAAIK, MIGRANTS AND MILITANTS: FUN AND URBAN VIOLENCE IN PAKISTAN 1–2 (2004).

²⁰² BAKEN & VAN DER LINDEN, *supra* note 174, at 30–31.

²⁰³ MATTHEW MCCARTNEY, INDIA—THE POLITICAL ECONOMY OF GROWTH, STAGNATION AND THE STATE, 1951–2007 5 (2009). See also ATUL KOHLI, DEMOCRACY AND DISCONTENT: INDIA’S GROWING CRISIS OF GOVERNABILITY 25–26 (1990); BOB ROWTHORN, CAPITALISM, CONFLICT AND INFLATION: ESSAYS IN POLITICAL ECONOMY 148 (1980).

²⁰⁴ MCCARTNEY, *supra* note 203, at 22–23.

²⁰⁵ STANLEY A. KOCHNANEK, THE CONGRESS PARTY OF INDIA: THE DYNAMICS OF ONE-PARTY DEMOCRACY 319–39 (1968).

interest, modernity, equity, justice, and efficiency.²⁰⁶ Central planning and an industrial policy designed by a statistician, Prasanta Chandra Mahalanobis, aimed at rapid industrialization through import-substitution, and state control of heavy industry, banking, and infrastructure.²⁰⁷ The prime object was “to contain class conflict within manageable dimensions, [and] to control and manipulate the many dispersed power relations in society to further as best as possible the thrust towards accumulation.”²⁰⁸ The Nehruvite consensus sutured development with welfare. Poverty-alleviation was projected as the central concern of the state; indeed, its *raison d’être*.²⁰⁹ A permanent bureaucracy, the inherited “steel frame” of colonial rule, was deployed to lead this project.²¹⁰

This was the phase when the development model of modernization by diffusion enjoyed hegemony.²¹¹ Even though

²⁰⁶ For details, see Sudipta Kaviraj, *A Critique of the Passive Revolution*, 23 *ECON. & POL. WKLY.* 2429, 2431–36 (1988); PRANAB BARDHAN, *THE POLITICAL ECONOMY OF DEVELOPMENT IN INDIA* 33–34 (1984); ACHIN VANAİK, *THE PAINFUL TRANSITION: BOURGEOIS DEMOCRACY IN INDIA* 3 (1990); LOYD I. RUDOLPH & SUSANNE HOEBER, *RUDOLPH, IN PURSUIT OF LAKSHMI: THE POLITICAL ECONOMY OF THE INDIAN STATE* 127–29 (1987).

²⁰⁷ C. P. Chandrasekhar, *Aspects of Growth and Structural Change in Indian Industry*, in *INDUSTRIAL GROWTH AND STAGNATION: THE DEBATE IN INDIA* 318, 322–23 (Deepak Nayyar ed., 1994); M. Bronfenbrenner, *A Simplified Mahalanobis Development Model*, 9 *ECON. DEV. & CULTURAL CHANGE* 45, 45–46 (1960).

²⁰⁸ PARTHA CHATTERJEE, *Development Planning and the Indian State*, in *STATE AND POLITICS IN INDIA* 270, 290 (1997).

²⁰⁹ The Indian Constitution enshrined the national project of a welfare state charged with the protection of a wide array of political, social, and economic rights. Attention to the basic needs of the poor, even when deficient on account of limited resources, helped to create a political alliance between the governing elites and the poor among the predominantly rural population. This made for “one-party democracy” and uninterrupted governance by the Congress Party for over twenty-five years with the help of an inherited colonial bureaucratic frame. RUDOLPH & RUDOLPH, *supra* note 206, at 130–32. The political alliance broke down as the development model collapsed in the 1970s. *Id.* See also BARDHAN, *supra* note 206, at 38–39.; VANAİK, *supra* note 206, at 62–63; RAJNI KOTHARI, *STATE AGAINST DEMOCRACY: IN SEARCH OF HUMANE GOVERNANCE* 23–25, 74 (1988); O.P. DWIVEDI & R. B. JAIN, *INDIA’S ADMINISTRATIVE STATE* 215–16 (1985); B. B. MISRA, *GOVERNMENT AND BUREAUCRACY IN INDIA 1947–1976* 37–38 (1986).

²¹⁰ RUDOLPH & RUDOLPH, *supra* note 206, at 2–3.

²¹¹ Viewing societies through the binary lens of modern/traditional, this model prescribed diffusion of modern technologies, laws, and ways of life as the panacea for underdevelopment. The resulting economic policies, crafted under the watchful eyes of experts from the global North, focused on growth of leading sectors of the economy whose trickle-down effect was supposed to, in time, take care of lagging sectors and poverty. The capacity for effective control rather than representative nature of the state was deemed the yardstick of an appropriate political order. See W.W. ROSTOW, *THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO* 26–28 (1962); BRUCE HERRICK & CHARLES P. KINDLEBERGER, *ECONOMIC DEVELOPMENT* 68 (1983). For critiques of this model, see SAMIR AMIN, *UNEQUAL DEVELOPMENT: AN ESSAY ON THE SOCIAL FORMATIONS OF PERIPHERAL CAPITALISM* 10 (Brian Pearce trans., 1976) (1973); SUSAN J. BODENHEIMER, *THE IDEOLOGY OF DEVELOPMENTALISM: THE AMERICAN PARADIGM—SURROGATE FOR LATIN AMERICAN STUDIES* 24–25 (1971); ARTURO ESCOBAR, *ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD* 83–85

tempered by nationalism and a commitment to a “mixed-economy,” the result was a bloated state apparatus presiding over top-down economic growth in concert with international aid agencies.²¹² The pervasive nationalist promises of the 1950s and 1960s to rebuild slums and create new housing faltered quickly, parallel with the early demise of plans to create an autonomous economy resistant to global economic pressures.²¹³ While mega-projects like hydroelectric dams, atomic energy, and heavy industry thrived, education, health, and housing needs of the poor and the marginalized got short shrift.²¹⁴ Often this development model led directly to the swelling of the ranks of the urban poor. For example, over fifty-six million, mostly “the poorest of the poor,” have been displaced in India by large hydroelectric dams.²¹⁵ By the late 1970s, any lingering faith in the development through state-led growth was shattered by poor growth rates, only marginal decline in poverty, and barely appreciable improvements in the quality of life.²¹⁶ As the nationalist development project derailed and took down with it the Nehruvite consensus, populist adjustments were attempted. *Gharibi hatao* (eliminate poverty), the slogan fashioned by Indira Gandhi in 1975 as a rationale for declaring Emergency, was an acknowledgement that benefits of development and growth had not “trickled down” and that poverty needed to be tackled through specific, dedicated programs.²¹⁷ Indira Gandhi’s Emergency symbolized “the definitive demise of the Nehruvian project . . . [and] the terminal crisis of the Nehruvian state.”²¹⁸

(1995). This model of development was an extension of colonial designs of social development. See VINAY GIDWANI, *CAPITAL, INTERRUPTED: AGRARIAN DEVELOPMENT AND THE POLITICS OF WORK IN INDIA* 84 (2008). It was in this context that the “law and development” project emerged as part of the ensemble of prescribed legal designs far removed from the culture, practices and material needs of the vast populations of the global South. See JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* 7–9 (1980); Laura Nader, *Promise or Plunder? A Past and Future Look at Law and Development*, 7 *GLOBAL JURIST* 1, 1–3 (2007). See generally Issa G. Shivji, *Law’s Empire and Empire’s Lawlessness: Beyond Anglo-American Law*, 1 *SOC. JUST. & GLOBAL DEV. J.* (2003).

²¹² GIDWANI, *supra* note 211, at 84.

²¹³ See GEORGE ROSEN, *WESTERN ECONOMISTS AND EASTERN SOCIETIES: AGENTS OF CHANGE IN SOUTH ASIA 1950–1970* 15, 227 (1985).

²¹⁴ See ROBERT-JAN BAKEN, *PLOTTING, SQUATTING, PUBLIC PURPOSE AND POLITICS: LAND MARKET DEVELOPMENT, LOW INCOME HOUSING AND PUBLIC INTERVENTION IN INDIA* 56–59, 305–10 (2003).

²¹⁵ AMITAVA KUMAR, *BOMBAY, LONDON, NEW YORK* 52 (2002).

²¹⁶ See Surendra J. Patel, *Goals of Planning in the Seventies: A Note*, 6 *ECON. & POL. WKLY.* 1565, 1567–68 (1971).

²¹⁷ See James P. Grant, *Development: The End of Trickle Down?*, 12 *FOREIGN POL’Y* 43, 43–44 (1973), available at <http://www.jstor.org/stable/1148094>; Vijay Prashad, *Emergency Assessments*, 24 *SOC. SCIENTIST* 36, 38, 53 (1996).

²¹⁸ Ajaz Ahmad, *Debating the Current Conjuncture*, in *CONTESTED TRANSFORMATIONS*, *supra* note 35, at 34, 43–45.

However, declining growth rates, escalating fiscal crisis of the state, and fragmentation of the legitimacy of political elites ruled out the implementation of refurbished welfare policies.

As the development project faltered in India, as elsewhere in the global South, the World Bank started to question the accumulation- and growth-centric approaches to development and turned toward alleviation of poverty as a goal distinct from growth.²¹⁹ Funding patterns were recalibrated to target agriculture, education, infrastructure, and low-cost housing.²²⁰ In the new approach, the developmental state was to address poverty by direct intervention.²²¹ Kalyan Sanyal argues that as a result there emerged “governmentalization” of the state in India—management of the social body through direct intervention of the state in terms of rationally-designed efficient technologies of administration aimed at promoting the welfare of society.²²² This was combined with the rise of “entitlements”—a relation connecting one set of ownership to another through certain rules of legitimacy.²²³ In the sixth Five Year Plan of 1980, “a number of poverty eradication measures were introduced.”²²⁴ They proved easier to design than to implement. Sanyal claims that the blows of primitive accumulation were softened during this period by the emergence of “welfarist governmentality.”²²⁵ He acknowledges, however, the exponential growth of the informal sector and the fact that formal and informal economies “are locked in an asymmetric relation . . . of dominance and subordination,” which leaves the “need economy”

²¹⁹ See ROBERT L. AYRES, *BANKING ON THE POOR: THE WORLD BANK AND WORLD POVERTY* 1 (1983).

²²⁰ See *id.* The new approach

posed some serious challenges to the prevalent Bank ideology. The result was a somewhat ambiguous pastiche of concepts and approaches. . . . The result . . . was a rather tenuous gluing together of some markedly divergent approaches. Poverty-oriented emphasis sometimes seemed to have been pasted on the prevalent ideology, without, however, altering its fundamental slant.

Id. at 75.

²²¹ SANYAL, *supra* note 77, at 170.

²²² *Id.* at 170–73. Sanyal’s claim is that “in a simultaneous process, the dispossessed are rehabilitated through the ‘pastoral functions’ of international organizations and the development state, [and that] governmentality is actively engaged in forming a need-economy be reversing the process of dispossession.” *Id.* at 220.

²²³ *Id.* at 178. Sanyal deploys Amartya Sen’s notions of entitlement that “refer to a set of alternative commodity bundles that a person can command in a society using the totality of rights and opportunities.” AMARTYA SEN, *RESOURCES, VALUES AND DEVELOPMENT* 497 (1984).

²²⁴ SUKHAMOY CHAKRAVARTY, *DEVELOPMENT PLANNING: THE INDIAN EXPERIENCE* 36 (1987).

²²⁵ SANYAL, *supra* note 77, at 221.

subordinate to the “accumulation-economy.”²²⁶ In his rush to apply the Foucauldian construct to conditions of post-coloniality,²²⁷ Sanyal elides the fact that at this stage the “one-party democracy” had disintegrated, and that the collapse of the developmentalist state combined with a backlash against proposed aggressive affirmative action had produced a revolt by the middle classes and religious fundamentalism in India.²²⁸ The reordering of political power and deepening fiscal crisis of the state precluded any sustained attack on poverty. None of this was good news for the swelling ranks of the urban poor and their housing needs.

In India, as the postcolonial state entrenched itself, state largess focused on housing members of bureaucracies, the military, and the emerging professional class, while lip-service was paid to the needs of the marginalized.²²⁹ In the 1970s, for example, public authorities promised the urban poor new homes and jobs in a modern twin-city opposite the Mumbai peninsula.²³⁰ However, while local residents of the new site were displaced, the bulk of new housing went to civil servants and professionals.²³¹ A perceptive commentary noted:

Ultimately, the grand conception of urban transformation was whittled down and domesticated to meet the immediate interests of the propertied classes. Instead of unfolding as idealistic projects of social regeneration, the town planning schemes evolved as avenues to further the interests and aspirations of the propertied and the instrument of the growing marginalization of the poor. The war against slums came dangerously close to being a battle to control the settlement and habitation of the poor, and indeed an offensive against the poor themselves.²³²

²²⁶ *Id.* at 220–21.

²²⁷ See MICHEL FOUCAULT, *Governmentality*, in THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 87, 87–104 (Graham Burchell et al. eds., 1991).

²²⁸ MANDAL COMMISSION, RESERVATION FOR BACKWARD CLASSES: MANDAL COMMISSION REPORT OF THE BACKWARD CLASSES COMMISSION 255 (1980) (recommending that the quota for “Scheduled Castes and Tribes” and “Other Backward Classes” in public employment and universities be increased from 27% to 49.5%). Steps toward implementation of these recommendations triggered a backlash. See NEVEDITA MENON & ADITYA NIGAM, POWER AND CONTESTATION: INDIA SINCE 1989 15–16 (2007); Jeemol Unni, *Contours of Conflict and Coalition: Rise of the Intermediate Classes and Castes*, in CONTESTED TRANSFORMATIONS, *supra* note 35, at 257; Pradip Kumar Datta, *Hindutva and the Re-Formation of the Indian Middle-Class Subject*, in CONTESTED TRANSFORMATIONS, *supra* note 35, at 270–71.

²²⁹ DAVIS, PLANET OF SLUMS, *supra* note 39, at 66.

²³⁰ *Id.* at 65–66.

²³¹ *Id.*; JACQUEMIN, *supra* note 29, at 196–97 (indicating that the development of the New Bombay area led to the loss of land, jobs, and incomes to the majority of local residents, which explained why the new housing went to civil servants and professionals).

²³² GOOPTU, *supra* note 195, at 84.

C. The Neoliberal Reordering

In this general context, India took a turn to neoliberal restructuring in the early 1990s, ushering in an era of “liberalisation-privatisation-globalisation,”²³³ marking “a fundamental transformation of India’s economic strategy.”²³⁴ It was envisaged that the economy “would be transformed in its basic orientation in a matter of a few years.”²³⁵ This entailed rapidly instituted deregulation, privatization, curtailment of food subsidies, cost recovery of public services, and liberalization of trade.²³⁶ Indian markets were opened up to an influx of capital, goods, and services. Foreign capital investment soared, as did the stock market and the real estate market. High, though doubtful, growth rates, based largely on performance of the service sector were sustained.²³⁷ A thorough empirical study finds that these rates of growth are not associated with liberalization of the domestic economy and international trade, but are a case of sustained growth that began a decade earlier.²³⁸ This presents “an important counterexample to the dominant orthodoxy.”²³⁹ In addition, accelerated remittances by skilled and unskilled labor buoyed foreign exchange reserves.

With the neoliberal turn in public policies, corporate capital assumed political and moral sway over the social formation. This hegemony was deployed to influence governmental decisions “not through electoral mobilisation of political parties and movements but largely through the bureaucratic-managerial class, the increasingly influential print and visual media, and the judiciary and other independent regulatory bodies.”²⁴⁰ The bureaucratic-managerial class now stands subordinated to corporate capital.²⁴¹ The latter is now in a position to set the terms of the political field to which other social groups are constrained to respond.

²³³ Mary E. John & Satish Deshpande, *Theorising the Present: Problems and Possibilities*, 43 ECON. & POL. WKLY. 83, 84 (2008). See also Kamal Nayan Kabra, *Indian Planning and Liberalisation*, 31 ECON. & POL. WKLY. 2740, 2740–41 (1996); Kuldeep Mathur, *Neo-liberal Agenda and Study of Institutions*, 1 REV. OF DEV. & CHANGE 167, 175 (1996).

²³⁴ Ashutosh Varshney, *Mass Politics or Elite Politics? India’s Economic Reforms in Comparative Perspective*, in *INDIA IN THE ERA OF ECONOMIC REFORMS* 222, 230 (Jeffrey D. Sachs et al. eds., 1999).

²³⁵ Jeffrey Sachs et al., *Introduction*, in *INDIA IN THE ERA OF ECONOMIC REFORMS*, *supra* note 234, at 1, 13.

²³⁶ *Id.* at 13–16.

²³⁷ Prabhat Patnaik, *The Meaning of Contemporary Globalization*, in *CONTESTED TRANSFORMATIONS*, *supra* note 35, at 7.

²³⁸ MCCARTNEY, *supra* note 203, at 236.

²³⁹ *Id.* at 235.

²⁴⁰ Partha Chatterjee, *Democracy and Economic Transformation in India*, 43 ECON. & POL. WKLY. 53, 57 (2008).

²⁴¹ *Id.* at 57–58.

The well-heeled took the position that “our second independence had arrived: we were going to be free from a rapacious and domineering state.”²⁴² The market emerged as the new messiah, and the welfare and development state went into a decisive retreat. Macroeconomic policy became obsessed with the specter of fiscal deficits.²⁴³ The question of poverty and the poor went through a fundamental reframing. Any expressions of the state’s concern for the poor under the “current versions are clearly framed in minimalist and palliative terms . . . politically dictated afterthoughts forced on to the agenda by electoral compulsions.”²⁴⁴

During the same time, the number of paupers in the country increased by fifty-six million, and between 1991 and 1994 the deregulated price for food grain grew by fifty-eight percent.²⁴⁵ Real wages of the poorest quintile in Delhi fell for the first time since 1947.²⁴⁶ The assigned reasons are the increased cost and increased use of privatized services, reduced access to subsidized food supplies, and a simultaneous shift away from formal sector waged work to self-employment and casual labor in the informal sector.²⁴⁷ The impact on slum-dwellers has been particularly acute.²⁴⁸ In Bangalore, the storied capital of the neoliberal high-tech boom, slums grew twice as fast as the general population with an estimated two million poor squatting in one thousand filthy slums, and the city’s periphery became “the dumping ground for those urban residents whose labour is wanted in the urban economy, but whose visual presence should be reduced as much as possible.”²⁴⁹ Urban dwellers are not the only “beneficiaries” of the neo-liberal “Shining India.” Between 1997 and 2007, as WTO-mandated agricultural policies took root, 182,936 Indian farmers committed suicide; growing debt burden

²⁴² GURCHARAN DAS, INDIA UNBOUND: FROM INDEPENDENCE TO THE GLOBAL INFORMATION AGE xi (2002).

²⁴³ The high watermark of this obsession was the Fiscal Responsibility and Budget Management Act of 2003, which binds the government to reduce the revenue deficit to zero by 2009–2010. Mihir Shah, *Structures of Power in Indian Society: A Response*, 43 ECON. & POL. WKLY. 78, 80 (2008).

²⁴⁴ John & Deshpande, *supra* note 233.

²⁴⁵ DAVIS, PLANET OF SLUMS, *supra* note 39, at 171; SEABROOK, *supra* note 175, at 46.

²⁴⁶ Gautam Bhan, “*This Is No Longer the City I Once Knew*”: *Evictions, the Urban Poor and the Right to the City in Millennial Delhi*, 21 ENV’T & URBANIZATION 127, 136 (2009).

²⁴⁷ *Id.*

²⁴⁸ See generally KALYANI MENON-SEN & GAUTAM BHAN, SWEPT OFF THE MAP: SURVIVING EVICTION AND RESETTLEMENT IN DELHI (2008); A. Iyer and Gita Sen, *Health Sector Changes and Health Equity in the 1990s in India*, in HEALTH AND EQUITY: TECHNICAL REPORT SERIES (2000). See also Minar Pimple & Madhuri Kamat, *Struggle for People’s Housing*, 59 INDIAN J. SOCIAL WORK 357, 358–59 (1999).

²⁴⁹ Schenk-Sandberg, *supra* note 46, at 131.

and the switch to cash-crops are cited as the primary reasons.²⁵⁰ In 2007, the Planning Commission candidly admitted that WTO “compulsions” had induced removal of tariffs and subsidies for the agriculture sector resulting in a “major crisis” in the 1990s.²⁵¹ Indeed, Bertolt Brecht had observed accurately that “famines do not simply occur; they are organised by the grain trade.”²⁵²

How does neoliberalism gain legitimacy in the face of its track record? This is accomplished through “infiltration of market logic into politics,”²⁵³ and the deployment of “an economic logic in defining, evaluating, and protecting certain categories of subjects and not others.”²⁵⁴ In this transition, the neoliberal project is framed as “government of free individuals who are then induced to self-manage according to market principles of discipline, efficiency, and competitiveness.”²⁵⁵ Neoliberalism is about “*self-responsibilization*.”²⁵⁶ Responsibilities and capacities of the states, save perhaps for war and internal security, are shrunk. Historic popular expectations from the state are folded. Self-contained individuals, now “freed” from the state, are to take *responsibility* to provide for themselves, optimize their participation in the “free” market, and not look to the state for any assistance or protection.²⁵⁷ For the wealthy, this may lead to more wealth and consumption, but for the poor this just adds another burden, the burden of responsibility, without any change in their capacity to shoulder it. Inequality is naturalized, and the differentiated opportunities of life that come with it are deemed an inevitable part of the “free” market.

How do the Indian ruling elites square the heralded economic miracle with increased vulnerability of the vulnerable? How does neoliberalism displace historical commitments and expectations of a caring and patrimonial state, particularly when

²⁵⁰ P. Sainath, *Neo-Liberal Terrorism in India: The Largest Wave of Suicides in History*, COUNTERPUNCH (Feb. 12, 2009), <http://www.counterpunch.org/sainath02122009.html>.

²⁵¹ In the 1990s, the rate of growth fell below the rate of population growth for the first time since the 1960s. Shah, *supra* note 243, at 80. The rate of growth of dryland crops that were grown and consumed by the poorest sections of the population dropped below zero. *Id.*

²⁵² Susan Marks, *Introduction*, in INTERNATIONAL LAW ON THE LEFT, *supra* note 135, at 1, 13. See also AMARTYA SEN, POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION 78–81 (1983); MIKE DAVIS, LATE VICTORIAN HOLOCAUSTS: EL NIÑO FAMINES AND THE MAKING OF THE THIRD WORLD 26–27(2001).

²⁵³ AIHWA ONG, NEOLIBERALISM AS EXCEPTION: MUTATIONS IN CITIZENSHIP AND SOVEREIGNTY 6 (2006).

²⁵⁴ *Id.* at 16.

²⁵⁵ *Id.* at 4.

²⁵⁶ See NIKOLAS ROSE, POWERS OF FREEDOM: REFRAMING POLITICAL THOUGHT 45 (1999).

²⁵⁷ *Id.* at 142.

these stand enshrined in the Constitution? This is accomplished by reconfiguring the social contract between the state and the subject, by reconstituting the grounds of eligibility for full citizenship, by redrawing expectations of collective responsibility, and by changing the composition of the political power-bloc. In India, as in many other places, over the last two decades corporate capital has secured dominance of the ruling power-bloc.²⁵⁸ Representing the interests of elites and professionals of the formal economy, the reconfigured power-bloc now holds moral-political hegemony—“the capitalist class . . . has . . . acquired a position to set the terms to which other political formations can only respond.”²⁵⁹ To achieve such domination and hegemony in India, a polity that is a representative democracy and has a historical political alliance between the poor and the nationalist elite, required recalibration of the democratic process.

This recalibration entailed turning electoral representative democracy into a “free market democracy.” For example, between two and ten billion dollars were spent in the 2009 general election in India, ninety percent of independent candidates lost, and the ruling coalition won a resounding mandate to continue on the path of neoliberalism by securing thirty-seven percent of the votes cast which work out to 10.3% of the country’s population.²⁶⁰ Elections in India have been turned into “heavily-sponsored, TV-friendly spectator sports . . . [whereby] an electorate has been turned into a market, voters are seen as consumers, and democracy is being welded to the free market. Ergo: those who cannot consume do not matter.”²⁶¹ In line with exhortations of neoliberalism, governance was increasingly turned into a matter of administration rather than politics, with a government that is run by technocrats rather than political representatives. At play here is the production of a distinction between the concept of citizens and that of populations. While the concept of citizen carried the notion of participating in sovereignty of the state, now the population is supposed to be a passive target of policies designed and implemented by government functionaries. As part of this process, an ideological reconstruction of poverty and inequality

²⁵⁸ See PARTHA CHATTERJEE, *THE POLITICS OF THE GOVERNED: REFLECTIONS ON POPULAR POLITICS IN MOST OF THE WORLD* 136–44 (2004).

²⁵⁹ Partha Chatterjee, *Democracy and Economic Transformation in India*, *supra* note 240, at 61.

²⁶⁰ ARUNDHATI ROY, *FIELD NOTES ON DEMOCRACY: LISTENING TO GRASSHOPPERS* 14–15 (2009).

²⁶¹ *Id.* at 17. For a case study of political marketing in the 1989 parliamentary election in India, see DILIP M. SARWATE, *POLITICAL MARKETING: THE INDIAN EXPERIENCE* 110–201 (1990).

unfolded that furnishes the ethical grounds for the disavowal of the rights of the poor. The Indian judiciary played a critical role in this enterprise.

IV. "CITIZENS" TO "ENCROACHERS": PUBLIC INTEREST AND THE INDIAN JUDICIARY

A. Slums, Citizens, and Human Rights

The record of the Indian judiciary regarding slums and housing needs of the urban poor is a checkered one. It demonstrates that the law is a historical force that has both emancipatory and oppressive potential.²⁶² Judges play their role in cultivating the hegemony of the dominant social forces by "creating a social conformism which is useful to the ruling group's line of development."²⁶³ Judges help the law become an effective social force by cementing society and economy together and binding subordinate groups to the will of the dominant. They emerge as "organic intellectuals" by constructing social domination as an articulation of the public interest or common sense.²⁶⁴

During the nationalist development phase, slum-dwellers, squatters, and other marginalized groups had some expectation of state protection. These expectations were grounded in an amalgamation of claims based on needs, rights of citizenship, and a recognition of the value of their participation in the economy—expectations endorsed by stated public policy and pronouncements of the courts.²⁶⁵ For a brief period, the courts tempered the violence of evictions and demolitions, ever-present dangers for slum-dwellers, by requiring adequate resettlement

²⁶² This is best captured by Gramsci who postulates the immanent unity of material and ideational conditions. Law is seen here as operating dialectically, both coercively as the arm of the state and consensually within civil society, "turning necessity and coercion into 'freedom.'" ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 242 (Quintin Hoare & Geoffrey Nowell Smith trans. & eds., 1971). For a detailed treatment of Gramsci's conception of the "double face of the law," see Maureen Cain, *Gramsci, the State and the Place of Law*, in LEGALITY, IDEOLOGY AND THE STATE 95, 98 (David Sugerman ed., 1983). For the tension between "determinate" and "responsive" impulses of modern law, see PETER FITZPATRICK, MODERNISM AND THE GROUNDS OF LAW 70–71 (2001).

²⁶³ A. Claire Cutler, *Gramsci, Law, and the Culture of Global Capitalism*, 8 CRITICAL REV. INT'L SOC. & POL. PHIL. 527, 527 (2005).

²⁶⁴ See CHANTAL MOUFFE, *Hegemony and Ideology in Gramsci*, in GRAMSCI AND MARXIST THEORY 168, 187 (1979).

²⁶⁵ Holston terms the grounds of such expectations of the state a "hybrid of special treatment rights, contributor rights, and text based rights." JAMES HOLSTON, INSURGENT CITIZENSHIP 253 (2008). For a detailed analysis of such expectations and their recognition, see MENON & NIGAM, *supra* note 228, at 74; PARTHA CHATTERJEE, THE POLITICS OF THE GOVERNED: REFLECTIONS ON POPULAR POLITICS IN MOST OF THE WORLD 135–37 (2004).

schemes.²⁶⁶ The neoliberal turn triggered a rupture, leading to a redefinition of poverty and the rights of the poor. Over the last two decades Indian courts have cast aside any considerations of humane treatment and adequate resettlement of squatters and have adopted a discourse of the illegality of slums and squatting.²⁶⁷ The link between public interest, urban development, and housing for the poor has been reconstituted by the erasure of any public responsibility for housing the urban poor.

In the landmark *Pavement Dwellers Case* (1985), the Supreme Court of India located the right to shelter within the ensemble of fundamental rights while allowing the state to clear streets and other urban spaces in the interest of order.²⁶⁸ It held that “no person has a right to encroach, by erecting a structure or otherwise, on footpaths, pavements or any other place reserved or ear-marked for a public purpose.”²⁶⁹ However, it also recognized that the loss of “the pavement or the slum is to lose the job,” and because the right to livelihood is an important facet of the right to life, “the eviction of the [pavement dwellers] will lead to deprivation of their livelihood and consequently to the deprivation of life.”²⁷⁰ Significantly, the Court argued that the urban poor do not “claim the right to dwell on pavements or in slums for the purpose of pursuing any activity which is illegal, immoral or contrary to public interest. Many of them pursue occupations which are humble but honorable.”²⁷¹ The Court also noted that it was the failure of the state to implement master plans for cities that had caused the problem in the first place.²⁷² The Court approved removals on the grounds that there was no absolute prohibition on the deprivation of life or liberty as long as the procedure established by law was followed.²⁷³ However, it articulated empathy for slum and pavement dwellers, and a desire to minimize the harm in the process of relocation.²⁷⁴ It instructed the government to provide alternative settlement sites for slums that had existed for twenty years or more, and

²⁶⁶ MENON & NIGAM, *supra* note 228, at 74–80.

²⁶⁷ *Id.* at 75–80.

²⁶⁸ *Olga Tellis v. Bombay Mun.*, (1985) 1 S.C.C. 545 (India). This case along with most of the other cases discussed in this section involving eviction, demolition, and resettlement, concerned Delhi, the capital of India. For detailed empirical data on the subject, see generally MENON-SEN & BHAN, *supra* note 248.

²⁶⁹ *Olga Tellis v. Bombay Mun.*, (1985) 1 S.C.C. 545 (India).

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

reminded the government of the plans for slum upgrading and low-income housing.²⁷⁵

In another decision, announced on the same day as the *Pavement Dweller's Case*, the Supreme Court mandated that alternative housing must be provided before evictions can take place, accepted a governmental assurance that "steps are being taken for the purpose of improving the slums and wherever they cannot be improved, alternative accommodation is provided to the slum-dwellers" and expressed confidence that "the government will continue to evince the same dynamic interest in the welfare of the pavement dwellers and slum-dwellers."²⁷⁶ In 1990, the Supreme Court went a step further to state that "reasonable residence is an indispensable necessity" for human development and the fulfillment of the "right to life."²⁷⁷ In 1996, the Court argued that the "right to life guaranteed in any civilized society implies the right to food, water, decent environment, education, medical care and shelter," and held that Article 21 of the Indian Constitution held within its ambit the right to shelter in order to make the right to life more meaningful.²⁷⁸ The Court read the constitution in the light of all civil, political, social, and cultural rights enshrined in the Universal Declaration of Human Rights to hold that "[s]helter for a human being . . . is not a mere protection of his life and limb. It is a home where he has opportunities to grow physically, mentally, intellectually and spiritually."²⁷⁹ In 1997, the Court defined human rights to include everyone's "right to a standard of living adequate for the health and wellbeing of himself and his family; it includes food, clothing, housing, medical care and necessary social services."²⁸⁰ It held that the right to life is not confined to physical existence but includes the right to live with human dignity.²⁸¹ Other decisions continued to push the frontiers of fundamental rights to include, for example, the right to education,²⁸² the right to health and medical care,²⁸³ and

²⁷⁵ *Olga Tellis v. Bombay Mun.*, (1985) 1 S.C.C. 545 (India).

²⁷⁶ *K. Chandru v. State of Tamil Nadu*, (1985) 3 S.C.C. 536 (India), available at <http://www.judis.nic.in/supremecourt/citation1.aspx>.

²⁷⁷ *Shantistar Builders v. Narayan Khimalal Gotame*, A.I.R. 1990 S.C. 630, 634 (India).

²⁷⁸ *Chameli Singh v. State of Uttar Pradesh*, A.I.R. 1996 S.C. 1051, 1053 (India).

²⁷⁹ *Id.*

²⁸⁰ *Ahmedabad Municipal Corp. v. Nawab Khan Gulab Khan*, A.I.R. 1997 S.C. 152, 158 (India).

²⁸¹ *Id.* See generally *Maneka Gandhi v. Union of India*, A.I.R. 1981 S.C. 746 (India).

²⁸² *Mohini Jain v. State of Karnataka*, A.I.R. 1992 S.C. 1858, 1864–92 (India). See also *J. P. Unni Krishnan v. State of Andhra Pradesh*, A.I.R. 1993 S.C. 2178 (India), available at <http://www.Indiankanoon.org/doc/1775396/>.

²⁸³ *Consumer Educ. & Research Ctr. v. Union of India*, A.I.R. 1995 S.C. 940 (India).

[t]he right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing, shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.²⁸⁴

Slum-dwellers and the marginalized had secured these protections during the boom years of public interest litigation (PIL) in India.²⁸⁵ This device initially emerged as a vehicle to protect legal rights of a “person or determinate class of persons [who] by reason of poverty, helplessness or disability or social or economic disadvantaged position [are] unable to reach the court for relief.”²⁸⁶ Dubbed “judicial activism,” and even “judicial excessivism,” PIL entailed dilution of the rules of standing, expansion of epistolary jurisdiction, and relaxation of adversarial procedural devices to provide access to those who by virtue of their “socially or economically disadvantaged position are unable to approach the court[s] for relief.”²⁸⁷ PIL opened the door for anyone to approach the highest courts in matters of public interest to “espouse the cause of the poor and oppressed (representative standing) and those wishing to enforce performance of public duties (citizen standing).”²⁸⁸ The Supreme Court of India saw itself as the “last resort for the oppressed and bewildered,”²⁸⁹ assuming the mantle of a “Supreme Court for

²⁸⁴ Francis Coralie Mullin v. Adm’r, Union of Territory of Delhi, A.I.R. 1981 S.C. 746, 753 (India).

²⁸⁵ See generally Jamie Cassel, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495, 497 (1989); HANS DEMBOWSKI, *TAKING THE STATE TO COURT: PUBLIC INTEREST LITIGATION AND THE PUBLIC SPHERE IN METROPOLITAN INDIA* 58 (2001); SAMPAT JAIN, *PUBLIC INTEREST LITIGATION* 12 (2002); Jill Cottrell, *Courts and Accountability: Public Interest Litigation in the Indian High Courts*, 1992 THIRD WORLD LEGAL STUD. 199, 199–200 (1992).

²⁸⁶ S.P. Gupta v. President of India, A.I.R. 1982 S.C. 149 (India), available at <http://indiankanoon.org/doc/1294854>. It should be noted that the PIL phase was ushered in only after the Indian judiciary yielded on its previously inflexible protection of private property rights and the blocking of important socio-economic legislations including amendments to the Constitution. It was only in 1973 that the Indian Supreme Court recognized that a constitution “is an organic document which must grow and must take stock of the vast socioeconomic problems.” *Bharati v. Kerala*, A.I.R. 1973 S.C. 1461 (India), available at <http://indiankanoon.org/dc/1294854>.

²⁸⁷ S.P. Gupta v. President of India, A.I.R. 1982 S.C. 149 (India), available at <http://indiankanoon.org/doc/1294854>. In this case, Justice Bhagwati elaborated the frameworks for “representative standing,” and “citizen standing.” *Id.* For further details, see S. P. SATHE, *JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS* 215 (2003); S. P. Sathe, *The Unfinished Agenda: The Constitution at the Crossroads*, 42 J. INDIAN L. INST. 171, 186 (2000).

²⁸⁸ Lavanya Rajamani, *Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability*, 19 J. ENV’T L. 93, 293 n.4 (2007).

²⁸⁹ *Id.*

India.”²⁹⁰ PIL emerged precisely at the moment of the collapse of the nationalist development project.

Progressive PIL decisions by the courts brought major changes in, among other things, the state of urban life. These actions included removal and relocation of large urban industries to outside city limits,²⁹¹ the conversion of all public transport and private commercial transport to the use of compressed natural gas,²⁹² ridding the River Ganges of effluents,²⁹³ and removal of garbage from the cities.²⁹⁴ The courts’ involvement extended into oversight of implementation of their directives.²⁹⁵ Encouraged by judicial pronouncements, in 1990, the Indian Law Commission recommended a new law to give statutory basis to a right of slum-dwellers to resettlement, preceding destruction of their homes.²⁹⁶ No such law was ever enacted. Similarly, an attempt to amend the Constitution to make the right to housing a fundamental right failed. Neoliberalism had arrived to change not only the rules of the game, but the game itself.

B. Encroachers in the Showcase City

PIL may well have stayed on its path, had not the global rules of the game changed so markedly with the neoliberal turn. In its new iteration, PIL was used by the courts to assume the role of policy maker and policy enforcer with the backing of the urban professional-managerial classes, who, under the spell of ideologies of corporate capital, have turned away from the state as the primary orchestrator of change. The judiciary, the non-political branch of government, became an instrumentality to depoliticize political questions of distribution, equity, access, and opportunity.

As neoliberal deregulation of the economy, down-sizing of the public sector, and “free market” ideologies became entrenched, the courts took a dramatic turn. Judicial activism in the interest

²⁹⁰ Upendra Baxi, *The Avatars of Indian Judicial Activism: Explorations in the Geography of [In]justice*, in FIFTY YEARS OF THE SUPREME COURT OF INDIA: ITS GRASP AND REACH 156, 157 (S. K. Verma, Kusum & A.S. Anand eds., 2000) (emphasis added).

²⁹¹ M. C. Mehta v. Union of India, Petition No. 13381 (*Taj Trapenzium Case* 1984).

²⁹² M. C. Mehta v. Union of India, Petition No. 13029 (*Dehli Vehicular Pollution Case* 1985).

²⁹³ M. C. Mehta v. Union of India, Writ Petition No. 3727 (*Ganges Pollution Case* 1985).

²⁹⁴ Almitra Patel v. Union of India, Writ Petition No. 888 (*Garbage Removal Case* 1996).

²⁹⁵ See Rajamani, *supra* note 288, at 315. In this regard, the courts were not only the arbiters of law and justice, but also functioned as parallel administrative and executive bodies in matters of urban affairs.

²⁹⁶ LAW COMMISSION OF INDIA, ONE HUNDRED THIRTY-EIGHTH REPORT ON LEGISLATIVE PROTECTION FOR SLUM AND PAVEMENT DWELLERS 26 (1990).

of the marginalized, seen as “chemotherapy for the carcinogenic body politic,”²⁹⁷ quickly turned lethal. With the neoliberal turn, the pace of evictions and demolitions of extra-legal settlements accelerated dramatically.²⁹⁸ Significantly, these eviction and demolitions were not mandated by any public planning directive or state action. Rather, they were ordered by the courts in response to PIL actions initiated by trade and non-poor resident welfare associations. In a dramatic switch, PIL, a weapon designed for the marginalized, was now wielded by the privileged.²⁹⁹ The privileged could use PIL because questions at hand, on their surface, involved use of public lands and did not implicate the protection of privately held property or the violation of any individual right.³⁰⁰ Evictions and demolitions were sought in public interest in urban solid waste management and the enforcement of urban master plans.³⁰¹ Indian courts now turned PIL into a tool to monitor and direct the exercise of state power in tune with the neoliberal schema; the “free market” was to address the substantive interests of the poor and the marginalized.³⁰² By a reconstruction of “public interest,” a process of “dispossession by law”³⁰³ at the service of accumulation by dispossession³⁰⁴ was set in motion. An analyst summarized the trend:

There was a time when courts would provide relief from the harsh and arbitrary actions of the executive reflected, in say the grant [of] stay of demolition of slums on the grounds of the lack of a rehabilitation plan

²⁹⁷ Upendra Baxi, *Preface*, in JUDICIAL ACTIVISM IN INDIA ix, xvi (S. P. Sathe ed., 2d ed. 2002).

²⁹⁸ For example, in Delhi, while between 1990–2003, 51,461 dwellings were demolished under “slum clearance schemes,” between 2004 and 2007, more than 45,000 dwellings were demolished. Bhan, *supra* note 246, at 128. Less than twenty-five percent of those evicted in the latter period received alternative resettlement sites. *Id.*

²⁹⁹ Analysts view the “clique” of public interest litigators and petitioners who filed hundreds of PIL petitions covering almost every aspect of collective life, as being “public spirited” and as bringing “a distinct view based on particular sensibilities.” Rajamani, *supra* note 288, at 305–06.

³⁰⁰ It has been rightly observed that after the neoliberal turn, the Indian courts “emerge[d] as the standard bearers of a whole new transformation of common sense. . . . [seeking] to reduce democracy, rather, to redefine it, as a set of abstract rules sans politics and people.” MENON AND NIGAM, *supra* note 228, at 13.

³⁰¹ *Okhla Factory Owners’ v. Gov’t of Nat’l Capital Territory of Delhi*, CWP No. 4441/1994 (Nov. 29, 2002), available at <http://indiankanoon.org/doc/>; *Pitampura Sudhar Samitii v. Gov’t of Nat’l Capital Territory of Delhi*, CWP 4215/1995 (Nov. 29, 2002), available at <http://indiankanoon.org/doc/1927946>; Bhan, *supra* note 246, at 134.

³⁰² See Radha D’Souza, *The ‘Third World’ and Socio-legal Studies: Neo-Liberalism and Lessons from India’s Legal Innovations*, 14 SOC. & LEGAL STUD. 487, 504–06 (2005).

³⁰³ MENON & NIGAM, *supra* note 228, at 69.

³⁰⁴ See *supra* notes 79–107 and accompanying text.

or the hardship of monsoons or school examinations. Today, demolitions of slums are being directed on the orders of the courts.³⁰⁵

How did the courts accomplish this sharp turn in a very short span of time? This was accomplished by deploying the whole array of neoliberal values, priorities, and prescriptions related to urban policy. Having mandated resettlement and alternate housing for those evicted in earlier decisions, when again faced with the question the Supreme Court articulated a newfound interest in fiscal responsibility of the state, and linked it with implied irresponsibility of the urban poor.³⁰⁶ In 1993, the Supreme Court expressed a concern that “the public exchequer has to be burdened with *crores* [tens of millions] of rupees for providing alternative accommodation to [those] who are trespassers on public land,” and directed that where resettlement was done, the resettled should not be given new land on leasehold, but on license.³⁰⁷ The short rope of a revocable license would keep the “irresponsible” disciplined and controlled.

The next step was to braid fiscal responsibility with a desire for a clean city, and graduate the “irresponsibility” of the poor into criminality. In 1996, the Supreme Court ordered that hazardous industries be moved outside the city limits and that cities be cleaned up.³⁰⁸ The Delhi High Court was quick to fall in line and ordered eviction of all squatters in Delhi because it “is a *show window to the world of our culture, heritage, traditions and way of life. It cannot be allowed to degenerate and decay.*”³⁰⁹ The Supreme Court picked up the pace in 2000, bemoaning that while Delhi was a “*showcase of the country,*” yet “no effective initiative of any kind” had been taken for “*cleaning up the city.*”³¹⁰ The Court characterized slums as “large areas of public land . . . *usurped for private use free of cost,*” and a plan to provide the free land for resettlement was rejected as “a proposal which attracts more *land grabbers*. Rewarding an *encroacher* on public land with an *alternative free site is like giving a reward to a pickpocket.*”³¹¹ Giving garbage priority over the destitute, the

³⁰⁵ Rakesh Shukla, *Rights of the Poor: An Overview of Supreme Court*, ECO. & POL. WKLY. 3755, 3757 (2006).

³⁰⁶ See Usha Ramanathan, *Illegality and the Urban Poor*, 41 ECO. & POL. WKLY. 3193, 3194 (2006).

³⁰⁷ *Id.*

³⁰⁸ M.C. Mehta v. Union of India, (1996) 4 S.C.C. 750, available at <http://www.nlsenlaw.org>; B.L. Wadhwa v. Union of India, (1996) 2 S.C.C. 594 (India), available at <http://www.ielrc.org/content/e960.pdf>.

³⁰⁹ Samitii, CWP 4215/1995, at 128 (emphasis added).

³¹⁰ Almitra Patel v. Union of India, (2000) 2 S.C.C. 679, 684–85 (India) (emphasis added).

³¹¹ *Id.* (emphasis added). The Delhi High Court endorsed this language: “*One cannot but use the expression as stated in the said [Almitra] judgment.*” Wazirpur Barton

Court, while castigating provision of adequate housing for the poor, mandated that public land be provided free of cost for garbage disposal.³¹² In holding slums responsible for the solid waste problem, the Court completely ignored the fact that per capita solid waste generation in Delhi runs along class lines.³¹³ For good measure, the Court retreated from the supervisory role in urban affairs that it had aggressively assumed in the earlier phase.³¹⁴ The solid waste management rules adopted in response to the Court’s direction, while providing opportunities for private companies and incinerators, dealt a blow to the related informal sector.³¹⁵ In Delhi there are an estimated one million waste pickers, of which ninety-four percent belong to “backward and

Normata Sangh v. Union of India, MANU/DE/2140/2002 C.W. 2112 of 2002, Order dated Nov. 29, 2002. The Supreme Court articulated the rationale:

Establishment or creating of slums, it seems, appears to be good business and is well organized. The number of slums has multiplied in the last few years by geometrical proportion. Large areas of public land, in this way, are usurped for private use free of cost. It is difficult to believe that this can happen in the capital of the country without passive or active connivance of the land owning agencies and/or the municipal authorities. The promise of free land, at the taxpayers cost, in place of a *jhuggi* [shack], is a proposal which attracts more land grabbers . . . The department of slum clearance does not seem to have cleared any slums despite its being in existence for decades. In fact more and more slums are coming into existence. Instead of “Slum Clearance” there is “Slum Creation” in Delhi. This in turn gives rise to domestic waste being strewn on open land in and around the slums. This can best be controlled at least, in the first instance, by preventing the growth of slums. The authorities must realize that there is a limit to which the population of a city can be increased, without enlarging its size. In other words the density of population per square kilometer cannot be allowed to increase beyond the sustainable limit. Creation of slums resulting in increase in density has to be prevented. What the slum clearance department has to show, however, does not seem to be visible. It is the garbage and solid waste generated by these slums which require to be dealt with most expeditiously and on the basis of priority.

Almitra Patel, 2 S.C.C. at 3–4 (emphasis added).

³¹² *Patel v. Union of India*, A.I.R. 2000 S.C. 1256, 1260–61 (India).

³¹³ Per capita solid waste generation in Delhi is 420 grams for the high income group, 240 grams for middle income groups, 150 grams for lower middle income group, and 80 grams for those in slums and shacks. Rajamani, *supra* note 288, at 302. See also *Patel v. Union of India*, A.I.R. 2000 S.C. 1256, 1259 (India).

³¹⁴ The Court took the position that:

We believe it is not for this Court to direct as to how the municipal authorities should carry out their functions and resolve difficulties in regard to the management of solid waste. The Court, in fact, is ill-equipped to do so. Without doubt the governmental agencies including the local authorities have all the powers of the State to take action and ensure that the city remains clean. They only have to wake up and act.

Patel v. Union of India, A.I.R. 2000 S.C. 1629, 1633 (India).

³¹⁵ C.P. Jomit, *The Impact of Privatization of Solid Waste Collection and Transportation in Delhi: The Impact on the Informal Recycling Sector*, ARTICLESBASE, June 24, 2009, <http://www.articlesbase.com/education-articles/the-impact-of-privatization-of-solid-waste-collection-and-transportation-in-delhi-the-impact-on-the-informal-recycling-sector-990546.htm>.

tribal castes,” and an estimated fifty thousand are children.³¹⁶ The livelihoods of these workers, who provide “an *unacknowledged subsidy* to the waste producer, the consumer goods and packaging industry, and the legal waste owner—the municipal body”³¹⁷—was severely impacted. In tune with the rapidly unfolding, “decisive embourgeoisement of the Indian city,”³¹⁸ a gentrified city, one that was pleasing to the eye with no garbage or slum-dwellers in sight, now stood as the judicially endorsed image of urban development.

Having removed “pickpockets,” the Supreme Court now put some content in the “show window to the world of our culture, heritage, traditions and way of life.”³¹⁹ It condoned the construction of the Akshardham religious theme park in Delhi on the Yamuna River floodplain that encroached on an area designated in the city’s master plan as an ecological zone.³²⁰ In 2009, the Court cited this decision while approving the construction of Commonwealth Games Village adjacent to the Akshardham Temple, which the Delhi High Court had found “would affect ecological integrity of the ‘riverbed’ besides causing irreversible damage to the ‘flood plain.’”³²¹ Coincidentally, fire “broke out” in the slums adjoining the construction site gutting seven shanty clusters,³²² further clearing the grounds to facilitate global solidarity through the sports festival.

Responsibilities of the state and fundamental rights brought to light only a few years ago remained to be dealt with. In 2002, the Delhi High Court struck down a resettlement policy for squatters, and directed that they be removed expeditiously and that no alternative sites needed to be provided for removal of

³¹⁶ RAVI AGARWAL ET AL., *RECYCLING RESPONSIBILITY: TRADITIONAL SYSTEMS AND NEW CHALLENGES OF URBAN SOLID WASTE IN INDIA* 35–37 (2002); Rajamani, *supra* note 288, at 306.

³¹⁷ AGARWAL ET AL., *supra* note 316, at 35.

³¹⁸ John & Deshpande, *supra* note 233, at 84.

³¹⁹ Almitra Patel v. Union of India, (2000) 226 S.C.C. 679, slip op. at 1632 (India), available at www.elaw.org/system/files/JDESA-Part-4.doc; Pitam Pura Sudhar Samiti v. Union of India & Ors., CWP 4215/1995, slip op. at 4 (India 2002), available at <http://indiankanoon.org/doc/842898/>.

³²⁰ Charu Soni, *Killing Delhi's Lifeline*, TEHELKA, Sept. 9, 2010, http://www.tehelka.com/story_main18.asp?filename=Cr081906Killing_Delhi.asp; Sanjay Srivastava, *Urban Spaces, Disney-Divinity and Moral Middle Classes in Delhi*, 44 ECON. & POL. WKLY. 338, 338–39 (2009).

³²¹ D.D.A. v. Rajendra Singh & Ors., 161 D.L.T. 330, slip op. at 2 (India 2009), <http://www.nlsenlaw.org/water/case-laws/supreme-court/appellants-d-d-a-vs-respondent-rajendra-singh-and-ors-decided-on-30-07-2009-1/>; *No Bar on Games Work, Orders Supreme Court*, THE HINDU, July 31, 2009, available at <http://www.thehindu.com/2009/07/31/stories/2009073157570100.htm>.

³²² *Fire in Delhi Slum near Commonwealth Games Village*, HINDUSTAN TIMES, Jan. 9, 2010, available at <http://www.hindustantimes.com/StoryPage/Print/495495.aspx>.

those squatting on public land.³²³ While recognizing the “duty of the Government authorities to provide shelter to the under-privileged,” it argued that the failure to do so does not mean that the state should be required to take up an “arbitrary system of providing alternative sites and land to encroachers on public land.”³²⁴ The judicially recognized fundamental right to adequate housing evaporated into thin air. Now the Court told squatters facing imminent removal: “[I]f you are occupying illegal land, *you have no legal right, what to talk of fundamental right*, to stay there a minute longer.”³²⁵ The specter of anarchy and breakdown of order was raised to deny any relief to squatters: “If encroachments on public land are to be allowed, *there will be anarchy*.”³²⁶

To guard against the specter of anarchy, the courts started to cast a shadow on citizenship rights of the urban poor and slum-dwellers. Two classes of citizens emerged—those rightfully entitled to protections of the law, and those who had surrendered such rights on account of being poor. Now courts distinguished between slum-dwellers who were designated “unscrupulous citizens,” and the “honest citizens who have to pay for land or a flat.”³²⁷ And, of course, finance capital and developers were to be given a complete run of the field. In 2006, the Delhi High Court, while refusing to stop slum-demolitions without any alternative site for resettlement, argued that the land had “*other uses that cannot be denied*,” and expressed the frustration that the more extra-legal settlers are removed, the “*more they come*.”³²⁸ Deploying a discourse of epidemics and pathology to characterize squatters and slum-dwellers, the Court argued that “their” numbers were “*growing and growing*,” and hence urgent steps must be taken to “*deal with the problem*.”³²⁹ The ultimate prescription was rather simple: “*If they cannot afford to live in Delhi, let them not come to Delhi*.”³³⁰

Then there are those who can “afford” it all and merit deference by the law and the courts. In the middle of demolition and clean-up drives, the Supreme Court allowed the construction of a shopping mall, which was being built illegally, to continue.³³¹

³²³ Okla. Factory Owners’ Ass’n v. Gov’t of Nat’l Capital Territory of Delhi & Ors., 108 D.L.T. 517, slip op. at 13 (India 2002), <http://www.indiankanoon.org/doc/1143856/>.

³²⁴ *Id.* at 11.

³²⁵ Ramanathan, *supra* note 306, at 3197 (emphasis added).

³²⁶ *Id.* (emphasis added).

³²⁷ Bhan, *supra* note 246, at 135 (emphasis added).

³²⁸ *Id.* (emphasis added).

³²⁹ *Id.* (emphasis added).

³³⁰ *Id.* (emphasis added).

³³¹ ROY, *supra* note 260, at 134.

The rationale for disparate treatment of corporate capital was articulated:

Had such parties inkling of an idea that such clearances were not obtained by DDA [the builders], they would not have invested such *huge sums of money*. The stand that wherever constructions have been made unauthorizedly [sic] demolition is the only option cannot apply to the present cases . . . [especially] when they . . . are *corporate bodies and institutions and the question of their having indulged in any malpractices in getting the approval or sanction does not arise*.³³²

The Supreme Court also used the “huge sums of money” rationale in the *Vedanta Group Case*, where bauxite mining operations in Niyamgiri, Orissa, an environmentally fragile area home to indigenous tribal groups, were approved despite multiple irregularities and strong objections of residents of the area.³³³

Emboldened by this judicial posture, the Delhi Laws (Special Provisions) Act 2006 was adopted, which provides for demolition of unauthorized structures, “whether in pursuance of Court orders or otherwise.”³³⁴ This Act gave license for the removal of slums where “clearance of land is required for specific public projects,” and “the Central Government may, from time to time, issue such directions to the local authorities as it may deem fit, for giving effect to the provisions of this Act and it shall be the duty of the local authorities to comply with such directions.”³³⁵ The end result of judicial, legislative, and executive actions is increased “segregation of economic classes” in Delhi.³³⁶ A “development pornography”³³⁷ has flourished where slum-dwellers and squatters are held responsible for “pressure on civic amenities, crime, social imbalances, economic exploitation,

³³² *Id.* (quoting the Writ Petition Against Vasant Junj Mall, Oct. 17, 2006, judgment of Justices Arijit Pasayat and S. H. Kpadiā) (emphasis added). This pattern led to the observation that “it is members of the so-called civil society who break laws with impunity and who demand that the rules be waived for them, whereas members of political society strive to become legal, to gain recognition and entitlements from the state.” Amita Baviskar & Nandini Sundar, *Democracy versus Economic Transformation?*, 43 *ECON. & POL. WKLY.* 87, 88 (2008).

³³³ Rahul Choudhary, *Environmental Clearance: A Farce Played by MoEF—The Vedanta Case*, *RADICAL NOTES JOURNAL*, Sept. 24, 2007, available at <http://radicalnotes.com/journal/2007/09/24/the-vedanta-case/>.

³³⁴ The Delhi Laws (Special Provisions Act, 2006 (No. 22 of 2006)), available at <http://www.delhi.gov.in/DoIT/Finance/PDF/Acts%20and%20Rules/specialprovisionalAct.pdf>. See also Ramanathan, *supra* note 306, at 3197.

³³⁵ The Delhi Laws (Special Provisions Act, 2006 (No. 22 of 2006)), available at <http://www.delhi.gov.in/DoIT/Finance/PDF/Acts%20and%20Rules/specialprovisionalAct.pdf>. See also Ramanathan, *supra* note 305, at 3197.

³³⁶ Nikhil Joseph & Pascal Goodman, *On the Outskirts of Legality: Policy and Legal Aspects of Slum Resettlement in Delhi* 19 (2008) (unpublished working paper) (on file with the Centre for Civil Society), available at <http://ssrn.com/abstract=1325962>.

³³⁷ Rotimi Sankore, *Behind the Image: Poverty and “Development Pornography”*, *PAMBAZUKA NEWS* (Apr. 21, 2005), <http://www.pambazuka.org/en/category/features/27815>.

unplanned growth, deterioration of city beautification, culture, environmental setback to city development in a planned manner etc.”³³⁸ Abdication of public responsibility for housing today stands enshrined in the Delhi Master Plan 2021, which envisages private developers catering to the housing needs of the “urban poor and the economically weaker sections in the form of houses of two rooms or less.”³³⁹ The turn from a welfare state to coercive facilitator of capital accumulation stands completed.³⁴⁰ Slums and slum-dwellers were left at the turn, with profound implications for the place and role of the law.

The neoliberal transition did not only shape judicial philosophy of the Indian high courts regarding the questions of poverty and shelter, it also appears to have compromised the integrity of the judges. This is put into sharp relief by the still-unfolding corruption and conflict of interest scandal that erupted in 2007, and centered on Y. K. Sabharwal, Chief Justice of the Indian Supreme Court from 2000–2007.³⁴¹ Chief Justice Sabharwal took the lead role in the Supreme Court’s denial to

³³⁸ Joseph & Goodman, *supra* note 336, at 13 (quoting *Detailed Project Report: Construction of Four Storied E.W.S. Housing for Slum Dwellers at Savdha Ghevra Phase III under INNURM*, Slum and JJ Department, Municipal Corporation of Delhi (Jan. 2008)).

³³⁹ *Id.* at 19 (quoting *Master Plan for Delhi with the perspective for the year 2021*, Ministry of Urban Development (February 2007)).

³⁴⁰ Evictions, removals, and demolitions of the housing and livelihood of the urban poor were not the only areas that were impacted by this judicial turn. In the area of workers’ rights, during the progressive PIL phase, the courts had set up principles of “equal pay for equal work,” “regularization of contract workers performing work of a permanent nature,” and “[r]einstatement with back wages.” *Randhir Singh v. Union of India*, A.I.R. 1982 S.C. 879 (India); *Shukla*, *supra* note 305, at 3757. With the neoliberal turn, the courts diluted the “equal pay” and “regularization” rules and adopted a posture of non-interference in cases of harsh and disproportionate punishments like dismissal of employees for minor infractions. *State of N.C.T. of Delhi v. Sanjeev*, A.I.R. 2005 S.C. 2080, 2084–87 (India); *D. P. S. Rural Regl Bank v. Munna Lal Jain*, A.I.R. 2005 S.C. 584, 589 (India). Concerns of irreparable environmental harm and dislocation of indigenous tribal communities were pushed to the side as the court approved the construction of a mega-dam as part of the largest river valley project in India. *Narmada Bachao Andholan v. Union of India & Ors.*, A.I.R. 2000 S.C. 3751, 3752–55, 3782 (India). “The dam is neither a nuclear establishment nor a polluting industry . . . [I]t will not be correct to presume that the construction of a large dam like Sardar Sarovar will result in ecological disaster.” *Id.* at 3753. As for the displacement of tribal communities, the court took the position that at the rehabilitation sites “there will be better facilities than in the tribal hamlets,” and the tribal communities will be “gradually assimilated in the mainstream of society.” *MENON & NIGAM*, *supra* note 228, at 74. In the *Networking of Rivers Case*, the Supreme Court used Public Interest Litigation to intervene in inter-state and federation-state relations, and tilted the balance of power in favor of the central government while brushing aside environmental and federalism concerns. *D’Souza*, *supra* note 302, at 488, 506.

³⁴¹ Sanjay Dubey, *Office for Profit: A Stink You Should Smell*, TEHELKA, Aug. 18, 2007, available at http://www.tehelka.com/story_main33.asp?filename=Ne180807Officefor.asp; Former Chief Justice of India Y.K. Sabharwal—Biography, <http://www.supremecourtfindia.nic.in/judges/bio/yks.htm> (last visited Sept. 18, 2010).

provide any relief against demolition and sealing of thousands of “illegal” commercial units operating in areas reserved for residential use by Delhi’s city plans.³⁴² The sealing impacted thousands of peoples’ lives, and violent protest erupted.³⁴³ A bench headed by Chief Justice Sabharwal insisted that the sealing continue.³⁴⁴ Within months of his retirement, an investigative report was published detailing that two sons of the Chief Justice, who ran three companies from their father’s house, made millions as a result of the sealing drive that forced scores of businesses to move to shopping malls and commercial complexes in which the sons had financial interests.³⁴⁵ Corporate developers had rushed into partnerships with the sons as the sealing drive gathered speed.³⁴⁶ While the Chief Justice suffered some embarrassment, the four journalists who published the account were found guilty of criminal contempt of court by the Delhi High Court.³⁴⁷ This is not the only scandal to implicate India’s high courts.³⁴⁸

The Supreme Court of India had long recognized that, “it is an accepted fact of constitutional interpretation that the content of justiciability changes according to how the Judge’s value preferences respond to the multi-dimensional problems of the day.”³⁴⁹ Indeed, the Court deemed “inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part” in their decision-making.³⁵⁰ As for the “social philosophy” and “value preferences” of the judges, it has been argued that their shared class affiliation and residing in Delhi makes them sympathetic to the middle class sensibilities about urban issues.³⁵¹ This affiliation

³⁴² For details of the affair, see ROY, *supra* note 331, at 1132. For details of the charges, see Prashant Bhushan, *Contempt of Judicial Power*, OUTLOOK INDIA, Sept. 19, 2007, <http://www.outlookindia.com/article.aspx?235601>.

³⁴³ Arundhati Roy, *Scandal In the Palace*, OUTLOOK INDIA, Oct. 1, 2007, available at <http://www.outlookindia.com/printarticle.aspx?235689>.

³⁴⁴ *Id.*

³⁴⁵ Dubey, *supra* note 341.

³⁴⁶ *Id.*

³⁴⁷ Binod Ringania, *Journalists Sentenced for Uncovering Corruption*, WORLD PRESS, Sept. 25, 2007, <http://www.worldpress.org/Asia/2941.cfm>.

³⁴⁸ Prashant Bhushan, *Judging the Judges*, OUTLOOK INDIA, Jan. 21, 2009, available at <http://www.outlookindia.com/article.aspx?239534>.

³⁴⁹ Rajamani, *supra* note 288, at 301 (quoting *State of Rajasthan v. Union of India*, (1977) 3 S.C.C. 592, 648 (India)).

³⁵⁰ *State of Madras v. V. G. Row*, (1952) 1957 S.C.R. 597, slip op. at 8 (India), <http://www.indiankanoon.org/doc/554839>.

³⁵¹ Rajamani, *supra* note 288, at 301. See also Partha Chatterjee, *Are Indian Cities Becoming Bourgeois at Last? Or, If You Prefer, We Could Exclaim: Are Indian Cities Becoming Bourgeois, Alas?*, in CONTESTED TRANSFORMATIONS, *supra* note 35, at 113, 113–14 (Mary E. John et al. eds., 2006); Janaki Nair, *‘Social Municipalism’ and the New Metropolis*, in CONTESTED TRANSFORMATIONS, *supra* note 35, at 125, 125.

and sympathy makes for not only substantive outcomes of these cases but also the modes of resolving them that signal a new modality of functioning of the state, whereby policy making increasingly becomes the preserve of professional and technocrats immune from political control. In the *Solid Waste Management Case*, the Court was quick to set up a committee of experts to design rules and guidelines for waste management.³⁵² This committee, like others the Court had set up for similar issues, for example, in the *Delhi Pollution Case*,³⁵³ consisted of technocrats, bureaucrats, and representatives of NGOs, without any mechanism to represent the interests of those who would be impacted by the decisions—the squatters and slum-dwellers.³⁵⁴ The process was not “structured to be participative” and was “neither consultative nor democratic.”³⁵⁵

Activists note the “technology focus” of the courts’ agenda and that the solutions devised and recommended were driven by a priority for “leaner municipalities and greater efficiency.”³⁵⁶ Decisions about whom to consult were “*ad hoc* and discretionary Not all stake holders were identified and consulted, and no avenues for wider public consultation were explored.”³⁵⁷ The non-participatory process resulted in the absence of equity, fairness, and justice.³⁵⁸ In its new guise, PIL was unhinged from citizen mobilization and yoked with the interests of those with social power. A device fashioned to give access to the marginalized, now became a “tremendous practical hurdle[] limiting the access of the poor to the Court, and therefore restricting the range of views before the Court.”³⁵⁹ The well-heeled groups are using “their leverage with the Court” to ensure conversion of “one strain of opinion into policy, while annihilating all others.”³⁶⁰ Such machinations are dictated by the neo-liberalism whereby “in the current period, legitimate human rights can be defined only as that set of rights that require government abstention from acts that violate the individual’s freedom to innovate and to invest time, capital, and

³⁵² Okla. Factory Owners’ Ass’n v. Gov’t of Nat’l Capital Territory of Delhi, (2002) 108 D.L.T. 517, slip op. at 4 (India), available at <http://www.indiankanoon.org/doc/1143856/>.

³⁵³ M. C. Mehta v. Union of India, A.I.R. 2004 S.C. 4016 (India), available at <http://www.ihrc.org/content/e0409.pdf>.

³⁵⁴ See generally Rajamani, *supra* note 288, at 296–301.

³⁵⁵ *Id.* at 304.

³⁵⁶ *Id.*

³⁵⁷ *Id.* at 304–05.

³⁵⁸ *Id.* at 305.

³⁵⁹ *Id.* at 306.

³⁶⁰ *Id.* at 305–06.

resources in processes of production and exchange.”³⁶¹ For example, in Mumbai, an emerging middle class has teamed up with property developers and select bureaucrats and politicians to create a “powerful neoliberal lobby [of] . . . building boomers.”³⁶² The emergence of the “upwardly mobile middle and elite class . . . [with an] anti-slum agenda is . . . one of the most significant changes in the Indian urban landscape.”³⁶³

With these neoliberal judicial pronouncements, extra-legality stands bifurcated: that of the “unscrupulous,” “pickpockets,” and “encroachers” and that of “honest citizens;” that of “who cannot afford to live in Delhi” and that of those with “huge sums of money.”³⁶⁴ Law is supposed to discipline the extra-legality of the first set, while not even raising “the question” about the extra-legality of the latter. On the grounds of this divide, sovereignty emerges as a decision on the exception—setting up zones beyond the reach of the law.³⁶⁵ This divide implicates the very concept of citizenship by reconstituting the grounds of recognition of a citizen. The characterizations deployed by the courts may well be essentialist categories reinforcing stereotypes, but “categories . . . are not meant to describe the world accurately but to organize and classify it symbolically.”³⁶⁶ The language about slum and pavement dwellers that took hold of Indian judicial

³⁶¹ Tony Evans, *Citizenship and Human Rights in the Age of Globalization*, 25 ALTERNATIVES 415, 416 (2000).

³⁶² Nainan, *supra* note 198, at 30.

³⁶³ Amita Bhide, *Shifting Terrains of Communities and Community Organizations: Reflections on Organizing for Housing Rights in Mumbai*, 44 CMTY. DEV. J. 367, 375 (2009).

³⁶⁴ Bhan, *supra* note 246, at 135–39.

³⁶⁵ GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 19 (Daniel Heller-Roazen trans., 1998). Agamben takes as his point of departure Schmitt’s claim that “[s]overeign is he who decides on the exception.” CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., Mass. Inst. of Tech. 1985). Agamben argues that the formation of a political community is based not on inclusion but on exclusion. See generally Jenny Edkins, *Sovereign Power, Zones of Indistinction and the Camp*, 25 ALTERNATIVES 3 (2000). He deploys the figure of *homo sacer* from Roman law to identify a zone where law suspends itself, rendering the zone not merely of exclusion but also of abandonment—the space of the exception. *Id.* For a critical reading, see generally Peter Fitzpatrick, *Bare Sovereignty: Homo Sacer and the Insistence of Law*, in *POLITICS, METAPHYSICS, AND DEATH: ESSAYS ON GIORGIO AGAMBEN’S HOMO SACER* 49 (Andrew Norris ed., 2005); GIORGIO AGAMBEN, *STATE OF EXCEPTION* (Kevin Attell trans., Univ. of Chicago Press 2005). Creation of a space on exception is a question of the boundaries and borders of law, in that the sovereign decision and the exception are “never decisively placed within or without the legal system, as they are precisely the moving border between the two.” Andrew Norris, *The Exemplary Exception*, in 119 RADICAL PHIL. 6, 10 (2003) (emphasis added). The critical result is that those placed in the zones of exception are included as objects of power but excluded from being subjects.

³⁶⁶ TERESA P.R. CALDEIRA, *CITY OF WALLS: CRIME, SEGREGATION, AND CITIZENSHIP IN SAO PAULO* 33 (2000).

pronouncements since the 1990s, is that of illegality.³⁶⁷ The courts appear mindful that in a constitutional liberal republic “in order, ethically, to justify denying a national citizen his text-based rights, it becomes necessary to make the informal settler into an ‘improper’ citizen.”³⁶⁸ The courts have done just that by characterizing slum and pavement dwellers as dishonest, unscrupulous, polluters, and predatory encroachers. Rendered an “improper citizen,” the “encroacher” can now be denied the protections of rights of citizenship.³⁶⁹ The political economy of slum production stands erased, the slum and the slum-dweller emerge as a space and a body without history, and responsibilities of the state stand vitiated. This is the legacy of neoliberalism in India.

Is there a way out for urban slums and slum-dwellers? We turn now to examine the prescriptions that hold the field.

V. “WHERE DO WE GO FROM HERE?”³⁷⁰

A. Slums and Remedial Prescriptions

By the 1970s it was apparent that in the global South, even in the face of persistent urban unemployment, rural-urban migration was accelerating and so was slum growth.³⁷¹ The urban bias of development plans, deeper penetration of the markets into rural areas, restructuring of the agricultural sector by WTO trade regimes, and increased capital-intensive nature of agricultural inputs combined to dispossess and uproot increasing numbers of rural farmers.³⁷² Actual and perceived wage differentials lure rural workers to urban centers, where they cannot all be absorbed in the sector with a “politically determined wage that is substantially higher than...[that of] the agricultural sector.”³⁷³ Consequently, increasing numbers of the

³⁶⁷ See Usha Ramanathan, *Illegality and Exclusion: Law in the Lives of Slum Dwellers*, in 4 KEY TEXTS ON SOCIAL JUSTICE IN INDIA 263, 281–82 (2009).

³⁶⁸ Bhan, *supra* note 246, at 139.

³⁶⁹ *Id.*

³⁷⁰ I adopt this from MARTIN LUTHER KING JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* (1967), where Dr. King focuses on questions of class and poverty.

³⁷¹ John R. Harris & Michael P. Todaro, *Migration, Unemployment and Development: A Two-Sector Analysis*, 60 AM. ECON. REV. 126, 126 (1970). See also SANYAL, *supra* note 77, at 197.

³⁷² See Carlos Oya, *Sticks and Carrots for Farmers in Developing Countries: Agrarian Neoliberalism in Theory and Practice*, in NEOLIBERALISM: A CRITICAL READER, *supra* note 108, at 127, 127–131; JAN BREMAN, *OF PEASANTS, MIGRANTS, AND PAUPERS: RURAL LABOUR CIRCULATION AND CAPITALIST PRODUCTION IN WEST INDIA* xvii, xx (1986); PETER M. ROSSET, *FOOD IS DIFFERENT: WHY WE MUST GET THE WTO OUT OF AGRICULTURE* xv–xvii (2006); Carmen G. Gonzalez, *Trade Liberalization, Food Security, and the Environment: The Neoliberal Threat to Sustainable Rural Development*, 14 TRANSNAT'L. L. & CONTEMP. PROBS 419, 470–71 (2004).

³⁷³ SANYAL, *supra* note 77, at 197.

urban poor joined the informal sector set apart from the formal labor market, characterized by formal contracts and statutory regulations.³⁷⁴ In little time it was recognized that:

[T]he informal sector now stands out 'as a potential provider of employment and incomes to millions of people who would otherwise lack the means of survival' or 'as a breeding ground for entrepreneurship on a mass scale' [T]he informal sector can significantly improve itself, practically in each aspect of its functioning, if only the past policy biases, under which it is denied access to the advantages (e.g., availability of credit, foreign exchange, and tax concessions) offered to the formal sector, are removed.³⁷⁵

Divergent views about the nature of the informal sector fall into three main schools of thought: the dualist school, the legalist school, and the structural school.³⁷⁶ The dualist and legalist schools furnish the scaffoldings of mainstream prescriptions for the informal sector. Assumptions drawn from the Fordist era in the global North view the informal sector "as a waiting room, or temporary transit zone: newcomers could find their feet there and learn the ways of the urban labour market."³⁷⁷ In the meantime, abysmal wages in the informal sector are expected to be mitigated by traditional support networks.³⁷⁸ The informal sector, however, grew exponentially as neoliberal globalization gathered speed with flexible production, outsourcing, fiscal

³⁷⁴ The vagueness and plurality of views of informality are so pervasive that, by one account, "formal and informal are better thought of as metaphors that conjure up a mental picture of whatever the user has in mind at that particular time." MARC BACCHETTA ET AL., GLOBALIZATION AND INFORMAL JOBS IN DEVELOPING COUNTRIES 40 (2009).

³⁷⁵ INT'L LAB. ORG., JOB CREATION IN URBAN INFORMAL SECTOR IN INDIA: ISSUES AND POLICY OPTIONS 4 (A. S. Oberai & G. K. Chadha eds., 2001) (emphasis added).

³⁷⁶ The *dualist* school posits that the informal sector is comprised of marginal activities—distinct from and not related to the formal sector—that provide income for the poor and a safety net in times of crisis. Chen, *supra* note 113, at 4, 6–7. Accordingly, the persistence of informal activities is due largely to the fact that not enough modern job opportunities have been created to absorb surplus labor, due to a slow rate of economic growth and/or to a faster rate of population growth. *Id.* The *legalist* school subscribes to the notion that the informal sector is comprised of microentrepreneurs who choose to operate informally in order to avoid the costs, time, and effort of formal registration. *Id.* It posits that microentrepreneurs will continue to produce informally so long as regulations in the formal sector are cumbersome and costly, and thus stifle private enterprise. *Id.* The *structuralist* school, one that is in tune with my position, sees the informal sector as subordinate economic units and workers that serve to reduce input and labor costs, and thereby increase the competitiveness of large capitalist firms. *Id.* In the structuralist model, in marked contrast to the dualist model, different modes and forms of production are seen not only to co-exist but also to be inextricably connected and interdependent. *Id.* According to this school, the nature of capitalist development, rather than a lack of growth, accounts for the persistence and growth of informal production relationships. *Id.*

³⁷⁷ Breman, *supra* note 151, at 34.

³⁷⁸ *Id.* at 35.

austerity, and structural adjustment of economies.³⁷⁹ While the *Wall Street Journal* expected the informal sector to serve as "one of the last safe havens . . . a critical safety net as the economic crisis spreads,"³⁸⁰ a detailed study finds that "incomes have declined, days of work available decreased, prices have fallen and livelihoods disappeared."³⁸¹

World Bank prescriptions play a defining role in shaping the policies of governments, other development agencies, and technocratic consultants.³⁸² The new orthodoxy in urban policy speaks of improving rather than replacing slums. The prescription offered for housing needs of the poor is "self-help" in combination with privatization of housing supply across the board. The populist and seemingly benign mantra of "helping-the-poor-to-help-themselves" furnishes a smokescreen for the abandonment of the obligation of the states to relieve poverty and homelessness, and turns attention away from structural changes at the state and global levels necessary for sustainable urban and housing policies that may ensure secure housing with dignity for all.³⁸³ Slogans like "people's participation" become thinly disguised euphemisms for the abdication by the state of its fundamental responsibilities toward its citizens. While some have demonstrated that "self-housing" is a myth as far as paid artisans and skilled labor is involved,³⁸⁴ others have documented that due to "cost-recovery" provisions of World Bank lending for low-income housing, the bottom thirty to sixty percent of the population was unable to meet the financial obligations of such loans.³⁸⁵ ILO's experts concluded that the World Bank's slum upgrading had failed to have any substantial impact.³⁸⁶

³⁷⁹ BACCHETTA ET AL., *supra* note 374, at 40; Alan Gilbert, *Love in the Time of Enhanced Capital Flows: Reflections on the Links Between Liberalization and Informality*, in URBAN INFORMALITY, *supra* note 176, at 33, 33–34, 37; Patralekha Chatterjee, *Shadow Lives: Urban India's Informal Economy*, 5:3 HABITAT DEBATE (1999), http://ww2.unhabitat.org/mdg/documents/asia/Vol5_No3_urban_indias_informal_economy.doc.

³⁸⁰ Patrick Barta, *The Rise of the Underground*, WALL ST. J., March 14, 2009, at W1.

³⁸¹ *We Are Self Employed*, SELF-EMPLOYED WOMEN'S ASSOCIATION OF INDIA (SEWA, Gujarat, India) May 15, 2009, available at <http://www.ifwea.org/news/2009/affiliateAnnounce/090604SEWAnewsletter.pdf>. In the case of waste collectors in Ahmedabad, the city used by the WSJ to draw examples, between April 2008 and January 2009 incomes fell to between thirty-seven and seventy percent. *Id.*

³⁸² See Ramin Keivani & E Werna, *Modes of Housing Provision in Developing Countries*, 55 PROGRESS IN PLANNING 65, 86 (2001).

³⁸³ See SEABROOK, *supra* note 175, at 196–97.

³⁸⁴ Kavita Datta & Gareth Jones, *From Self-help to Self-Finance: The Changing Focus of Urban Research and Policy*, in HOUSING AND FINANCE IN DEVELOPING COUNTRIES 3, 11–12 (Kavita Datta & Gareth Jones eds., 2000).

³⁸⁵ See generally Lisa Peattie, *Affordability*, in 11 HABITAT INT'L 69, 69–76 (1987).

³⁸⁶ OBERAI, *supra* note 5, at 122.

The “self-help” prescription is complemented by the World Bank’s calls for a “market-enabling” strategy: curtail direct public intervention in housing and lift restraints from private land and housing market to let commodity circulation penetrate into lower-income groups.³⁸⁷ The prescription has simply not worked. Experts conclude that

the market-enabling approach neglects urban poor because it overemphasizes the formal market process to the detriment of other existing modes of provision, it lacks specific consideration of informal markets and their particular requirements and it fails to consider who benefits from the increased market efficiency.³⁸⁸

The market-enabling approach is inappropriate for housing needs of the urban poor in the global South because formal markets do not respond adequately to rapid urban growth, poverty, chaotic economic conditions, and the deficiencies of infrastructure and services.³⁸⁹ More often the result is excessive speculation and monopoly behavior for maximizing profits, which drive up land and housing prices without significant access to mortgage or building finance by low-income groups.³⁹⁰ One affected resident asks: “Whose problem does it solve?”³⁹¹

At this juncture the myth of the informal worker as entrepreneur was born.³⁹² This was also the point of entry of the legalist school which viewed the informal sector as constituted by

³⁸⁷ WORLD BANK, HOUSING: ENABLING MARKETS TO WORK 1–2 (1993); G. A. Jones and K. Datta, *Enabling Markets to Work: Housing Policy in the ‘New’ South Africa*, 5:3 INT’L PLANNING STUD. 393, 395–97 (2000); R. Harris and C. Giles, *A Mixed Message: The Agents and Forms on International Housing Policy, 1945-1973*, 27 HABITAT INT’L 167, 174, 176–78 (2003); WORLD BANK, URBAN POLICY AND ECONOMIC DEVELOPMENT: AN AGENDA FOR THE 1990S 6–7 (1991); A. Jones and P. E. Ward, *The World Bank’s ‘New’ Urban Management Program: Paradigm Shift or Policy Continuity?*, 18 HABITAT INT’L 33, 35 (1994).

³⁸⁸ Ramin Keivani, Michael Mattingly and Hamid Majedi, *Public Management of Urban Land, Enabling Markets and Low-Income Housing Provision: The Overlooked Experience of Iran*, 45:9 URBAN STUDIES 1825, 1827 (2008) (internal citations omitted).

³⁸⁹ See V. Mukhija, *Enabling Slum Redevelopment in Mumbai: Policy Paradox in Practice*, 16:6 HOUSING STUDIES 791, 791 (2001); V. Mukhija, *The Contradictions in Enabling Private Developers of Affordable Housing: A Cautionary Case from Ahmerabad, India*, 41 URBAN STUDIES 1, 3 (2004).

³⁹⁰ See R. Keivani and E. Werna, *Modes of Housing Provision in Developing Countries*, 55 PROGRESS IN PLANNING 65, 69 (2001); R. Keivani and E. Werna, *Refocusing the Housing Debate in Developing Counties from a Pluralist Perspective*, 25 HABITAT INT’L 191, 201 (2001); R. BAKEN AND J. VAN DER LINDEN, LAND DELIVERY FOR LOW INCOME GROUPS IN THIRD WORLD CITIES 12, 45 (1992). See generally W. P. Strassmann, *Oversimplification in Housing Analysis, with Reference to Land Markets and Mobility*, 11 CITIES 377 (1994).

³⁹¹ See generally Priscilla Connolly, *Uncontrolled Settlements and Self-Built: What Kind of Solution? The Mexico City Case*, in SELF-HELP HOUSING: A CRITIQUE 141 (Peter M. Ward ed., 1982).

³⁹² See Rebecca B. Galemba, *Informal and Illicit Entrepreneurs: Fighting for a Place in the Neoliberal Economic Order*, 29:2 ANTHROPOLOGY OF WORK REVIEW 19, 19 (2008).

voluntary micro-entrepreneurs, who were a reservoir for future growth if only regulatory reforms would lower the cost of entry and operation in the formal sector. It was claimed that those who work in the informal sector do so “because they choose to be self-employed, using skills acquired in the formal sector to establish themselves as independent producers or traders.”³⁹³ The premise is that they are there “not because they were redundant to the formal sector but because they chose to be self-employed.”³⁹⁴ However, the reality is that far from choosing to do so, those in the informal sector are shut out or ejected from the formal sectors though a combination of global, national, and local impacts of neoliberal structuring of public policies and the introduction of “flexible production,” whereby capital seeks to engage labor located outside the regimes of formal contract, labor rights, and public regulation.³⁹⁵ The result is “immiserisation of the laboring poor.”³⁹⁶

Given the rising value of increasingly scarce land in and around urban areas, squatting usually operates through an invisible and informal real estate market.³⁹⁷ Calling informal subdivision settlements “extra legal rather than illegal,” analysts point out that often those shut out of the formal housing market buy lots from entrepreneurs who acquire tracts of undeveloped land and subdivide it without conforming to any regulations, and the area is incrementally upgraded, yielding ever-increasing returns for the land owners.³⁹⁸ This model of privatized urbanization is also, in effect, the privatization of squatting. In some instances, owners of nonresidential tracts even encourage squatters to organize themselves as a land invasion in the expectation that the state may be forced to regularize the settlement and develop infrastructure.³⁹⁹ In another model, squatters purchase the “right” to dwell on state-owned land from corrupt politicians and bureaucrats. Often it is middlemen who secure possession, provide protection against eviction, and supply

³⁹³ HAROLD LUBELL, *THE INFORMAL SECTOR IN THE 1980S AND 1990S* 112 (1991).

³⁹⁴ *Id.*

³⁹⁵ See Jan Breman, *An Informalized Labor System: End of Labor Market Dualism*, 36:52 *ECON. & POL. WKLY.* 4804, 4807 (2002); N. Neetha, *Flexible Production, Feminisation and Disorganisation: Evidence from Tiruppur Knitwear Industry*, 37:21 *ECON. & POL. WKLY.* 2045, 2049–51 (2002).

³⁹⁶ Breman, *supra* note 395, at 4813.

³⁹⁷ See generally Paul Baross, *Sequencing Land Development: The Price Implications of Legal and Illegal Settlement Growth*, in *THE TRANSFORMATION OF LAND SUPPLY SYSTEMS IN THIRD WORLD CITIES* 69 (Paul Baross & Jan van der Linden eds., 1990).

³⁹⁸ RAKESH MOHAN, *UNDERSTANDING THE DEVELOPING METROPOLIS: LESSONS FROM THE CITY STUDY OF BOGOTA AND CALI, COLUMBIA* 152–53 (1994).

³⁹⁹ DAVID KEELING, *BUENOS AIRES: GLOBAL DREAMS, LOCAL CRISES* 107–08 (1996).

water and transport facilities.⁴⁰⁰ The result is an informal extra-legal economy and the commercialization of slums.⁴⁰¹

The heralded guru of the legalist school, Hernando de Soto, posits that the solution for cities of the global South is the granting of property rights to slum-dwellers, which will turn their extralegal holdings into liquid capital thus alleviating the need for external capital investments for job creation.⁴⁰² He asserts that “trillions of dollars, [are] ready to be put to use if only the mystery of how assets are transformed into live capital can be unraveled.”⁴⁰³ Citing the failures of the legal system in Peru, de Soto recommends legalization of extralegal landholdings coupled with deregularization of the economy including housing.⁴⁰⁴ Contra to de Soto’s prescription about the injection of

⁴⁰⁰ AKHTER HAMEED KHAN, ORANGI PILOT PROJECT: REMINISCENCES AND REFLECTIONS 72 (1996).

⁴⁰¹ Ayse Yonder, *Implications of Double Standards in Housing Policy: Development of Informal Settlements in Istanbul*, in *ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES* 55, 61–62 (Edesio Fernandes & Ann Varley eds., 1998) [hereinafter *ILLEGAL CITIES*].

⁴⁰² See HERNANDO DE SOTO, *THE OTHER PATH: THE ECONOMIC ANSWER TO TERRORISM* 159–60 (1989) [hereinafter *DE SOTO, THE OTHER PATH*]; HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 37 (2000) [hereinafter *DE SOTO, THE MYSTERY OF CAPITAL*]. Herald of capitalism were quick to endorse De Soto’s recipe. See *Why the Poor Need Property Rights: Want to Make the Poor Less Poor? Give Them Title to What They Own*, *ECONOMIST*, Mar. 31, 2001. The World Bank adopted his recommendations too. *WORLD BANK, WORLD DEVELOPMENT REPORT 2005: A BETTER INVESTMENT CLIMATE FOR EVERYONE* (2004). De Soto’s career as a protégé of Friedrich Hayek, and his grooming and promotion by the Free Market Project at the University of Chicago, Mont Pelerin Society of neoliberal intellectuals, and the Atlas Foundation for Economic Research is well documented. See, e.g., Timothy Mitchell, *The Work of Economics: How a Discipline Makes its World*, in *XLVI:2. ARCHIVES EUROPEENNES DE SOCIOLOGIE* 297, 304–09 (2005) [hereinafter Mitchell, *The Work of Economics*]. At the urging of Hayek, the Atlas Foundation helped set up and fund de Soto’s Institute for Liberty and Democracy, one of the first neoliberal think tanks of the global South. While he grew up in Geneva, started his career at GATT, and was the head of the International Council of Copper Exporting Countries, his credibility came to depend on his identity as a neoliberal from the South. The Center for International Private Enterprise, set up by the Reagan Administration started funding de Soto’s Institute in the 1980s. De Soto became the principal political advisor for Peruvian president Alberto Fujimori in 1990 and presided over the drastic neoliberal restructuring of Peru’s economy that resulted in a deep recession whereby within two years wages fell by forty percent and the proportion of Peruvians living in poverty increased by fifty-four percent. See Kenneth M. Roberts, *Neoliberalism and the Transformation of Populism in Latin America: The Peruvian Case*, 48 *WORLD POLITICS* 82, 96 (1996). De Soto’s Institute started its pilot titling program in Lima. In 1996 the Peruvian government adopted a law on poverty formalization, and in 1998 the World Bank started funding the program. However, research funded by the World Bank showed that property titling had produced no increase in credit to the poor, the primary goal of the program. See Mitchell, *The Work of Economics*, *supra* note 402, at 308 (2005).

⁴⁰³ *DE SOTO, THE MYSTERY OF CAPITAL*, *supra* note 402, at 37. For a critical analysis of de Soto’s ideas, see Mitchell, *The Work of Economics*, *supra* note 402, at 299; Ann Varley, *Private or Public: Debating the Meaning of Tenure Legalization*, 26 *INT’L J. URB. & REGIONAL RES.* 449, 449–50 (2002).

⁴⁰⁴ *DE SOTO, THE OTHER PATH*, *supra* note 402, at 177, 182, 255–58.

the law into the informal sector, the informal and extra-legal sector is not separate and apart from the formal and legal one. It is produced by operations of the market and the state that have the “power to determine . . . what is informal and what is not, and to determine what forms of informality will thrive and which will disappear.”⁴⁰⁵

De Soto’s claim that the global South is “exactly where Europe, Japan, and the United States were a couple of hundred years ago,”⁴⁰⁶ utterly glosses over the colonial encounter and its impact. He ignores the “process of primitive accumulation that force[s] people into the cities,” and sidesteps questions about who owns capital now, and how it is deployed.⁴⁰⁷ He seeks to research “folk conventions” around property rights to be incorporated into the modern property regimes.⁴⁰⁸ Others also celebrate the multiplicity of informal legal norms that animate property relations in extra-legal urban housing.⁴⁰⁹ But, all informal normative orders are not born equal. While some values and desires are inherent to a community, others are fashioned as tactical responses to threatening forces. Many customary norms in the global South emerged after initial separation of native peoples from the commons and colonial inventions of tradition.⁴¹⁰ Many norms of the informal sector emerged in response to predatory capitalist markets. While signifying ingenuity and resistance of impacted groups, these norms presuppose hostile and overarching legal regimes that dispossess and marginalize them. We must remain mindful that colonial and postcolonial coexistence of modes of production is not a horizontal articulation of different modes. Imperatives of capitalism demarcate the conditions of possibility of non-capitalist modes. As a result, the informal sector remains “locked in an asymmetrical relation” of “subordination” to the accumulation economy.⁴¹¹ Recognition of porous legality and plurality of legal frames does not necessarily

⁴⁰⁵ Ananya Roy, *Urban Informality: Towards an Epistemology of Planning*, 71 J. AM. PLAN. ASS’N 147, 149 (2005). See also Ray Bromley, *Power, Property, and Poverty: Why De Soto’s “Mystery of Capital” Cannot Be Solved*, in URBAN INFORMALITY, *supra* note 176, at 271, 277–83.

⁴⁰⁶ DE SOTO, THE MYSTERY OF CAPITAL, *supra* note 402, at 181.

⁴⁰⁷ Moore, *supra* note 92, at 98–99.

⁴⁰⁸ DE SOTO, THE MYSTERY OF CAPITAL, *supra* note 402, at 179.

⁴⁰⁹ For a thoughtful analysis of the theoretical questions involved and examples of informal property norms, see Daniel Bonilla Maldonado, *Extralegal Property, Legal Monism, and Pluralism*, 40 U. MIAMI INTER-AM. L. REV. 213, 214 (2009).

⁴¹⁰ See generally Terence Ranger, *The Invention of Tradition in Colonial Africa*, in THE INVENTION OF TRADITION 260–62 (Eric Hobsbawm & Terence Ranger eds., 1992) (discussing how traditions in Africa developed).

⁴¹¹ SANYAL, *supra* note 77, at 220.

imply that resistive norms of the marginalized furnish adequate grounds for alleviation of their predicaments.

Evidence from the global South suggests that regularization of slum ownership without radical changes in larger public policies has marginal positive impact at best, and has more often aggravated the condition of slum-dwellers.⁴¹² In tune with de Soto, the neoliberal apothecary, the World Bank's 2003 report prescribes private property as the answer to the land question.⁴¹³ However, even a World Bank working paper acknowledged that "it would be dangerous to promote formal titling as the sole solution necessary to solve the problems of the urban poor [W]here the capital markets are underdeveloped and a spectrum of ownership structures exist, titling alone will not 'unlock' capital."⁴¹⁴ De Soto claimed that in "developing countries much of the teeming mass does not consist of oppressed legal proletarians but of oppressed extralegal small entrepreneurs."⁴¹⁵ Labeling those marooned in the informal sector "entrepreneurs," however, does not change their condition of life. Most slum-dwellers are renters of land "owned" by powerful criminal and political interests. For such owners, regularization is a bonanza, but for tenants this often amounts to ejection from any form of housing. Tax collectors, municipal utility charges, fracturing of intra-slum solidarities and slums within slums quickly became visible as a result of commodification and real estate submarket consolidation that issues from deregulation.⁴¹⁶

A recent study that interrogates de Soto's panacea of legalization of extra-legally occupied dwellings in the light of the experience of Bogota, finds claims about the dynamics of housing market informality and the benefits of formal title wanting.⁴¹⁷ The experience of other countries and cities confirms this

⁴¹² See Geoffrey Payne, unpublished report, quoted in ALAN GILBERT & ANN VARLEY, *LANDLORD AND TENANT: HOUSING THE POOR IN URBAN MEXICO* 4 (1991); Suzana Taschner, *Squatter Settlements and Slums in Brazil*, in *HOUSING THE URBAN POOR* 215, 216–19 (Brian Aldrich & Ravinder Sandhu eds., 1995).

⁴¹³ DE SOTO, *THE MYSTERY OF CAPITAL*, *supra* note 402, at 67; KLAUS DEININGER, *LAND POLICIES FOR GROWTH AND POVERTY REDUCTION* xvii–xxi (2003).

⁴¹⁴ Robert M. Buckley & Jerry. Kalarickal, *Shelter Strategies for the Urban Poor: Idiosyncratic and Successful, but Hardly Mysterious* 22–23 (World Bank Policy Research, Working Paper No. 3427, 2004), available at <http://papers.ssrn.com/sol3/Delivery.cfm/39291.pdf?abstractid=625305&mirid=1>.

⁴¹⁵ DE SOTO, *THE MYSTERY OF CAPITAL*, *supra* note 402, at 216.

⁴¹⁶ Donald A. Krueckeberg, *The Lessons of John Locke or Hernando de Soto: What If Your Dreams Come True?*, 15 *HOUS. POL'Y DEBATE* 1, 3–4 (2004).

⁴¹⁷ Carmen G. Gonzalez, *Squatters, Pirates, and Entrepreneurs: Is Informality the Solution to the Urban Housing Crisis?*, 40 *U. MIAMI INTER-AM. L. REV.* 239, 239–51, (2009).

conclusion.⁴¹⁸ A landmark study of slums points out that the de Sotoian “semi-utopian view of the informal sector, however, grows out of a nested set of epistemological fallacies.”⁴¹⁹

In tune with the recommendations of the legalist school, an adverse possession model has been attempted sporadically in some counties.⁴²⁰ In the 1990s, Peru instituted this mode through the Formalization Commission of Informal Property (COFOPRI).⁴²¹ The model suffers from various problems. Squatters must continue to bear the costs of acquiring and occupying land that they do not own for a long time, giving rise to violence and protection rackets.⁴²² This model also does not address the fact that squatter settlements are often located on marginal and ecologically vulnerable lands.⁴²³ Neither does it address provision of services and public health issues, or deter future squatting and continued cycles of remedial responses. It has marginal impact on wealth disparity between occupants of extra-legal settlements and legal property owners because titling, on average, increases value of untitled property by a mere

⁴¹⁸ See Brian R. Roberts, *From Marginality to Social Exclusion: From Laissez Faire to Pervasive Engagement*, 39 LATIN AM. RES. REV. 195, 195–97 (2004); PETER WARD, MEXICO CITY 193 (1998); Taschner, *supra* note 412, at 217–19; Jean-Louis Van Gelder, *Tales of Deviance and Control: On Space, Rules, and Law in Squatter Settlements*, 44 LAW & SOC'Y REV. 239, 262 (2010).

⁴¹⁹ DAVIS, PLANET OF SLUMS, *supra* note 39, at 179. These include the failure to distinguish between micro-accumulation and sub-subsistence, and between informal petty bourgeoisie and informal proletariat. *Id.* at 180. “[M]ost participants of the informal economy directly or indirectly work for someone else.” *Id.* There is growing inequality within the networks of exploitation of the informal sector. *Id.* at 181. Informality increases the exploitation and abuse of women and children. *Id.* Rather than generating new jobs, the informal sector fragments existing work and subdivides incomes. *Id.* Gambling, lotteries, pyramid schemes, and even quasi-magical and spiritual promises of wealth proliferate in the informal sector. *Id.* at 183. Reform of the informal sector has little impact on structural inequities of the economy and resulting poverty. *Id.* Increased competition within the informal sector rapidly depletes the collective social capital of the marginalized and dissolves self-help networks and political solidarities among the urban poor. *Id.*

⁴²⁰ Common law typically provides a statute of limitations “fixing the period of time beyond which the owner of land can no longer bring an action, or undertake self-help, for the recovery of his land from a person in possession of the land.” Winter King, *Illegal Settlements and the Impact of Titling Programs*, 44 HARVARD INT'L L. J. 433, 448 (2003) (quoting RICHARD R. POWELL, POWELL ON REAL PROPERTY § 91.01 (Michael Allen Woe ed., 2003)). For such a claim to be ripe, “the possession [must] be (1) actual, (2) open and notorious, (3) exclusive, (4) continuous, and (5) hostile under a claim of right.” *Id.* Most civil law jurisdictions have similar provisions; for example, *usucapiao* in Brazil and *prescripcion adquisitiva* in Peru. As opposed to common law, *usucapiao* or *prescripcion adquisitiva* can be used against vacant public land. *Id.* at 449. See also EDESIO FERNANDES, LAW AND URBAN CHANGE IN BRAZIL 118 (1995).

⁴²¹ King, *supra* note 420, at 449.

⁴²² *Id.* at 450.

⁴²³ *Id.* See also JORGE E. HARDOY & DAVID SATTERTHWAITE, SHELTER: NEED AND RESPONSE 232–33 (1981).

23.5%.⁴²⁴ Fearful that new owners will promptly sell their titles for profit, states often prohibit transfer of title and subdivisions for substantial periods of time or indefinitely.⁴²⁵ Finally, requirement of public and notorious possession encourages settlements in ecologically vulnerable areas.⁴²⁶

Another legalization model grants titles on a case-by-case basis. This was done, for example, in Peru as a once-for-all regularization under a 1961 law, and in India and Mexico at various stages.⁴²⁷ Ruling parties generally deploy this model close to elections to gain political support and votes.⁴²⁸ The ad-hoc nature of the model and its dependence upon whims of political authorities makes this an unstable and unpredictable mode of regularization. Furthermore, it does not address issues of squatting costs, lack of services, environmental concerns, and intra-slum divides. The dominant result has been that “[s]peculative rises in the price of land and the costs imposed on residents both directly and indirectly (in the form of service charges and property taxes) lead to the displacement of the original population. Rather than increasing security of tenure, regularization actually diminishes it.”⁴²⁹ Indeed, regularization is often misused by landowners to their profit by using squatters for their ends. The case of Lima is illustrative:

Very often landowners and private developers have manipulated the squatters into forcing portions of the land onto the real estate market, by obtaining from the authorities some urban infrastructure for the squatters, thus enhancing the land value and opening the way for profitable housing construction. In a second phase, the squatters are expelled from the land they have occupied and forced to start all over

⁴²⁴ Jean O. Lanjouw & Philip I. Levy, *Untitled: A Study of Formal and Informal Property Rights in Urban Ecuador*, 112 ECON. J. 986, 988 (2002). This data is based on a study of Guayaquil, Ecuador.

⁴²⁵ King, *supra* note 420, at 446.

⁴²⁶ See Lee J. Johnson et al., *A Model of Rural Conflict: Violence and Land Reform Policy in Brazil*, 4 ENV'T. & DEV. ECON. 135, 157–58 (1999); Arild Angelsen, *Playing Games in the Forest: State-Local Conflicts of Land Appropriation*, 77 LAND ECON. 285, 291 (2001).

⁴²⁷ See Alain Durand-Lasserve, *Law and Urban Change in Developing Countries: Trends and Issues*, in *ILLEGAL CITIES*, *supra* note 401, at 157, 234; Kenneth A. Manaster, *The Problem of Urban Squatters in Developing Countries: Peru*, 1968 WIS. L. REV. 23, 42–43 (1968). In the case of Mexico this also involved extra-legal subdivisions and development of *ejodi* lands—a form of collectively owned communal property developed after the Mexican revolution. The community could not alienate its *ejido* property, nor lose it through prescription. The land was set aside for agriculture with strict restrictions on development. Antonio Azuela de la Cueva, *Low Income Settlements and the Law in Mexico City*, 11 INT'L J. URB. & REGIONAL RES. 522, 530–31 (1987).

⁴²⁸ Antonio Azuela & Emilio Duhau, *Tenure Regularization, Private Property and Public Order in Mexico*, in *ILLEGAL CITIES*, *supra* note 401, at 157, 168; Azuela de la Cueva, *supra* note 427, at 526; Ann Varley, *The Political Uses of Illegality: Evidence from Urban Mexico*, in *ILLEGAL CITIES*, *supra* note 401, at 172–75.

⁴²⁹ Azuela & Duhau, *supra* note 428, at 163.

again on the frontier of a city which has expanded as a result of their efforts.⁴³⁰

A more productive model is the "state as developer" model,⁴³¹ with direct state planning, intervention, and investment in "sites and services" projects.⁴³² While this model was only marginally successful in Mexico and Peru,⁴³³ there is the relatively successful and "[o]verlooked [e]xperience in Iran."⁴³⁴ The revolutionary government of Iran inherited exploding urban growth, concentration of land ownership, and a choke-hold of landed interests over land and housing policies.⁴³⁵ A series of laws introduced between 1979 and 1992 aimed to regulate the urban land market and urban housing with the objective of "acquisition of excess urban land above a defined limit and its direct allocation for housing [through public channels], co-operatives and the private sector."⁴³⁶ Islamic law was deployed whereby the state could rightly acquire undeveloped land for distribution without compensation.⁴³⁷ The impact on direct land

⁴³⁰ MANUEL CASTELLS, *THE CITY AND THE GRASSROOTS: A CROSS-CULTURAL THEORY OF URBAN SOCIAL MOVEMENTS* 191 (1983).

⁴³¹ King, *supra* note 420, at 458. This study used seven criteria for comparison between the various models utilized to deal with the problem of extra-legal settlements, and it found that "state as developer" model comparatively most effective. The criteria are: prevention of violence, prevention of the use of unsuitable land, public services, entry into the formal sector, rule of law, discourage further extra-legal settlements, increase of wealth, and viable alternative to extra-legal settlements. *Id.* at 447. This study also finds the model, as practiced in Iran, to be the most attractive alternative. *Id.* at 460–61, 466.

⁴³² Peter M. Ward, *Land for Housing the Poor: How Can Planners Contribute?*, in *LAND FOR HOUSING THE POOR* 34, 39 (Shlomo Angel et al. eds., 1983). Ward defines "sites and services" as state "sponsorship of land subdivisions in which a basic service network was installed from the outset." *Id.*

⁴³³ See generally King, *supra* note 420, at 468; Ann Varley, *The Relationship Between Tenure Legalization and Housing Improvements: Evidence from Mexico City*, 18 DEV. & CHANGE 463 (1987).

⁴³⁴ Ramin Keivani et al., *Public Management of Urban Land, Enabling Markets and Low-income Housing Provision: The Overlooked Experience of Iran*, 45 URB. STUD. 1825, 1848 (2008). A comprehensive comparative study also finds the "state as developer" model, as practiced in Iran, the most attractive alternative. King, *supra* note 420, at 458–61. See also Mohammad Mehdi Azizi, *The Provision of Urban Infrastructure in Iran: An Empirical Evaluation*, 32 URB. STUD. 507, 520–21 (1995); Mohammad Mehdi Azizi, *The User-Pays System in the Provision of Urban Infrastructure: Effectiveness and Equity Criteria*, 37 URB. STUD. 1345, 1348–49 (2000); Mohammad Mehdi Azizi, *Evaluation of Urban Land Supply Policy in Iran*, 22 INT'L J. URB. & REGIONAL RES. 94, 103 (2002); Mohammad Mehdi Azizi, *Provision of Urban Public Facilities through the Development of Public Commercial Land in Iran*, 19 HABITAT INT'L 269, 276–77 (1995) [hereinafter Azizi, *Provision of Urban Public Facilities*].

⁴³⁵ Keivani et al., *supra* note 434, at 1832. In 1978, about eighty-five percent of land within Tehran belonged to the royal family and a few others. *Id.* Ninety percent of the eighty million square meters of land on the outskirts of Tehran belonged to ten percent of the landowners. *Id.* The land in Tehran increased by five hundred percent between 1971 and 1976. *Id.*

⁴³⁶ *Id.*

⁴³⁷ See, e.g., Mehrdad Valibeigi, *Banking and Credit Rationing Under the Islamic Republic of Iran*, 25 IRANIAN STUD. 51, 64 (1992).

provision and the land market was dramatic.⁴³⁸ Within a ten year period 85,557 hectares of urban land was acquired by the Urban Land Organization (ULO).⁴³⁹ Seventy-seven percent of the land was allocated for housing, and the rest for commercial, industrial and public service purposes.⁴⁴⁰ The land reserved for commercial projects was sold and thirty percent of the profit was given to municipalities to provide services, giving priority to green spaces, schools, clinics, and health centers.⁴⁴¹ Until 1985, the focus was on the public sector provision of infrastructure to new residential areas.⁴⁴² The program was expensive and was plagued with inefficiency. In 1985, a revised plan aimed at addressing the problem *ex ante*.⁴⁴³ The state acquired land close to cities, laid out infrastructure—roads, electricity, and sewer systems—and allotted housing plots to applicants on a user-pay financing basis. The fees for the development were paid by future occupants either before or after occupation.⁴⁴⁴ By selecting land for acquisition, urban migration was steered to mid-sized cities in addition to areas around large metropolises.⁴⁴⁵ Cost recoupment ratio was satisfactory, and where payments exceeded development costs, the surplus was plowed back into additional services like hospitals and schools.

In a ten year period land was transferred to 422,864 families through direct allocation (234,000), housing cooperative societies (131,000) and public and private developers (58,000).⁴⁴⁶ Between 1976 and 1986, the housing stock doubled, increasing from 2,377,586 to 4,685,666.⁴⁴⁷ Even the World Bank was constrained to acknowledge that provision of public land had “play[ed] an important role in attracting developers to invest in low-income housing and in rental accommodations,” and that this approach “should be explored as part of a housing policy concerned particularly with provision of low-income housing.”⁴⁴⁸ Analysts conclude that:

Iran substantially expanded the stock of low-income urban housing . . . by directly providing land . . . effectively by-passing urban land and housing markets and their shortcomings [through policies]

⁴³⁸ See Keivani et al., *supra* note 434, at 1833–40 (detailing the statistical data that evidences this impact).

⁴³⁹ *Id.* at 1833.

⁴⁴⁰ *Id.* at 1836.

⁴⁴¹ Azizi, *Provision of Urban Public Facilities*, *supra* note 434, at 273, 277.

⁴⁴² King, *supra* note 420, at 459.

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*

⁴⁴⁶ Keivani et al., *supra* note 434, at 1825, 1836.

⁴⁴⁷ Azizi, *Provision of Urban Public Facilities*, *supra* note 434, at 271.

⁴⁴⁸ Keivani et al., *supra* note 434, at 1841.

designed specifically to benefit a large section of low and middle-income sectors that would otherwise be excluded land and housing markets.⁴⁴⁹

As practiced in Iran, the state as developer and sites and services models address the extra-legal settlement problem *ex ante*, and avoid social and human costs of squatting.⁴⁵⁰ Planned selection of settlement sites helps preclude environmentally fragile and hazardous landscapes.⁴⁵¹ Provision of services before occupation avoids public health issues.⁴⁵² Land bearing legal title enters the market through the state, thus avoiding transaction costs of regularization.⁴⁵³ Concerns remain that user-pay financing may keep such housing out of the reach of the destitute.⁴⁵⁴ However, if the state were to subsidize the cost of occupation for the poor, this model can become an effective means of redistributing wealth and directing public resources to alleviate a critical social problem, i.e., housing for the urban poor. Sustained governmental foresight and a political commitment toward the urban poor are the key ingredients of this model.

The experience of Iran substantiates that housing for the urban poor is primarily a political problem, one that requires political will that issues from composition of the power-bloc. Note that the primary social base of political support for the revolutionary regime in Iran was provided by the urban poor and the lower middle classes.⁴⁵⁵ Due to the early legitimacy of the revolution, any backlash from other interest groups toward the policy to house the urban poor was not powerful enough to derail the program.⁴⁵⁶ As merchant groups gained ascendancy within the power-bloc in the 1990s Iran yielded to the pressures and temptations of neoliberal restructuring, and land and housing policy were increasingly influenced by supply-side policies.⁴⁵⁷

⁴⁴⁹ *Id.* at 1848. Similar public interventions in the housing market have produced desirable results in Sweden. See S. S. Duncan, *House Building, Profits and Social Efficiency in Sweden and Britain*, 1 HOUS. STUDIES 11, 13 (1986); James Barlow, *Controlling the Housing Land Market: Some Examples from Europe*, 307 URB. STUD. 1129, 1133 (1992). See also MICHAEL BALL, HOUSING POLICY AND ECONOMIC POWER: THE POLITICAL ECONOMY OF OWNER OCCUPATION 4 (1983).

⁴⁵⁰ Keivani et al., *supra* note 434, at 1848–49.

⁴⁵¹ *Id.* at 1827.

⁴⁵² King, *supra* note 420, at 450–51.

⁴⁵³ Sheila R. Foster, *Urban Informality as a Commons Dilemma*, 40 U. MIAMI INTER-AM. L. REV. 261, 278 (2008).

⁴⁵⁴ Keivani et al., *supra* note 434, at 1844.

⁴⁵⁵ See Charles Kurzman, *The Qum Protests and the Coming of the Iranian Revolution*, 27:3 SOC. SCI. HIST. 287, 299–300 (2003); NIKKI R. KEDDIE, MODERN IRAN: ROOTS AND RESULTS OF REVOLUTION 232 (2006).

⁴⁵⁶ Keivani et al., *supra* note 434, at 1849.

⁴⁵⁷ *Id.* at 1832. Policies shifted toward commercial allocation and full cost recovery, reduction of individual land allocation, and increased reliance on mass housing provision by private developers. *Id.*

The negative impact was quick. The housing situation in urban areas worsened progressively, going through several cycles of boom and bust.⁴⁵⁸ Housing prices escalated and, feeling political pressure, the government was recently forced to announce new measures of land allocation and subsidized housing in new housing projects.⁴⁵⁹ Even with its substantial success, the challenge remains whether the “state as developer” model can be replicated in the global South beyond Iran. All social formations of the global South are not commensurable; certainly not in regard to their power-blocs. What is needed is an overarching conceptual principle that can guide suitable remedial strategies in diverse settings.

B. Toward the Right to the City

Injecting extreme competition in the already impoverished and exploitative informal sector as prescribed by neoliberalism is to “simply grease the skids to a Hobbesian hell.”⁴⁶⁰ A promising path out of this Hobbesian hell may be the incipient right to the city. The concept, first introduced by Henry Lefebvre in the late 1960s,⁴⁶¹ and characterized as “one of the most precious yet most neglected of our human rights,”⁴⁶² is playing an influential role in urban politics in Latin America and international efforts to develop a “World Charter on the Right to the City.”⁴⁶³

Lefebvre saw the right to the city not as a natural or contractual right, but as one that issues from the entitlement to urban space “of the whole society and firstly of all those who *inhabit*.”⁴⁶⁴ Lefebvre’s point of departure is that while the scope of human rights has expanded as a result of social movements and political struggles, the rights of the citizen largely remain the same as stipulated in the Declaration of the Rights of Man and Citizens of 1789.⁴⁶⁵ Therefore, an expansion of the rights of

⁴⁵⁸ *Id.* at 1849.

⁴⁵⁹ *Id.*

⁴⁶⁰ DAVIS, PLANET OF SLUMS, *supra* note 39, at 185.

⁴⁶¹ See HENRI LEFEBVRE, WRITINGS ON CITIES 6 (Eleonore Kofman & Elibeth Lebas eds., 1996).

⁴⁶² Harvey, *The Right to the City*, *supra* note 60, at 23.

⁴⁶³ Edesio Fernandes, *Constructing the ‘Right to the City’ in Brazil*, 16:2 SOC. & LEGAL STUD. 201, 201–02 (2007). For detailed explication of Lefebvre’s construct of the right to the city, see Mark Purcell, *Excavating Lefebvre: The Right to the City and its Urban Politics of the Inhabitant*, 58 GEOJOURNAL 99, 100 (2002); DON MITCHELL, THE RIGHT TO THE CITY: SOCIAL JUSTICE AND THE FIGHT FOR PUBLIC SPACE 19 (2003); David Harvey, *The Right to the City: From Capital Surplus to Accumulation by Dispossession*, in ACCUMULATION BY DISPOSSESSION, *supra* note 180, at 17.

⁴⁶⁴ HENRI LEFEBVRE, WRITING ON CITIES, *supra* note 461, at 158.

⁴⁶⁵ The scope of international human rights has moved beyond civil and political rights to include economic and social rights and collective solidarity rights. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10,

the citizen is needed to address new relations between individuals and society in modern urban life. He linked reconfiguration of citizenship rights with democratic governance of cities, the primary zone of modern collective life.⁴⁶⁶ Rather than rejecting classic liberal political rights, Lefebvre aimed to build upon them to include the right to information, the right to culture, the right to identity in difference and in equality, the right of democratic control of the economy and politics, the right to public services, and above all, the right to the city.⁴⁶⁷ The right to the city consists of the right of all city-dwellers to fully enjoy urban life with all its services and advantages—the right to habitation, as well as playing a direct role in the management of cities. This calls for an emphasis on use value of all things urban in order to redress the social imbalances that issue from excessive emphasis on exchange value, the hallmark of the production of urban space under capitalism. Besides a claim upon adequate urban services and management, it includes full use of space by those who inhabit the city, including the right against segregation and expulsion from social life. Most importantly, it seeks an active participatory role in “all circuits of decision-making leading to the control and development of the organization of social space,” in order to resist the control of space by the state and capital.⁴⁶⁸

The right to the city can compliment constructs of political citizenship with a broader notion of “urban citizenship.”⁴⁶⁹ It signals legitimization of collective struggles to transform the “power relations that underlie the production of space, fundamentally shifting control away from capital and the state and toward urban inhabitants.”⁴⁷⁰ It not only expands the eligibilities of those traditionally considered members of the

1948); Int'l Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966); Int'l Covenant on Economic, Social, and Cultural Rights, GA Res. 2200, 21 UN GAOR Supp. No. 16, UN Doc. A/6316 (1966).

⁴⁶⁶ See LEFEBVRE, WRITINGS ON CITIES, *supra* note 461, at 140–41. This is in tune with his general theory about the mutually constitutive role of space and the social, he argues that “[g]roups, classes or fractions of classes cannot constitute themselves, or recognize one another as ‘subjects’ unless they generate (or produce) a space.” HENRY LEFEBVRE, THE PRODUCTION OF SPACE 416 (Donald Nicholson-Smith trans., 1991).

⁴⁶⁷ Liette Gilbert & Catherine Phillips, *Practices of Urban Environmental Citizenships: Rights to the City and Rights to Nature in Toronto*, 7 CITIZENSHIP STUD. 313, 317 (2003).

⁴⁶⁸ M. R. Martins, *The Theory of Social Space in the Work of Henry Lefebvre*, in URBAN POLITICAL ECONOMY AND SOCIAL THEORY 160, 183 (R. Forrest, J. Henderson & P. Williams, eds., 1982).

⁴⁶⁹ See Eugene McCann, *Space, Citizenship, and the Right to the City: A Brief Overview*, 58 GEOJOURNAL 77, 78 (2002); ENGIN ISIN, *Democracy, Citizenship and the City*, in DEMOCRACY, CITIZENSHIP AND THE GLOBAL CITY 1, 14 (2000).

⁴⁷⁰ Purcell, *supra* note 464, at 101–02.

political community, i.e., citizens, but could bring refugees, asylum seekers, and the undocumented within the zone of eligibilities and entitlements on account of their spatial presence.⁴⁷¹ Of course, we have to be mindful that “the number of rightless peoples also grows even as human rights norms and standards proliferate.”⁴⁷² We also have to note the critique of the classic discourse of rights for its formalism, questionable claims of universality, limited scope, and failures in implementation.⁴⁷³ Furthermore, framing all issues and strategies in the language of rights may itself impede their realization.⁴⁷⁴ The right to the city is amenable to readings that may restrict it and simply add to the portfolio of individual liberties best suited for the interests of the powerful political and economic elites. If it is to challenge hegemonic liberal political and neoliberal market constructs, this right has to be envisaged as more than an individual liberty to access urban resources, and seen instead as a collective right to reshape the process of urbanization. The right would be meaningful only if it entails democratic control over deployment of surplus, and management of urban development. It is imperative that counter-hegemonic social movements remain the drivers of this right which is essentially a solidarity right. Only then will it become an effective instrument to address the inequities of urban life. David Harvey has called for the adoption of the right to the city both as a slogan and a political project because

it focuses on the question of who commands the necessary connection between urbanization and surplus production and use. The democratization of that right, and the construction of a broad social movement to enforce its will is imperative if the dispossessed are to take back the control which they have for so long been denied, and if they are to institute new modes of urbanization.⁴⁷⁵

A productive model is furnished by the struggle for the right to the city as it has unfolded in Brazil.⁴⁷⁶ It rests on the principle

⁴⁷¹ See Chris Butler, *Sydney: Aspiration, Asylum and the Denial of the Right to the City*, in LAW AND THE CITY 205, 217 (Andreas Philippopoulos-Mihalopoulos ed., 2007).

⁴⁷² UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* viii (2002).

⁴⁷³ See TALAL ASAD, *FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY* 148, 151–58 (2003).

⁴⁷⁴ See, e.g., David Kennedy, *The International Human Rights Movement: Part of the Problem?* 15 HARV. HUM. RTS. J. 101, 101 (2002).

⁴⁷⁵ Harvey, *The Right to the City*, *supra* note 60, at 40.

⁴⁷⁶ See LEONARDO AVRITZER & BELO HORIZONTE, *URBAN REFORM, PARTICIPATION, AND THE RIGHT TO THE CITY IN BRAZIL* 3 (2007). For social movements in Brazil, see Maria Helena Moreira Alves, *Sao Paulo: The Political and Social Transformations Wrought by the New Labor Movement*, in WORLD CITIES BEYOND THE WEST: GLOBALIZATION, DEVELOPMENT AND INEQUALITY 299, 300–01 (Josef Gugler ed., 2004). See also Ulrich Brand and Marcus Wissen, *Neoliberal Globalization and the Internationalization of Protest: A European Perspective*, 37 ANTIPODE 9, 10 (2005); AMORY

that regulation of urban development is a public matter that cannot be reduced to either individual or state interests. The right is then seen as an ensemble of rights of all residents of the city—the right to housing, the right to urban planning, the right to environmental preservation, the right to capture surplus value, and the right to regularize informal settlements. A landmark in this context was the enactment of Federal Law No. 10.257, entitled “City Statute,” in Brazil on July 10, 2001.⁴⁷⁷ The statute aims to regulate the framework of urban policy introduced by the 1988 Federal Constitution that explicitly recognized a collective right to the city, affirmed a central role for local governments, and declared that representative democracy be reconciled with participatory political process.⁴⁷⁸ The City Statute provides the frame of interpretation of the constitutional principle of the social function of urban property and the city, lays down a regulatory framework for the construction and financing of urban development by municipalities, prescribes the design of democratic management of cities, and identifies legal modalities for comprehensive regularization of informal settlements in private and public urban areas.⁴⁷⁹

Another promising development is the proposal for a “World Charter for Human Rights in Cities,” first proposed at the VI Brazilian Conference on Human Rights in 2001.⁴⁸⁰ It was inspired generally by the international instruments on civil, political, social, cultural, and environmental rights, and in particular by the European Charter for Safeguarding of Human Rights in the City,⁴⁸¹ and by the Treaty for Democratic, Equitable and Sustainable Cities, Towns and Villages.⁴⁸² The World Social

STARR, NAMING THE ENEMY: ANTI-CORPORATE MOVEMENTS CONFRONT GLOBALIZATION 88 (2000).

⁴⁷⁷ THE POLIS INSTITUTE, THE STATUTE OF THE CITY: NEW TOOLS FOR ASSURING THE RIGHT TO THE CITY IN BRAZIL 11 (2002), available at http://polis.org.br/obras/arquivo_163.pdf.

⁴⁷⁸ *Id.* at 28. For details, see EDESIO FERNANDES, LAW AND URBAN CHANGE IN BRAZIL 68 (1995).

⁴⁷⁹ THE POLIS INSTITUTE, *supra* note 477, at 27.

⁴⁸⁰ See Enrique Ortiz, *Towards a World Charter for the Right to the City*, HABITAT INTERNATIONAL COALITION, <http://www.hic-net.org/articles.php?pid=2296> (last visited Sept. 2, 2010). For English text of the World Charter, see DISABLED PEOPLE'S INTERNATIONAL, <http://v1.dpi.org/lang-en/events/details.php?page=124> (last visited Sept. 2, 2010).

⁴⁸¹ Leticia Osorio, *The World Charter on the Right to the City*, in INTERNATIONAL PUBLIC DEBATES: URBAN POLICIES AND THE RIGHT TO THE CITY 107, 107 (2005). This was presented in Saint-Denis in May 2000, and has since been adopted by over four hundred European cities. *Id.*

⁴⁸² *Id.* This was approved in 1992 at the World Environment Summit in Rio de Janeiro. *Id.*

Forum, the umbrella “movement of movements,”⁴⁸³ has been the primary vehicle to elaborate the World Charter and to design strategies for its adoption by the United Nations.⁴⁸⁴ In 2005, UN-HABITAT and UNESCO launched a joint initiative entitled “Urban Policies and the Right to the City” aimed at social mobilization for the World Charter.⁴⁸⁵ The objective of the World Charter is to recognize and to establish legal mechanisms to enforce the right to the city in its social, economic, cultural, and political dimensions.⁴⁸⁶ It seeks to redesign international norms of economic, social, cultural, and environmental rights in a more clearly defined framework of the right to the city.⁴⁸⁷ If approved by the United Nations, the World Charter would confer legitimacy to social movements of the urban poor and slum-dwellers. It would help develop international legal norms for human rights to guide public, community, and private agents to ensure equitable and sustainable distribution and use of urban land and resources. In this role, it could serve as a useful instrument in the struggle of slum-dwellers and the urban poor.⁴⁸⁸ The right to the city can facilitate recovering the original meaning of the city—the body of citizens, and the community. We have to recognize, however, that general declarations of rights are important but not sufficient. Effective social movements and *locus standi* for individuals and social movements to enforce those rights through the courts are essential for the realization of such a right. Even the enforcement of this right at the level of the cities may remain largely symbolic if international and national economic and

⁴⁸³ See A MOVEMENT OF MOVEMENTS: IS ANOTHER WORLD REALLY POSSIBLE? x (Tom Mertes ed., 2004).

⁴⁸⁴ JEREMY BRECHER, *Global Self—Organization From Below*, ZNET (May 10, 2002), <http://www.zcommunications.org/global-self-organization-from-below-by-jeremy-brecher-1.pdf>. For a detailed exposition of the origins and career of the World Social Forum, see JACKIE SMITH ET. AL., GLOBAL DEMOCRACY AND THE WORLD SOCIAL FORUM 30, 131 (2008); Ahmed Allahwala & Roger Keil, *Introduction to a Debate on the World Social Forum*, 29 INT’L J. URB. & REG’L RES. 409, 409 (2005). See also GLOBALIZATION AND THE POLITICS OF RESISTANCE 9 (Barry K. Gills ed., 2001); WALDEN BELLO, DEGLOBALIZATION: IDEAS FOR A NEW WORLD ECONOMY 234 (2002); NEW SOCIAL MOVEMENTS IN THE SOUTH: EMPOWERING THE PEOPLE 234 (Ponna Wignaraja ed., 1993); JEREMY BRECHER, TIM COSTELLO & BRENDAN SMITH, GLOBALIZATION FROM BELOW: THE POWER OF SOLIDARITY 129 (2000).

⁴⁸⁵ *Urban Policies*, UNESCO, <http://www.unesco.org/new/en/social-and-human-sciences/themes/social-transformations/urban-development/urban-policies/> (last visited Sept. 2, 2010).

⁴⁸⁶ OSORIO, INTERNATIONAL PUBLIC DEBATES URBAN POLICIES AND THE RIGHT TO THE CITY, *supra* note 481, at 108.

⁴⁸⁷ *Id.*

⁴⁸⁸ See MANFRED B. STEGER, GLOBALISMS: THE GREAT IDEOLOGICAL STRUGGLE OF THE TWENTY-FIRST CENTURY 102 (2009).

urban policies remain imprisoned in the straitjacket of the global rule of capital, particularly its neoliberal reincarnation.

CONCLUSION

The persistence and growth of slums is perhaps the most eloquent testimony of the failures of the capitalist world order. Machinations of global capital, managerial designs of global management, national policies imprisoned in bankrupt development models, and the absence of comprehensive social movements remain hurdles in any road to dignity and full participation in political and socio-economic life for marginalized populations. It is a particular burden of scholars to devise strategies to reverse this state of affairs. Correct diagnosis remains indispensable to productive prescriptions. The primary intellectual challenge is to cut through the ideological fog that envelops the operations and effects of socio-economic orders procreated by the rule of unbridled capital accumulation. We have to contest and interrogate propositions that phenomena like slums, urban poverty, and human misery are accidental, incidental, or a mandate of the natural scheme of things. The connection between accelerating urban poverty in the global South and global accumulation of capital has to be clearly understood, along with the supporting roles of global managers, national policy makers, and local administrators. Legal scholars face a particular challenge to interrogate the role of law in this context. Our theories of citizenship, class, identity formation, and social change must take into account the rhythms of lived experiences of the urban poor. Only then can transformative prescriptive designs be imagined and implemented. To address this historic agenda, we will do well to learn from and build upon the daily struggles and resistive ingenuities of slum-dwellers. In an evocative scene of *Slumdog Millionaire*, while torturing the slum-dweller protagonist, a police officer inquires: “What can a slumdog possibly know?” The protagonist responds: “The answers!”⁴⁸⁹

⁴⁸⁹ *Slumdog Millionaire*, *supra* note 13.

Rethinking Damages for Lost Earning Capacity in a Professional Sports Career: How to Translate Today's Athletic Potential into Tomorrow's Dollars

*Richard T. Karcher**

INTRODUCTION

There are many who “want to be like Mike,” but very few people possess the skills or potential to *actually be* like Mike. So how do we know when somebody actually possesses the extraordinary athletic skill or potential to be able to earn money in a professional sports career? We know that those who are currently earning money possess such skill and—assuming they stay healthy—will probably continue to do so. But how do we know when somebody has the potential to one day become a professional athlete?

Suppose for a moment that the real life Michael Jordan was injured by the tortious conduct of a third party when he was a senior in high school, leaving him unable to play basketball for the rest of his life. While the entire world would have missed the opportunity to witness arguably the best basketball player of all time, Jordan himself would have missed the opportunity to earn millions in employment compensation and endorsement income as a professional athlete.

Now suppose that the injury did not prevent him from playing basketball for the rest of his life, but kept him from playing during his freshman year at the University of North Carolina. Although he may not have lost the chance at a professional career, that chance may have been diminished. The challenge would be to determine how much that chance has been diminished and to quantify that diminished chance in lost future earnings. Having the luxury of hindsight today, it is easy to say that when Jordan was a senior in high school and a freshman in college he had the potential of becoming the best basketball

* Professor of Law and Director of the Center for Law and Sports, Florida Coastal School of Law.

player of all time. But having to assess his potential at the time of the injury prospectively would provide much less certainty.

Though claims involving lost earning capacity damages are open to the critique of being based on mere “speculation and conjecture,” there is a level of speculation in any estimate of damages due to the uncertain nature of the future.¹ In lost earning capacity damages, as in awards for pain and suffering, the law provides recovery where damages can be proved with reasonable certainty.² Courts addressing these issues in the context of athlete-plaintiffs, for the most part, have failed to delineate any standards for distinguishing those particular plaintiffs who possess the requisite level of athletic skill and potential to be allowed recovery for lost future earnings in a professional sports career. Implicit in their holdings is what this Article refers to as a “two-step burden of proof.”³ Step one entails proving that the defendant’s conduct did in fact cause the plaintiff’s chance to earn money in the future as an athlete to be lost or diminished (the factual cause link).⁴ Step two entails proving the amount of the lost or diminished chance with reasonable certainty.⁵

This Article provides a theoretical and practical perspective on damages for lost earning capacity in a professional sports career. Part I addresses how an athlete’s earning potential can be assessed and the various factors that go into the assessment. In this context, the Article proposes that earning potential be considered in terms of a range that defines low, middle, and high categories of athletic potential. Part II discusses the athlete’s burden of proof in the form of a two-step process. This part addresses the complexities of the causation analysis and explains how the loss-of-chance doctrine and the traditional but-for test can be applied to establish the factual cause link. This part also explains how evidence and expert witness testimony can be used to meet both burdens of proof and satisfy the admissibility standard under Federal Rule of Evidence 702. Part III discusses the methodology, data compilations, and calculations the author used as an expert witness to estimate Andy Oliver’s future lost earnings in his lawsuit against the NCAA.⁶ This part highlights

¹ See *Gorniak v. Nat’l R.R. Passenger Corp.*, 889 F.2d 481, 484 (3rd Cir. 1989).

² *Id.*

³ See *infra* Part II.

⁴ See *infra* Part II.A.

⁵ See *infra* Part II.B.

⁶ One week before the scheduled trial, Oliver settled the issue of damages for \$750,000. This Article does not address the merits of Oliver’s underlying claims. The judgment granting declaratory and permanent injunctive relief is reported at *Oliver v. Nat’l Collegiate Athletic Ass’n*, 155 Ohio Misc. 2d 17, 2009-Ohio-6587, 920 N.E.2d 203, 206

the complexities involved in proving lost earning capacity damages of top draft prospect amateur athletes, but nevertheless offers a useful roadmap for similar cases.

I. ASSESSING EARNING POTENTIAL

A. What is Lost Earning Capacity?

Victims of tortious conduct are generally entitled to recover damages for past or prospective loss or impairment of earning capacity.⁷ This recovery often arises in connection with personal injury caused by intentional torts, negligence, and strict liability.⁸ However, recovery is not limited to personal injury actions involving physical harm that prevents the plaintiff from working as he or she would like. Recovery may also be had where the defendant's conduct does not result in physical injury, but nevertheless impairs the plaintiff's ability to earn money. This is evident in cases involving defamation, tortious interference with an existing or prospective business or business transaction, employment discrimination, and wrongful termination or discharge from employment.⁹

Lost earning capacity damages compensate the plaintiff for an impairment of the ability to earn money in the future that would not exist but for the defendant's wrongful conduct.¹⁰ The standard measure of damages for lost earning capacity can therefore be stated in general terms as the difference between what the plaintiff was capable of earning before the defendant's conduct and what the plaintiff is capable of earning thereafter.¹¹ It is the impairment or diminution in the ability to earn money in the future that is being measured today, not the difference in actual earnings before and after the impairment causing event.¹²

(2009). Numerous law review articles have been written about the *Oliver* case and its implications. See, e.g., T. Matthew Lockhart, *Oliver v. NCAA: Throwing a Contractual Curveball at the NCAA's "Veil of Amateurism,"* 35 U. DAYTON L. REV. 175 (2010); Brandon D. Morgan, Comment, *Oliver v. NCAA: NCAA's No Agent Rule Called Out, but Remains Safe,* 17 SPORTS LAW. J. 303 (2010); Virginia A. Fitt, Note, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism,* 59 DUKE L.J. 555 (2009); James Halt, Comment, *Andy Oliver Strikes Out the NCAA's "No-Agent" Rule for College Baseball,* 19 J. LEGAL ASPECTS OF SPORT 185 (2009).

⁷ RESTATEMENT (SECOND) OF TORTS § 924(b) (1979).

⁸ JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES § 6.1 (Gerald W. Boston ed., 3d ed. 1991).

⁹ See, e.g., *Morales v. Cadena*, 825 F.2d 1095, 1100 (7th Cir. 1987) (affirming loss of earning capacity award in employment discrimination case based upon jury's consideration of plaintiff's emotional turmoil, depression, and career disruption).

¹⁰ *Gorniak v. Nat'l R.R. Passenger Corp.*, 889 F.2d 481, 484 (3rd Cir. 1989).

¹¹ JOHN A. TARANTINO & PATRICIA K. ROCHA, ESTIMATING & PROVING PERSONAL INJURY DAMAGES §§ 320-21 (Scott Ward ed., James Publishing, Inc. 1996).

¹² "Evidence of earnings before and after the injury would be relevant" but "[p]re-injury earnings may understate the actual loss. If future wage increases are to be

Therefore, although evidence of actual earnings is relevant and may assist the fact finder in establishing the plaintiff's earning ability, recovery for lost earning capacity damages is not jeopardized if the plaintiff was not gainfully employed at the time, or even if the plaintiff had no prior history of wages earned.¹³ Moreover, lost earning capacity is not necessarily limited in scope to the power to earn money in the particular line of work engaged in by the plaintiff at the time of the impairment-causing event. Indeed, the fact-finder may determine that the plaintiff was capable of earning *more* than she was actually earning at the time of the wrongful conduct and may consider what the plaintiff was capable of earning in *any* particular line of work for which the plaintiff was suited prior to the impairment-causing event.

If the plaintiff has special knowledge, ability, or skill, the impairment in earning power is much greater than that of a person of ordinary knowledge, ability, or skill. In situations in which the plaintiff is engaged in or pursuing a professional career that requires extensive education or training, establishing lost earning capacity damages becomes more problematic in that the value of a person's earnings in professional pursuits varies greatly depending upon the extent of an individual's exertions. This certainly applies in the context of professional athletes. As a result, it is difficult to accurately assess lost earning capacity based entirely upon what members of the plaintiff's profession generally are capable of earning. Relevant and meaningful factors to consider include the quality and level of the plaintiff's performance in the education or training already received and the initiative or motivation displayed by the plaintiff in pursuing the career goal to be realized through the education or training.

Lost earning capacity damages should be viewed as compensating the plaintiff today in an amount that will not be determined with absolute certainty until some point in the future. Without a crystal ball, some level of uncertainty is inherent in *any* determination of lost earning capacity, including

expected, either because of general increase in industrial productivity or because of the plaintiff's reasonably expected advancement, those increases have also been lost and are thus recoverable as damages." DAN B. DOBBS, *THE LAW OF TORTS* 1048 (2001).

¹³ See, e.g., *O'Shea v. Riverway Towing Co.*, 677 F.2d 1194, 1198 (7th Cir. 1982) ("If a man who had never worked in his life graduated from law school, began working at a law firm at an annual salary of \$35,000, and was killed the second day on the job, his lack of a past wage history would be irrelevant to computing his lost future wages."). But see VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 209 (4th ed. 2009) ("As a practical matter, an actual work history helps a lot in determining the amount a plaintiff would have been capable of earning but for an injury.").

that of an athlete.¹⁴ In this respect, lost earning capacity damages are no different than compensatory damages for future pain and suffering in personal injury cases. In such cases, the fact finder determines an amount today that attempts to accurately reflect *unknown* future harm (i.e., the level of pain and suffering the plaintiff will incur), but which is based upon facts and circumstances *known* today (i.e., the plaintiff's age, the extent of the injury, the medical treatments incurred, etc.).¹⁵ Uncertainty in and of itself should not be a concern, provided there is a sufficient level of confidence in the precise method being employed to accurately assess the loss.

An accurate assessment of lost earning capacity damages must consider the plaintiff's wage-earning *potential*, which is based upon existing facts and circumstances, and only a part of which is evidence of actual earnings.¹⁶ For example, a high school or college student with no history of wages earned may have significant potential today to earn substantial wages in the future based upon certain accomplishments, level of education, and other factors. Conversely, a middle-aged adult with a well-established wage history may have already reached his or her highest earning potential. Thus, in order to accurately assess the plaintiff's lost earning capacity *today*, the fact finder must determine the plaintiff's wage-earning potential, taking into account wage history and other existing facts and circumstances.

Another layer of complexity is added to the assessment of earning potential where the plaintiff possesses a rare or special native talent, such as an artist, musician, actor, or athlete. While there exists a certain level of uncertainty regarding the earning potential of a person who is engaged in academic study leading to a career in a typical occupation or profession, there is a much greater degree of uncertainty as to the earning potential of one pursuing an artistic or athletic career in which future success depends not only on training but also primarily on native

¹⁴ "The challenge of proving a professional athlete's lost career earnings is not unlike that faced by every plaintiff in every tort suit." Roger I. Abrams, *Calculating the Expected Earnings of a Major League Pitcher*, 8 VA. SPORTS & ENT. L.J. 193, 194 (2009).

¹⁵ "As a broad rule, any competent evidence is admissible which tends to prove the plaintiff's earning capacity, such as evidence of the nature of the injury which has interfered with that earning capacity, the duration of the injury, and the value of the earning capacity before and after the injury." STEIN, *supra* note 8, at § 6:6.

¹⁶ *Id.* ("The admission of evidence to prove the plaintiff's future earning capacity may include evidence that would fairly indicate present earning capacity and the probability of its increase or decrease in the future, including evidence of age, intelligence, habits, health, occupation, life expectancy, ability, probable increase in skill, and rates of wages paid generally to those following the same vocation, particularly where the injured person has fitted himself or herself for, but has not yet entered, the work of his or her choice.").

talent.¹⁷ In recognizing a distinction between persons who largely exploit native talents and those who exploit intensive training, the court in *Grayson v. Irvmar Realty Corp.*¹⁸ reduced a jury award of damages for lost earning capacity to a young woman studying music toward the development of a career as an opera singer:

It is notable that those who exploit rare and special talents may achieve exceedingly high financial rewards, but that the probability of selection for the great rewards is relatively low. On the other hand, those who, provided they have the intelligence and opportunities, train for the more skilled occupations and professions, not so heavily dependent upon unusual native gifts, will more likely achieve their objectives.

The would-be operatic singer, or the would-be violin virtuoso, or the would-be actor, are not assured of achieving their objectives merely because they have some gifts and complete the customary periods of training. Their future is a highly speculative one, namely, whether they will ever receive recognition or the financial perquisites that result from such recognition. Nevertheless, the opportunities exist and those opportunities have an economic value which can be assessed, although, obviously, without any precision. But a jury may not assume that a young student of the opera who has certain gifts will earn the income of an operatic singer, even in the median group.¹⁹

Although the *Grayson* court allowed recovery for lost earning capacity damages, the court significantly reduced the jury's award because "except from her teachers, she had not achieved any spectacular or extraordinary recognition for her talents."²⁰

B. The Athlete's Earning Potential Range (EPR)

Spectacular or extraordinary recognition for talent goes hand-in-hand with earning potential. With regard to athletically talented individuals with professional prospects and aspirations, there exists a wide earning potential range, which this article will refer to as the "EPR." Lowest on the EPR are unknown high school athletes who have never earned any compensation for their athletic ability. Highest on the EPR are well-known, high-profile professional athletes with an established record of employment earnings or endorsement income. Between these

¹⁷ See *Grayson v. Irvmar Realty Corp.*, 184 N.Y.S.2d 33, 35 (N.Y. App. Div. 1959) ("[I]n the case of persons of rare and special talents many are called but few are chosen. For those who are not chosen, the probabilities of exploiting their talents financially are minimal or totally negative. In this class would fall the musical artist, the professional athlete, and the actor.").

¹⁸ *Id.*

¹⁹ *Id.* at 36–37.

²⁰ *Id.* at 37.

opposite ends of the EPR, there are numerous categories of athletes who have achieved varying levels of recognition for their athletic skill and possess varying levels of wage-earning potential.

For example, toward the lower end of the EPR, there are amateur athletes, known as “prospects,” who have the potential to become professional athletes. However, among these prospects, there are high-profile college football and basketball players who have achieved spectacular recognition for their athletic skills at the most competitive collegiate programs. These prospects are likely to reach the professional ranks much sooner than some younger, unknown high-school prospects who may need more time to mature and develop their skills against better competition in college or the minor-league farm system. Moreover, players drafted in early rounds have achieved greater recognition and are generally considered to be better prospects than players drafted in later rounds. Thus, a first-round draft pick typically has greater earning potential—and is therefore higher on the EPR—than a fifth-round draft pick. Likewise, a high school athlete who will become eligible to be drafted at a future date and is currently “projectable” as a first round draft pick is viewed as a better prospect than a college athlete projectable as a fifth round pick, and thus has greater earning potential. The better the prospect, the greater the earning potential, and the higher the athlete is on the EPR.

Toward the higher end of the EPR are the star veteran players at the top of the wage scale in their respective sports, as well as the “journeyman” veteran players making the league minimum salary. Likewise, Olympic athletes such as Michael Phelps and Shaun White, who have achieved celebrity status and have a history of endorsement earnings, would be high on the EPR.²¹ The high end of the EPR also includes young professional players who have performed well early in their careers and who, though currently making the league minimum salary, will likely earn a substantial salary that more accurately reflects their market value in the coming years. Moreover, there are professional baseball players at various levels in the minor-league farm system, with players in the Triple-A leagues generally considered to be closer to advancing to the major league level than players in the Double-A, Single-A and Rookie leagues. However, this does not necessarily mean that all players in

²¹ “[Shaun] White reportedly earns more than \$7.5 million a year in endorsements and prize money.” Tripp Mickle, *Whiteout: Action Sports Star Leaves Longtime Agency IMG and Signs with CAA*, SPORTS BUS. J., May 31–June 6, 2010, at 1, 28.

Triple-A have greater earning potential than those in the leagues beneath them, because there are players in the Rookie and Single-A leagues who are considered to be better prospects than many players at the higher levels, and who therefore have greater earning potential.

In *Nat'l Collegiate Athletic Ass'n v. Yeo*,²² Yeo, an amateur Olympic swimmer, claimed that a university's enforcement of the NCAA's ineligibility ruling constituted an unconstitutional deprivation of protected liberty and property interests. The trial court recognized the plaintiff's earning potential based upon the following uncontradicted evidence produced at trial:

(1) Yeo had already established a world-class reputation and her 'good name, outstanding reputation, high standing in her community, her unblemished integrity and honor are particularly important in the Republic of Singapore and in light of her cultural background'; (2) if NCAA rules did not prohibit athletes from accepting professional compensation while competing in NCAA sanctioned events, Yeo 'would be immediately eligible to capitalize on her public persona by entering into lucrative endorsement and marketing opportunities as well as being eligible for prize winnings due to her performance as a member of Singapore's national team'; and (3) 'UT-Austin represented to [Yeo] at the time she transferred from [Cal-Berkeley] to become a student-athlete at UT-Austin that UT Austin would not jeopardize or compromise [Yeo's] eligibility to compete on behalf of UT-Austin in NCAA athletic competition.' . . . Yeo had competed in two Olympic games before attending college and had been named sportswoman of the year and Olympic flag-bearer for her native country, Singapore. At both the temporary restraining order and permanent injunction hearings, Yeo represented that it was this continuing interest in her athletic and professional reputation that UT-Austin had damaged by its actions.²³

Although the Supreme Court of Texas rejected the lower court's determination that Yeo's claimed interest in future financial opportunities was entitled to due process protection, the trial court's discussion regarding Yeo's earning potential would be relevant to an assessment of lost earning capacity damages of an amateur athlete who successfully establishes a legal claim other than a constitutionally-based claim.²⁴ It appears the trial

²² 171 S.W.3d 863 (Tex. 2005).

²³ *Yeo*, 171 S.W.3d at 868.

²⁴ "Yeo's claimed interest in future financial opportunities is too speculative for due process protection. There must be an actual legal entitlement." *Id.* at 870 (citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). *But see* *Hall v. University of Minnesota*, 530 F. Supp. 104 (D.C. Minn. 1982) (holding that a university student and varsity basketball player, whose applications for admission into a degree program had been denied, and whose athletic eligibility had been lost as a result, was entitled to a preliminary injunction because otherwise his overall aspirations regarding a career in

court viewed Yeo fairly high on the EPR even though she was an amateur and had never earned any compensation as a professional swimmer.

A variety of factors come into play in the assessment of extraordinary athletic skill and thereby impact an athlete's future earning potential. On a macro level, an athlete's ability to earn money is based upon his or her value to an employer (i.e., a team or sporting event)²⁵ and value as an endorser of products and services.²⁶ This value is generally based upon the athlete's performance, reputation, and marketability.²⁷ With regard to a professional boxer's earning power, one court essentially found that earnings fall directly on the heels of winning:

As in most money-making callings, a boxer's earning capacity is related to his reputation and his reputation is dependent upon his success. In the sports world the interested public follows the detailed records of individual athletes and teams with avidity. It flocks to watch the athletes with winning records; and the earnings of those athletes are related directly to the number of paying spectators they can attract. Spiritually, a professional boxer may emerge greater in defeat than in victory. Materially, however, his prestige and the purses he can command are lowered. Any action which affects his record so prejudicially of necessity impairs economic rights and interests sufficiently to give the petitioner legal standing to sue.²⁸

An athlete's *potential* to earn money in the future is based upon an assessment of their *future* capability to achieve success as an athlete. This is determined by thoroughly evaluating evidence of past athletic performance, recognition and training already received, and the amount of training and opportunities the athlete is likely to receive and realize in the future.²⁹

professional basketball would be substantially threatened, that harm outweighed any harm that granting the injunction would inflict on other parties, and student demonstrated a substantial probability of success on his due process claim).

²⁵ See Erik Matuszewski, *LeBron James's Departure Would Cut Value of NBA Cavaliers by \$250 Million*, BLOOMBERG (June 29, 2010, 8:23 AM), <http://www.bloomberg.com/news/2010-06-29/lebron-james-s-departure-may-cut-value-of-nba-s-cavaliers-by-250-million.html> (discussing the value of LeBron James to the Cleveland Cavaliers).

²⁶ See generally *Doe v. McFarlane*, 207 S.W.3d 52 (Mo. Ct. App. 2006).

²⁷ *Id.* at 63 (citing, in a right of publicity case, expert witness testimony that "using athletes and entertainers as endorsers or spokespeople can increase brand awareness and thereby provide a company a commercial advantage over its competitors, and that it is 'vitally important' that the celebrities not have any negative connotation associated with them so as not to offend any potential consumer").

²⁸ *Tilelli v. Christenberry*, 120 N.Y.S.2d 697, 699 (N.Y. Sup. Ct. 1953) (holding that evidence was not sufficient to sustain Athletic Commissioners' conclusion that judge had failed to follow standards set forth in boxing rules in a petition to annul action of Commissioners, which action had changed the vote cast by a judge in a boxing match).

²⁹ *Grayson*, 184 N.Y.S.2d at 37 ("In determining, therefore, the amount to be recovered, the jury may consider the gifts attributed to plaintiff; the training she has

Further, an athlete's earning potential must take into account the athlete's present physical attributes and skills, as well as an assessment of what those attributes and skills will look like in the future.

In their assessment of future athletic ability and performance, professional scouts look at an athlete's individualized native talents, referred to as "tangibles," as well as makeup³⁰ and character, referred to as "intangibles."³¹ Tangibles consist of things like an athlete's physical size, strength, power, speed, and athleticism,³² as well as possession of sport-specific skills (or "tools") such as ability to throw, catch, hit, shoot, field, and so on.³³ Intangibles are made up of attitude, personality, leadership skills, motivation and drive, priorities, philosophies, intelligence, temperament, ability to handle pressure situations both on and off the field, performance in important games, prior incidents of team or league discipline for misconduct, criminal records, academic performance, performance on psychological exams, and virtually anything else that may positively or negatively impact an athlete's image.³⁴

received; the training she is likely to receive; the opportunities and the recognition she already has had; the opportunities she is likely to have in the future; the fact that even though the opportunities may be many, that the full realization of those opportunities is limited to the very few; the fact that there are many other risks and contingencies, other than accidents, which may divert a would-be vocal artist from her career; and, finally, that it is assessing directly not so much future earning capacity as the opportunities for a practical chance at such future earning capacity.").

³⁰ One commenter described makeup as

a mix of discipline, attitude, confidence, seriousness and stage presence that allows players under the spotlight in a technically difficult sport like baseball to adjust to tougher and tougher competition. Makeup leads the chosen to the top. Its absence chops down the insanely talented athletes they're up against. Scouts say signing players who have it is a smart way to play the odds.

John W. Miller, *Baryshnikov in Baseball Cleats*, WALL ST. J. (Aug. 19, 2009, 6:14 AM), http://online.wsj.com/article_email/SB10001424052970204683204574356811579058466-1MyQjAxMDA5MDEwODExNDgyWj.html (discussing an \$800,000 signing bonus paid by the Minnesota Twins to a sixteen year-old from Berlin whose parents are former Berlin ballet stars).

³¹ See *infra* note 34 (citing references).

³² See Mike Courter, *NFL Draft-Hot Prospects for 2009*, THE HUDDLE (Apr. 23, 2008), http://www.thehuddle.com/x8/nfl_draft/mc-hot-2009-prospects.php (noting that Demetrius Byrd "will be readily mentioned as a first round projection for the 2009 Draft by combining classic height, weight and speed tangibles . . .").

³³ See Ray Glier, *Scouts Scour for Set of Five Tools in Preparation for Draft*, USA TODAY (June 2, 2010, 4:25 PM), http://www.usatoday.com/sports/baseball/2010-06-02-mlb-draft-five-tool-player_N.htm (noting that a "five-tool player" in baseball means "a hitter for average and power who has a strong arm, is good with the glove and runs to first base in at least 4.3 seconds out of the right-handed batter's box").

³⁴ Greg A. Bedard, *2010 NFL draft: Quarterback prospects at a glance*, MILWAUKEE WIS. J. SENTINEL (Apr. 14, 2010), <http://www.jsonline.com/sports/packers/90746109.html> ("[Tim Tebow] [m]ay have the best intangibles—leadership, charisma, character, intelligence, desire—in the entire draft."); Blake Hofstad, *ESPN Scouts Inc. Intangibles: What?*, COLLEGE FOOTBALL SATURDAY (Apr. 9, 2010),

According to Terry Bradway, the New York Jets' senior personnel director, character is divided into personal character and football character—"Football character is in terms of work ethic and spending time, preparation, study, doing all those extra things that you want to do to become a player Then from the personal standpoint, it's the off-the-field stuff."³⁵ Gary Hughes, special assistant to the general manager of the Chicago Cubs, said:

A player's mental makeup can influence his physical skills. Instincts is a tremendous tool, to say that instincts is not a tool is foolish Makeup is a tool, too, but it is tougher to recognize. You see a guy get upset at a play that goes bad, and you might say, 'I love that. The guy is [a] fiery player.' But the other scout might say, 'He's a hothead.'³⁶

An athlete's tangibles tend to entail more of an objective assessment influenced by performance statistics, radar guns, and stop watches.³⁷ An athlete's intangibles are more subjectively determined, but they certainly have an impact upon professional scouts' evaluations of the athlete, including where the athlete is ultimately selected in the annual amateur draft.³⁸

<http://www.collegefootballsaturday.com/?p=1217> ("Perhaps the most overlooked trait when evaluating NFL Draft prospects are leadership abilities on and off the field. These don't have to do with position, size, speed, or anything else. It's the difference between the good prospects and great ones."). For a discussion of the types of factors that go into a draft prospect's intangibles, see Joe LaPointe, *Where Athletes Run, Jump and Mull Life as a Cat*, N.Y. TIMES, Feb. 23, 2009, at D3, available at http://www.nytimes.com/2009/02/23/sports/football/23combine.html?_r=4&ref=sports ("Along with medical tests and drills to measure physical skills, the N.F.L. scouting combine allows 32 teams to talk to top prospects for 15 minutes each. It is like speed dating for draft choices, and the questions are not always about football."). *ESPN Magazine* addressed the impact of intangibles regarding prospects for the 2010 NFL draft:

[S]couting is often less about projecting and more about digging up dirt. "It's not just an evaluation job," says Falcons GM Thomas Dimitroff. "It's a research job." Every year, there are prospects who'd benefit from a little extra intel. This year, Oklahoma tight end Jermaine Gresham needs GMs to know he's not a loose cannon; USC defensive end Everson Griffen is battling rumors he's inconsistent; and Michigan cornerback Donovan Warren must reverse a rep for blowing assignments.

Each prospect is assigned a magnetic card, which details his height, weight, Wonderlic score, overall grade and position within the team's system. The card also features stickers that designate intangibles, coded differently by each team. The Patriots, for example, use lowercase and capital letters: "C" stands for circumstance—if, say, a receiver's stats are down because he played with a lousy quarterback; "c" represents a character concern.

Seth Wickersham, *You Have Terrible Taste in Prospects*, ESPN MAG., Apr. 19, 2010, at 79, 80, 82, available at <http://sports.espn.go.com/nfl/draft10/news/story?id=5115152>.

³⁵ William Rhoden, *Shifting Standards for Character*, N.Y. TIMES, Apr. 17, 2010, at D2, available at <http://www.nytimes.com/2010/04/17/sports/football/17rhoden.html>.

³⁶ Glier, *supra* note 33.

³⁷ See Courter, *supra* note 32.

³⁸ See, e.g., *NFL Teams Focus on Character as Much as Talent for '10 Draft*, SPORTS BUS. DAILY (Apr. 23, 2010), <http://www.sportsbusinessdaily.com/article/138790>. See also Rhoden, *supra* note 35 ("A player who is perceived as having good character will move up

In summary, lost earning capacity damages in cases involving a plaintiff who possesses extraordinary athletic skill are based upon an assessment of the plaintiff's earning potential as an athlete that exists *today*. The next section will discuss how the athlete-plaintiff can prove (1) a causal connection between the defendant's actions and a lost or reduced chance or opportunity to earn money in the future as an athlete, and (2) the amount of that loss to a reasonable degree of certainty. The EPR can be helpful to plaintiff and defense counsel, as well as their expert witnesses, in addressing both burdens of proof.

II. THE ATHLETE'S TWO-STEP BURDEN OF PROOF

Compensatory damages for harm to earning capacity are not recoverable without proof of pecuniary loss.³⁹ A prerequisite to recovering for lost earnings or loss of earning capacity is that the plaintiff must offer evidence establishing "that a significant amount of earnings has been lost, or that his earning capacity has been significantly harmed."⁴⁰ The plaintiff must establish "by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit."⁴¹ However,

the draft ladder, and a player perceived as a character risk will move down and lose millions of dollars."); Nate Davis, *NFL Draft's Dust Settled, a Look at Some of the Event's Winners and Losers*, USA TODAY (Apr. 25, 2010, 1:46 AM), <http://content.usatoday.com/communities/thehuddle/post/2010/04/nfl-draft-dust-settled-a-look-at-some-of-the-events-winners-and-losers/1> ("[Tim Tebow's] unquestioned intangibles and determination to improve his throwing motion did, in fact, ultimately earn him a first-round contract."); Charles Robinson, *Fortunes of Tebow, Clausen Unlike Projections*, YAHOO! SPORTS (Apr. 24, 2010, 7:49 PM), http://sports.yahoo.com/nfl/news;_ylt=AoRw0pqB.u8oXqJdurBS6Mw5nYcB?slug=cr-draftwinnersandlosers042410 (noting how concerns about Jimmy Clausen's leadership abilities and attitude "left him crashing down draft boards"); Alex Marvez, *Round 1 Shows Character Counts*, FOXSPORTS.COM (Apr. 23, 10:45 AM), <http://msn.foxsports.com/nfl/story/Tim-Tebow-selection-shows-NFL-places-premium-on-character> ("[Dez] Bryant was a top-10 talent who dropped all the way to No. 24 until picked by Dallas Bryant's off-field problems at Oklahoma State overshadowed his ample physical gifts. Bryant was suspended for almost all of his junior season after lying to NCAA investigators. Media reports have painted Bryant as immature and irresponsible even when it came to something as simple as attending college classes on time."); Associated Press, *Cowboys Open Training Camp; Dez Bryant First Player on Field*, USA TODAY (July 24, 2010, 10:02 PM), http://www.usatoday.com/sports/football/nfl/cowboys/2010-07-24-cowboys-training-camp_N.htm?csp=usat.me ("The Cowboys traded up three spots in April to get Bryant 24th overall after the talented receiver slipped in the draft amid questions about his character."); Nicole Auerbach, *DeMarcus Cousins Aims to Boost Draft Stock, Shed Labels*, USA TODAY (June 23, 2010, 10:14 AM), http://www.usatoday.com/sports/basketball/nba/2010-06-22-draft-demarcus-cousins_N.htm (noting that DeMarcus Cousins "has been pegged as uncoachable—an immature troublemaker with a bad attitude" and "selecting him in the draft can seem risky" considering such perceptions).

³⁹ RESTATEMENT (SECOND) OF TORTS § 906 (1979).

⁴⁰ RESTATEMENT (SECOND) OF TORTS § 912 cmt. d (1979).

⁴¹ § 912.

the desirable level of certainty to be reached in determining adequate compensation is one of *reasonable certainty*, not one of complete or definite certainty.⁴² Thus, recovery is permissible even in cases where there is no real equivalence between the harm and compensation in money (i.e., claims involving emotional harm) or where the nature of the harm is extremely difficult to approximate or quantify with a sufficient level of accuracy (i.e., claims involving lost business profits).⁴³

Comment d to section 912 of the Restatement (Second) of Torts describes a situation in which the defendant has tortiously interfered with the plaintiff's entering into or continuing a business enterprise or business transaction, which entails both the likelihood of profit and, conversely, a possibility for loss.⁴⁴ In order for a plaintiff to recover lost profits, she must prove that the enterprise or transaction "was or was likely to be profitable and that the chance of profits has been interfered with."⁴⁵ To illustrate, the Restatement provides an example of a business transaction in a sports context involving tortious interference with a contract to promote a boxing match:

A has a contract with B by the terms of which A is to arrange for a boxing match between B and C. D tortiously causes B to break his contract before A has incurred any expenses with reference to it. A is entitled to compensatory damages from D only if he proves that it is more probable than not that the match would have been made by him and would have been a financial success, and if his proof offers a reasonable basis for estimating the profits.⁴⁶

The above illustration saliently demonstrates the complexity inherent in proving economic damages for lost future earnings or lost earning capacity: First, A must prove that D's wrongful conduct did *in fact* cause A a loss of the chance or opportunity to earn money. Second, A must prove the *amount* of that loss to a reasonable degree of certainty.⁴⁷ There must be a reasonable probability, not just speculation, that the plaintiff suffered damages from the defendant's actions, and there must be

⁴² § 912, cmt. a. *See also* Felder v. Physiotherapy Assocs., 158 P.3d 877, 886 (Ariz. Ct. App. 2007) ("As the comment to the Restatement recognized, however, it is desirable that 'an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered.'" (citing RESTATEMENT (SECOND) OF TORTS § 912, cmt. a (1979))).

⁴³ RESTATEMENT (SECOND) OF TORTS § 912 cmt. a (1979).

⁴⁴ § 912 cmt. d.

⁴⁵ § 912 cmt. d.

⁴⁶ § 912 cmt. d, illus. 8.

⁴⁷ § 912 cmt. a ("It is desirable that responsibility for harm should not be imposed until it has been proved with reasonable certainty that the harm resulted from the wrongful conduct of the person charged. It is desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible.").

evidence, not just speculation, that provides a reasonable estimate of the amount of damages.⁴⁸ Depending upon where the plaintiff falls on the EPR, meeting this “two-step burden of proof” can be a daunting, possibly even insurmountable task for plaintiffs seeking lost earning capacity damages.

Any evidence or expert testimony proffered to meet the athlete-plaintiff’s burdens of proof must satisfy the admissibility standard under Rule 702 of the Federal Rules of Evidence:⁴⁹ “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise”⁵⁰ As the Supreme Court articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁵¹ the determination of admissibility requires the judge to make a two-pronged “preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.”⁵² In order for the proffered testimony to meet the first prong—the “scientific knowledge” prong—the Court in *Daubert* explained that *science* “implies a grounding in the methods and procedures of science” and that *knowledge* means something “more than subjective belief or unsupported speculation” and refers to “any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds.”⁵³ “In short, the requirement that an expert’s testimony pertain to ‘scientific knowledge’ establishes a standard of evidentiary reliability.”⁵⁴ The second prong of Rule 702, the “helpfulness” requirement, according to the Court, is essentially a standard of relevance and, more specifically, a question of “fit,” because if the proposed scientific evidence does not bear a “valid scientific connection” to the inquiry of the case, it will not be helpful to the jury and therefore is not relevant under Rule 702.⁵⁵

⁴⁸ § 912 cmt. a.

⁴⁹ *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1256 (11th Cir. 2002) (noting “that [t]he burden of laying the proper foundation for the admission of the expert testimony is on the party offering the expert, and the admissibility must be shown by a preponderance of the evidence”) (citing *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999)).

⁵⁰ FED. R. EVID. 702.

⁵¹ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

⁵² *Id.* at 592–93.

⁵³ *Id.* at 590.

⁵⁴ *Id.*

⁵⁵ *Id.* at 591–94. The Court emphasized that “scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes.” *Id.* at 591.

The “gatekeeping” obligation of trial judges under *Daubert*, however, extends to all expert testimony, not merely testimony that is scientific.⁵⁶ Under *Daubert* and its progeny, “expert testimony is admissible if the expert is qualified to testify on the topic at issue, the testimony will assist the trier of fact, and the expert’s methodology is sufficiently reliable.”⁵⁷ A merger of Rule 702’s two-prong test with the two-step burden of proof means that non-scientific evidence or expert testimony concerning an athlete’s lost earning capacity damages must (a) be sufficiently reliable, and (b) assist the trier of fact in (i) making a determination whether the defendant’s conduct caused a loss or reduction of the athlete’s chance to earn money in a prospective professional career, and if so, (ii) making a determination of the present value of that lost or reduced chance.

A. Step One: Proving that the Defendant’s Conduct in Fact Caused a Lost or Reduced Chance to Earn Money as an Athlete

1. The Loss of Chance/Opportunity Doctrine

Damages for lost earning capacity essentially compensate the plaintiff for a loss of chance or opportunity to earn future profits, and thus lost earning capacity is conceptually analogous to the loss of chance doctrine. The loss of chance doctrine, also known as the lost opportunity doctrine, allows a plaintiff to recover for the impairment (i.e., “loss”) of the plaintiff’s ability (i.e., “chance” or “opportunity”) to achieve a more favorable outcome or result because of the defendant’s actions.⁵⁸ Thus, the plaintiff’s real injury in a lawsuit seeking damages for lost earning capacity consists of the diminished chance of achieving a favorable outcome. The loss of chance doctrine seeks to give the plaintiff a recovery equal to the extent that the defendant’s

The study of the phases of the moon, for example, may provide valid scientific ‘knowledge’ about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night.

Id.

⁵⁶ See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) (holding that the *Daubert* factors for assessing reliability apply to nonscientific as well as scientific reliability).

⁵⁷ Stewart I. Edelstein, *Daubert and Lost-Profits Testimony*, 41 TRIAL 31, 31 (2005).

⁵⁸ For a discussion of the loss of chance doctrine, see Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981) [hereinafter King, *Causation*]. See also Joseph H. King, Jr., “Reduction of Likelihood” Reformulation and Other Retrofitting of the Loss-of-a-Chance Doctrine, 28 U. MEM. L. REV. 491 (1998); Darrell L. Keith, *Loss of Chance: A Modern Proportional Approach to Damages in Texas*, 44 BAYLOR L. REV. 759 (1992).

conduct caused a reduction in the *chance* to profit, which makes it distinct from a lost profits claim.

The loss of chance doctrine, which is applied often in personal injury and medical malpractice cases, evolved in response to the perceived unfairness of the “all or nothing” rule of tort recovery.⁵⁹ The all or nothing rule provides that the plaintiff may only recover if she can prove that the defendant’s conduct more likely than not caused the unfavorable outcome—if the plaintiff meets this burden, she recovers one hundred percent of her damages, but if she does not meet this burden, she recovers nothing.⁶⁰ For example, if a patient has a fifty-one percent chance of survival and a doctor’s negligent failure to diagnose or properly treat caused that chance to drop to zero, the estate would be entitled to one hundred percent of the wrongful death damages, but if a patient has a forty-nine percent chance of survival and the negligence caused that chance to drop to zero, the estate receives nothing.⁶¹ A fundamental problem with the all or nothing approach is that it does not accomplish a fair and adequate allocation of costs and risks in proportion to the extent of the harm.⁶² If the plaintiff’s chance of achieving a favorable outcome before the defendant’s wrongful conduct was less than fifty percent, it is logically impossible for the plaintiff to show that the defendant’s conduct was the but for cause of the diminished chance. The loss of chance doctrine attempts to alleviate the flaw that is inherent in the all or nothing rule; the flaw being that it provides a “blanket release from liability” whenever there is less than a fifty percent chance of achieving a favorable outcome, irrespective of the flagrancy of the defendant’s conduct.⁶³ To illustrate the loss of chance doctrine in monetary terms utilizing a proportional damages method, if the favorable outcome is \$100, and the plaintiff’s chance of obtaining it was fifty percent before the defendant’s conduct, and that conduct reduced the plaintiff’s chance to thirty-three percent, then the loss of chance damages would be \$17, which represents the seventeen percent reduction (\$100 multiplied by seventeen percent).⁶⁴

⁵⁹ See King, *Causation*, *supra* note 58, at 1365–66.

⁶⁰ *Matsuyama v. Birnbaum*, 890 N.E.2d 819, 829 (Mass. 2008).

⁶¹ *Id.*

⁶² See King, *Causation*, *supra* note 58, at 1377 (“By placing [loss of chance] losses outside tort law, the all-or-nothing approach distorts the loss-assigning role of that law.”).

⁶³ *Matsuyama*, 890 N.E.2d, at 829–30.

⁶⁴ “[T]he proportional damages method is the most appropriate way to quantify the value of the loss of chance for a more favorable outcome, because it is an easily applied calculation that fairly ensures that a defendant is not assessed damages for harm that he did not cause.” *Id.* at 840. See also *Renzi v. Paredes*, 890 N.E.2d 806, 813 (Mass. 2008). But see David A. Fischer, *Tort Recovery for Loss of a Chance*, 36 WAKE FOREST L.

The landmark British case of *Chaplin v. Hicks*⁶⁵ first recognized loss of chance as an independent recovery of breach of contract damages. In *Chaplin*, a contestant in a beauty contest was awarded damages based on the value of her loss of chance to actually compete in the contest.⁶⁶ The contest involved fifty candidates, from whom twelve would be selected as winners and who would be awarded professional acting contracts—the plaintiff was one of the original fifty contestants.⁶⁷ The defendant, a theatrical manager, breached a contractual obligation to notify the plaintiff that she was required to do a personal interview as a condition to participation in the contest.⁶⁸ Because the plaintiff did not complete the interview, she was denied the right to participate in the contest and thus lost the chance to be selected as one of the twelve winners.⁶⁹ The court found it irrelevant that the plaintiff could not possibly prove that she would have been successful being selected as one of the twelve contest winners, because the plaintiff's damage or injury consisted of the lost *opportunity* to compete in the contest.⁷⁰ The defendant appealed the jury's award, asserting that it was unduly speculative and contingent, but the award was affirmed on appeal.⁷¹ The plaintiff's damages equaled the amount of the value of the acting contract, discounted based on the plaintiff's probability of being selected for a contract; twenty-five percent, in this case, since the average chance of each competitor winning was one in four (twelve winners selected out of fifty candidates).⁷² In essence, *Chaplin* demonstrates a straight application of the proportional damages method illustrated earlier, which works in a case like *Chaplin* where both the value of the favorable

REV. 605, 631–33 (2001) (arguing that the proportional damages method fails to serve the basic aims of deterrence because it routinely over or under compensates plaintiffs). Some courts have rejected the proportional damages method in favor of an approach in which the fact finder makes a subjective determination of the value of the lost chance without going through the illusory exercise of setting a value for a more favorable outcome and then reducing that amount by some percentage. *See, e.g.,* *Smith v. State Dept. of Health & Hosp.*, 676 So.2d 543 (La. 1996).

⁶⁵ *Chaplin v. Hicks*, [1911] 2 KB 786.

⁶⁶ *Id.*

⁶⁷ *Id.* at 787.

⁶⁸ *Id.* at 791.

⁶⁹ *Id.* at 793.

⁷⁰ *See* *Snow v. Villacci*, 754 A.2d 360, 365 (Me. 2000) (“[T]here is no logical or public policy reason to deny recovery to a person who has lost an opportunity due to the negligent acts of another person, as long as the elements necessary for recovery are proven by a preponderance of the evidence. If a plaintiff has in fact lost a unique opportunity to increase her earnings, and that loss was caused by defendant's actions, she should be able to recover those damages just as she would have if the defendant's wrongdoing has caused her to lose wages.”).

⁷¹ [1911] 2 KB at 788.

⁷² *Id.* at 791.

outcome (the acting contract) and the reduced chance (twelve out of fifty) is relatively easy to determine.

To put this in the context of an athlete's recovery of damages for lost earning capacity or lost future earnings in a professional sports career, the athlete's economic harm is the lost or diminished chance to earn an amount of money in the future (the favorable outcome), and the athlete must establish that the defendant's wrongful conduct was the factual cause of the diminished or lost chance.⁷³ For example, in *Hall v. University of Minnesota*,⁷⁴ the district court articulated the economic harm that would be bestowed upon a college basketball star if he was wrongly denied application to a degree program, resulting in a declaration of ineligibility:

According to the evidence, if the plaintiff is accorded the opportunity to represent the University of Minnesota in intercollegiate varsity basketball competition during winter quarter of 1982, his senior year, he will have a significant opportunity to be a second round choice in the National Basketball Association draft this year, thereby acquiring a probable guarantee of his first year's compensation as a player in the National Basketball Association. If the plaintiff is denied the opportunity to participate in intercollegiate basketball competition on behalf of the University of Minnesota during winter quarter 1982, his chances for a professional career in basketball will be impaired; and it will be extremely unlikely that his compensation as a first year player in the National Basketball Association will be guaranteed. The evidence indicates that without an opportunity to play during the winter quarter of 1982, the plaintiff would likely be a sixth round choice in the National Basketball Association draft.⁷⁵

2. The But For Test

Proving the precise reduction in loss of chance in exact percentages, in most cases, is nearly impossible to do. Nevertheless, once breach is established, the plaintiff still must prove the existence of a factual cause link between the defendant's actions and the lost or diminished chance.⁷⁶ In other words, it must be shown that the defendant's conduct is the but for cause of the loss of chance (i.e., but for the defendant's conduct, the likelihood of a favorable outcome would not have been reduced or destroyed).⁷⁷ In lost profits claims, the plaintiff typically must prove that it is more probable than not the

⁷³ See, e.g., *Hall v. Univ. of Minn.*, 530 F. Supp. 104 (D. Minn. 1982).

⁷⁴ *Id.*

⁷⁵ *Id.* at 106.

⁷⁶ See *Matsuyama v. Birnbaum*, 890 N.E.2d 819 (Mass. 2008).

⁷⁷ "The proper test in a loss of chance case concerning the conduct of a single defendant is whether that conduct was the but-for cause of the loss of chance." *Id.* at 842.

plaintiff would have profited.⁷⁸ In loss of chance cases, while some courts have required the plaintiff to prove by a preponderance of the evidence that the defendant's actions caused the diminished chance,⁷⁹ other courts have held the plaintiff to a lower burden of proof than the usual preponderance of evidence standard generally applicable in civil claims.⁸⁰ For example, one court held that the plaintiff need merely show that, but for the defendant's breach, a "real and substantial chance" existed that an opportunity or transaction with a third party would have occurred and led to the plaintiff's profits; a real and substantial chance defined as something more than a purely speculative or fanciful chance.⁸¹

As a threshold matter, the underlying cause or causes of action that establish liability in a particular case may impact the athlete's ability to prove a factual causal link between the defendant's wrongful conduct and the athlete's diminished or lost chance of future earnings. There are two cases decided by the Arizona Court of Appeals that illustrate this point; one case involved a college basketball coach's damages for breach of an employment contract,⁸² and the other case involved a personal injury action brought by a minor league baseball player against a physical rehabilitation company.⁸³

In the first case, *Lindsey v. University of Arizona*,⁸⁴ the plaintiff, who successfully coached men's basketball for several years at Grand Canyon College, applied for and accepted a head coaching position at the University of Arizona.⁸⁵ The plaintiff was terminated by the university after an unsuccessful first season and filed suit, claiming that the university breached an oral promise to hire him for four years, despite language in a letter from the university president that the contract was only for one year.⁸⁶ The Arizona Court of Appeals affirmed a jury's award of \$215,000 for the plaintiff's lost wages, representing deprivation

⁷⁸ See, e.g., RESTATEMENT (SECOND) OF TORTS § 912 cmt. d., illus. 8 ("A is entitled to compensatory damages from D only if he proves that it is more probable than not that the match would have been made by him and would have been a financial success. . . .").

⁷⁹ See *Matsuyama*, 890 N.E.2d at 832 ("In order to prove loss of chance, a plaintiff must prove by a preponderance of the evidence that the physician's negligence caused the plaintiff's likelihood of achieving a more favorable outcome to be diminished. That is, the plaintiff must prove by a preponderance of the evidence that the physician's negligence caused the plaintiff's injury, where the injury consists of the diminished likelihood of achieving a more favorable medical outcome.").

⁸⁰ See, e.g., *Allied Maples v. Simmons & Simmons*, (1995) 1 W.L.R. 1602 (U.K.).

⁸¹ *Id.* at 1611–14.

⁸² *Lindsey v. Univ. of Ariz.*, 754 P.2d 1152 (Ariz. Ct. App. 1987).

⁸³ *Felder v. Physiotherapy Assoc.*, 158 P.3d 877 (Ariz. Ct. App. 2007).

⁸⁴ *Lindsey*, 754 P.2d 1152.

⁸⁵ *Id.* at 1154.

⁸⁶ *Id.* at 1155–56.

of employment for three years because sufficient evidence was presented to sustain a finding of breach of contract.⁸⁷ However, the Court of Appeals overturned the jury's award for loss of future earning capacity in the amount of \$480,000, to which the plaintiff maintained he was entitled because of the difficulty he would have in obtaining future employment as a coach in view of his premature termination as coach at Arizona.⁸⁸ The *Lindsey* court concluded that this was akin to reputation damage, which, according to the court, as a general rule is not recoverable in a breach of contract action because it "cannot reasonably be presumed to be within the contemplation of the parties when they entered into the contract" and the computation of such damages is "too speculative."⁸⁹ In regard to the effect the plaintiff's termination would have on his future earning capacity as a basketball coach, the court found that the jury could "do nothing more than engage in speculation and conjecture" because it would depend upon the success or failure of the Arizona basketball team had the plaintiff continued as head basketball coach for an additional three years.⁹⁰

Twenty years later, the same court decided the case of *Felder v. Physiotherapy Associates*, in which a minor league AAA professional baseball player prevailed at trial on a negligence claim against a physical rehabilitation company relating to a permanent eye injury he sustained while taking batting practice at the company's facility.⁹¹ Regarding the issue of lost earning capacity, which necessarily involved an assessment of the plaintiff's chances of making it to the major leagues, the potential length of his major league career, and the potential range of his compensation, the jury awarded \$7 million and found that the plaintiff was thirty percent at fault, thus reducing the award to \$4.9 million.⁹² On appeal, the defendant claimed that the trial court erred as a matter of law by failing to find that the evidence of lost future earnings was "too speculative" and therefore insufficient to support a claim of lost earning capacity.⁹³ The

⁸⁷ *Id.* at 1157.

⁸⁸ *Id.* at 1158.

⁸⁹ *Id.*

⁹⁰ *Lindsey*, 754 P.2d at 1158 ("Had Lindsey continued in his employment as the University of Arizona head basketball coach for an additional three years and sustained losing seasons similar to the team's 4-24 overall record for the 1982-83 season, his coaching career would most likely have been ended and he would have no future earning capacity as a basketball coach. Had he, on the other hand, coached the team to a national championship, his future earning capacity may have exceeded the \$480,000 award many times over.").

⁹¹ *Felder*, 158 P.3d at 877.

⁹² *Id.* 884.

⁹³ *Id.* at 885.

defendant tried to attack the factual cause link between the defendant's negligence and a major league career, arguing that the "fact of damage" is damage to the plaintiff's major league career, and thus the plaintiff must first prove that he would have been promoted to the major leagues.⁹⁴ But the Court of Appeals viewed the causation issue in a different light, noting that the evidence clearly showed that the plaintiff's professional baseball career ended as a direct result of the eye injury, and thus the *fact* of damage was proven.⁹⁵ The court found that reaching the major league level would be an "advancement" in the plaintiff's professional career and the eye injury "plainly took away his chance to continue and advance as a player," including the chance of a major league career, thus "the amount of the damages for being deprived of that chance was for the jury to decide."⁹⁶

The *Felder* court distinguished *Lindsey* as involving a "bright-line rule" whereby a reduction in future earning power or capacity is not recoverable in an action for breach of an employment contract, and it concluded that the holding in *Lindsey* was not applicable to a personal injury case.⁹⁷ The court further noted that proving lost profits in breach of contract cases is "more complicated" and the line between the fact of damage and the amount of damage becomes more blurred when lost profits are at issue.⁹⁸ According to the *Felder* court, although many of the lost profits cases discuss the evidentiary hurdle in terms of proving the *amount* of lost profits, the courts are actually more heavily scrutinizing whether the plaintiff has presented sufficient proof of the *fact* of lost profits.⁹⁹ However, the *Felder* court did not explain *why* the factual cause link in breach of contract actions involving damages for lost future earnings or profits requires more skepticism and scrutiny than in personal injury cases. Certainly, the answer does not lie in the fact that one is necessarily more "speculative" than the other. Surely it is just as speculative to suggest that a minor league baseball player who never played an inning in the major leagues would have earned substantial compensation in the future at the

⁹⁴ *Id.* at 886.

⁹⁵ *Id.*

⁹⁶ *Id.* at 886–88.

⁹⁷ *Felder*, 158 P.3d at 887 n.6.

⁹⁸ *Id.* at 887.

⁹⁹ *Id.* See, e.g., *Rancho Pescado, Inc. v. Nw. Mut. Life Ins. Co.*, 680 P.2d 1235, 1247 (Ariz. Ct. App. 1984) (affirming the finding that plaintiff, who sought to recover lost profits from a commercial catfish farm, had failed to show that he would have been successful at the business); *Coury Bros. Ranches, Inc. v. Ellsworth*, 446 P.2d 458, 463–64 (Ariz. Ct. App. 1968) (finding evidence failed to show that breach of contract caused losses).

major league level as it is to say that a college basketball coach who was wrongfully terminated would have earned substantial compensation in the future as a winning coach.

The most plausible justification for the “bright-line rule” in *Lindsey* is perhaps the fact that contract remedies seek to accomplish different goals, incentives, and policies. Contract law seeks to award an amount that puts the non-breaching party in the same economic position it would have been had the contract not been breached—also known as general or expectation damages.¹⁰⁰ Under traditional contract law principles, the most that the coach in *Lindsey* could have expected to earn under the terms of his employment contract, absent the university’s breach, was his annual compensation pursuant to the terms of the agreement for as long as the length of the contract term, which is the amount the coach was awarded by the jury. Indeed, recovery for lost future earnings or lost profits in a breach of contract case, known as special or consequential damages, presents a classic *Hadley v. Baxendale*¹⁰¹ scenario that demands special proof and a sufficient level of foreseeability at the time the contract was entered in order to bring such damages within the contemplation of the parties.¹⁰² The requirement of proof of foreseeability is evidence of the courts’ hesitance to allow recovery for special damages when the risk of such losses can sufficiently be allocated between the contracting parties or by procuring insurance before the loss is incurred. Tort law, on the other hand, is aimed at deterrence, compensating the victim and making the injured party whole, and apportioning liability based on fault. Thus, the lost earning capacity factual cause link in a case involving tortious interference with contract does not typically demand the same level of scrutiny as one that involves breach of contract.

The *Lindsey* and *Felder* courts did not discuss the causation issue in terms of the traditional but for analysis applied in loss of

¹⁰⁰ The *Lindsey* court specifically noted that damages for lost earning capacity “cannot reasonably be presumed to be within the contemplation of the parties when they entered into the contract.” *Lindsey v. Univ. of Ariz.*, 754 P.2d 1152, 1158 (Ariz. Ct. App. 1987).

¹⁰¹ *Hadley v. Baxendale*, (1854) 9 L.R.Exch. 341, 355 (holding that damages based on lost profits were not foreseeable to the defendant common carrier which entered into a contract with plaintiff grain miller to deliver a broken crankshaft to another party for repairs by a certain date, and delivery failed to occur on time resulting in lost business for the plaintiff and a resulting breach of contract claim against the carrier seeking recovery of lost profits).

¹⁰² See, e.g., *Susi v. Simonds*, 85 A.2d 178, 179 (Me. 1951) (“[F]or the plaintiff to recover the special damages he claims to have suffered beyond what would naturally flow from the breach claimed of such contract, it must affirmatively appear that the special circumstances under which the contract was actually made which gave rise to such damages were communicated by the plaintiff to the defendant and were thus in the contemplation of both parties at the time of making the contract.”).

chance cases.¹⁰³ However, it seems that the *Felder* court was implicitly suggesting that but for the plaintiff's eye injury (due to the defendant's negligence) the plaintiff would not have lost the *chance* at a major league career, not that the plaintiff would have in fact reached the major leagues.¹⁰⁴ In other words, it is not debatable that a permanent eye injury ending the plaintiff's ability to play professional baseball at the minor league level also ended any chance of eventually playing in the major leagues, which chance existed before the injury, and it was then up to the jury to assess an amount of his damages for being deprived of that chance.¹⁰⁵ If the plaintiff had been precluded from proving lost earning capacity damages, he would have fallen victim to the "all or nothing" rule discussed earlier.¹⁰⁶ The "bright-line rule" for lost earning capacity in breach of contract cases, as in *Lindsey*,¹⁰⁷ could alternatively be viewed as an application of the all or nothing rule with an implicit assumption that the plaintiff should recover nothing because he cannot prove that the defendant's breach more likely than not caused an unfavorable future outcome. Moreover, the inherent unfairness of the all or nothing rule in tort cases is *usually* absent in breach of contract cases essentially for the reasons that justify application of the bright-line rule in most contract cases.¹⁰⁸ However, *Chaplin* highlights the exception to the bright-line rule and demonstrates that there may be contract cases that especially warrant recovery of damages for lost future earnings.¹⁰⁹ The causal link was fairly compelling in *Chaplin* because (1) the loss of a chance to compete in the beauty contest and be one of the twelve finalists who would receive an acting contract was within the "contemplation of the parties at the time the contract was entered,"¹¹⁰ and (2) we can confidently say that, but for the defendant's failure to notify the plaintiff about the condition to participating in the beauty contest, the plaintiff would not have lost the chance (albeit a twenty-five percent chance) to be one of the twelve finalists and receive an acting contract.¹¹¹

Nevertheless, the pertinent question left unanswered in *Felder* was the extent of the plaintiff's chance, before the eye

¹⁰³ *Lindsey v. Univ. of Ariz.*, 754 P.2d 1152 (Ariz. Ct. App. 1987); *Felder v. Physiotherapy Assoc.*, 158 P.3d 877 (Ariz. Ct. App. 2007).

¹⁰⁴ *Felder*, 158 P.3d at 886 ("His injury plainly took away his *chance* to continue and advance as a player.") (emphasis added).

¹⁰⁵ *Id.*

¹⁰⁶ See *supra* notes 59–64 and accompanying text.

¹⁰⁷ 754 P.2d 1152.

¹⁰⁸ See *supra* note 102 and accompanying text.

¹⁰⁹ *Chaplin v. Hicks*, [1911] 2 KB 786.

¹¹⁰ *Id.* at 795.

¹¹¹ *Id.* at 793.

injury was inflicted, of earning future compensation in a major league career—the court determined that the plaintiff lost that chance without addressing what the plaintiff's chance was prior to the eye injury.¹¹² A more precise application of the loss of chance doctrine, then, would be based on the proportional damages method applied in *Chaplin*,¹¹³ which would only give the plaintiff a recovery in an amount that reflected the extent to which the defendant's conduct caused a *reduction* in the chance of a major league career, which would necessarily require an assessment of the plaintiff's chance both before and after the injury (but which may have been nearly impossible to determine in *Felder*). For example, suppose it could be shown that the plaintiff only had a twenty percent chance of making the major leagues before the eye injury and, because the injury ended the plaintiff's professional career, the injury reduced that chance to zero. Presumably, then, the plaintiff would only be entitled to twenty percent of the amount he could expect to have earned in a future major league career absent the injury. But even if it could somehow be shown that he had a twenty percent chance, the amount he could reasonably expect to have earned in a future major league career would also need to be determined, which of course would be more uncertain than the known value of one of the twelve acting contracts to be awarded in the beauty contest.

Determining the reduction in chance is further complicated when the defendant's tortious conduct does not result in a personal injury or death that permanently ends an athlete's career, as in *Felder*, but instead hinders the athlete's ability to reach their full athletic potential or to earn an increased level of compensation as an athlete.¹¹⁴ In these situations, an additional calculation must be made regarding the plaintiff's percentage chance *following* the injury, which would obviously be some percentage greater than zero if the injury does not end the plaintiff's career (and then the difference between the two would equal the lost chance in a percentage amount). The proportional damages method, in which percentages are assigned based on probabilities, may lend itself well in cases where estimates can be made based on data obtained and analyzed scientifically and accepted by the relevant community, such as the use of statistical survival rates in medical malpractice cases to determine the

¹¹² *Felder v. Physiotherapy Assoc.*, 158 P.3d 877 (Ariz. Ct. App. 2007).

¹¹³ See *supra* note 65 and accompanying text.

¹¹⁴ For a case in which the court determined that the injury did not hinder the plaintiff's ability at all, see *Taylor v. Allstate Ins. Co.*, 205 So. 2d 807, 810–11 (La. Ct. App. 1968) (rejecting plaintiff's claims that his performance as an established professional football player was curtailed as a result of injury to plaintiff's back because there was no evidence in the record which indicates that the injury had any such result).

chance that a patient would survive a certain medical condition or treatment.¹¹⁵ However, such percentage determinations are usually not very conducive to assessing an athlete's lost earning capacity in a professional career, which probably explains why the *Felder* court did not venture down that path.¹¹⁶ Courts that impose a lower burden of proof or require less precision for causation purposes can demand a higher level of scrutiny when the plaintiff must prove the damage amount with a reasonable degree of certainty.

The higher the plaintiff is on the EPR, the greater the degree of confidence with which it can be estimated that the plaintiff did *in fact* have a real and substantial chance of future earnings in a professional career.¹¹⁷ *Albrecht v. Industrial Commission*¹¹⁸ presents such a case, in which a former professional football player for the Chicago Bears, whose football career as an offensive lineman ended after five years when he sustained a back injury, appealed the Commission's decision denying him wage-loss differential workers' compensation benefits (the purpose of which is to compensate injured employees for reduced earning capacity).¹¹⁹ Based on evidence that Albrecht was a first-round draft choice and started every game from his first season in 1977 up to the time of his injury in 1982, in addition to evidence that there were offensive linemen in the NFL, and specifically with the Bears, who played longer than the ten-year average career length for an NFL offensive lineman, the court was able to conclude that "but for claimant's injury, he would have been in the full performance of his duties as a Bears offensive lineman after 1983."¹²⁰ The court rejected arguments that Albrecht "cannot prove how long he could have continued

¹¹⁵ See *Matsuyama v. Birnbaum*, 890 N.E.2d 819, 833 (Mass. 2008) ("A statistical survival rate cannot conclusively determine whether a particular patient will survive a medical condition. But survival rates are not random guesses.").

¹¹⁶ See *supra* note 112 and accompanying text.

¹¹⁷ See, e.g., *Nolan v. Jefferson Downs, Inc.*, 592 So.2d 831, 839–40 (La. Ct. App. 1991) (awarding of lost future earning capacity affirmed where jockey won over sixty races in first year of apprenticeship, retained an agent, was breaking and setting records, was in the top ten, was the first successful female jockey at Jefferson Downs, had beaten one of the top jockeys in the country on a fairly regular basis, and was recognized as outstanding female athlete in Louisiana and named to the Sugar Bowl Hall of Fame).

¹¹⁸ *Albrecht v. Indus. Comm'n*, 648 N.E.2d 923 (Ill. App. Ct. 1995).

¹¹⁹ Such an award is based

on the difference between the 'average amount' the employee would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of injury and the 'average amount' he is earning or is able to earn in some suitable employment after his injury.

Albrecht, 648 N.E.2d at 925–26 (quoting *Gen. Elec. Co. v. Indus. Comm'n*, 495 N.E.2d 68, 73 (Ill. App. Ct. 1986)).

¹²⁰ *Albrecht*, 648 N.E.2d at 926.

playing professional football or how much he would have earned without engaging in speculation” and that “the competitive nature and physical demands of the sport dictated that [his] employment as a Bear was of a temporary nature in that it was dependent on [his] ability to excel over other players competing for his job.”¹²¹ It similarly discounted testimony from the general manager for the Bears that Albrecht signed contracts year to year that “were contingent on [his] success in making the football team” and that “not every player is guaranteed to make the team on any given year.”¹²²

3. Personal Injury Cases Involving Amateur Athletes

When the athlete is an amateur, the causal connection does not necessarily become more tenuous, but remains a very fact intensive inquiry as to whether the plaintiff had a chance at a professional sports career that was reduced or lost as a result of the defendant’s actions. Personal injury cases involving athletes in many respects resemble any bodily injury case in that (1) the victim is no longer able to perform the type of work he had performed before the injury, which is typically established through medical testimony, and (2) if severe enough, the injury is usually permanent in nature such that the loss of earning capacity extends for the plaintiff’s entire work life, and the permanence of the injury is also typically established by medical testimony to evidence that the plaintiff has reached maximum recovery.¹²³ Personal injury cases involving athletes also resemble employment discrimination cases that require the plaintiff to demonstrate that they are *qualified* to do the work,¹²⁴ just as an athlete is required to demonstrate that he is qualified to earn future compensation as a professional athlete.¹²⁵ There are a number of personal injury cases in which amateur athletes, for the most part college students or graduates, have sought

¹²¹ *Id.*

¹²² *Id.* (“[W]e may not base our decision solely on the evidence submitted by the Bears organization since that would require impermissible speculation that claimant’s career would not have extended beyond 1983 due to the nature of the sport when evidence in the record indicates otherwise.”).

¹²³ See, e.g., *Nolan v. Jefferson Downs, Inc.*, 592 So.2d 831, 840 (La. Ct. App. 1991) (citing testimony from doctors that jockey could no longer do competitive horse racing because of eye injury; one doctor testifying that a fluorescein angiogram of jockey’s eye indicated “it is more likely than not that over the course of her entire life time that she will have a progressive decrease in her central vision in the right eye” and that it was likely the vision in her eye would ultimately decrease to legal blindness).

¹²⁴ See, e.g., CAL. GOV’T CODE § 12940(a)(1) (West 2000) (noting that it does not constitute employment discrimination to refuse to employ a person with a disability where that disability prevents the person from performing the essential job functions with reasonable accommodation).

¹²⁵ See *supra* Part II.A.1.

recovery of damages for loss of earnings or earning capacity for having been deprived of the chance for a professional sports career.

In the cases in which amateur athletes were awarded recovery, the courts tended to generalize the standard for meeting the factual cause link, but the causal connection was nevertheless established in these cases based on a theory that the plaintiff had previously demonstrated considerable promise as an amateur athlete. For example, in *Horton v. McCrary*, the court affirmed an award of \$100,000 to a nineteen-year-old college baseball player who was involved in a car accident and incurred a broken leg requiring surgery.¹²⁶ Damages were awarded for loss of the opportunity for a professional baseball career based on expert testimony from a person who had a degree in physical education with an emphasis on coaching, coached baseball, taught baseball techniques, played semi-professional baseball, and observed the plaintiff play college baseball.¹²⁷ He opined that the plaintiff would have been drafted to play professional baseball, that the plaintiff “had better skills than many of the other college baseball players who became professionals” and that if the plaintiff “had continued on the pace that he was going through his freshman year there was no doubt in . . . [his] mind that Tim would have been picked up by a professional ball club.”¹²⁸ The court approved of the trial judge’s admission into evidence of a scrapbook consisting of newspaper articles, photographs, and awards documenting the plaintiff’s athletic accomplishments during high school and college, all of which tended to show his “desire and fervor for athletics” and helped to quantify the loss he suffered because of his inability to continue participation in athletics at the same level he had prior to the accident.¹²⁹

In *Stafford v. Unsell*, the court affirmed a jury’s award of \$35,000 to the plaintiff, an amateur motorcycle racer, who suffered a broken nose and a broken foot in an auto accident.¹³⁰ At age fifteen, the plaintiff was one of the top ranked amateur motorcycle racers in the country, and he anticipated turning professional at age sixteen and signing a contract with a major

¹²⁶ *Horton v. McCrary*, 620 So.2d 918, 930 (La. Ct. App. 1993), *aff’d in part, rev’d in part on other grounds*, 635 So.2d 199, 204 (La. 1994).

¹²⁷ 620 So.2d at 929.

¹²⁸ *Id.*

¹²⁹ *Id.* at 927–28, 931 (“Despite Tim’s attempts to regain his pre-accident physical condition, the record preponderates that he would not be able to pursue his dream of playing professional baseball. The testimony of the two expert witnesses . . . clearly show that Tim had the desire and the ability before the accident to play professional baseball.”).

¹³⁰ *Stafford v. Unsell*, 492 So.2d 94 (La. Ct. App. 1986).

motorcycle manufacturer/sponsor.¹³¹ A calcium deposit formed on the plaintiff's foot as it was healing, which allegedly caused severe pain when he engaged in strenuous physical activity and kept him from properly training as a racer.¹³² Testimony at trial indicated that racers must be superbly conditioned athletes, which causes many to burn out by the age of twenty-four, and the plaintiff claimed that because the injury prevented him from maintaining a conditioning program, his racing performance had been so poor that he was unable to get a contract.¹³³ In answer to the defendant's appeal, the plaintiff asserted that his loss of future earnings was much higher than the jury awarded—in the neighborhood of \$400,000.¹³⁴ The court disagreed with the plaintiff and, from a causation standpoint, found that even though the plaintiff had a chance at a professional racing career, it was only a slight chance due to facts and circumstances unrelated to the injury from the accident—for example, the fact that the “hazards of racing can end a promising career abruptly” and the fact that the plaintiff had various other physical ailments that the jury could have reasonably believed contributed to or solely caused his loss of racing skills.¹³⁵ In essence, the court's holding suggests that it viewed the \$35,000 award as reasonably proportionate to the extent to which the accident diminished the plaintiff's already slim chance of making money as a professional racer.

In *Washington v. American Community Stores Corp.*,¹³⁶ the court upheld a jury verdict that the plaintiff, who sought to recover for back injuries that were undisputedly permanent, had suffered a permanent impairment of his earning capacity in a career as a professional wrestler or wrestling coach based on evidence which showed that he had received numerous accolades as a wrestler, including college football and wrestling scholarships, compiled a collegiate wrestling record of 103 wins and only four losses, won a national varsity wrestling championship during his sophomore and senior years in college, and intended to compete in the Olympic trials.¹³⁷ There was also

¹³¹ *Id.* at 98.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 98–99 (“The jury also could have reasonably believed that Scooter's pain was not as severe or disabling as claimed and that his performance was not significantly hampered. He only consulted a doctor once over several years in regard to the pain allegedly caused by the calcium deposit.”).

¹³⁶ *Wash. v. Am. Cmty. Stores Corp.*, 244 N.W.2d 286 (Neb. 1976).

¹³⁷ *Id.* at 288–89. The plaintiff had been employed by the state as an adult parole officer since his graduation from college, and there was no evidence that he had received

expert testimony that, before his injury, he was a prime candidate for the U.S. Olympic team and had the qualifications to become a great international wrestler and win an Olympic medal, and that those who compete in the Olympics and win a medal have a much better opportunity to secure employment in the coaching or professional wrestling fields.¹³⁸ In conclusive fashion, the court found “that the evidence strongly supports the inference . . . that the plaintiff, besides his bodily disability, had suffered a permanent impairment of his earning capacity in a professional or coaching career in the wrestling sport.”¹³⁹

In *Clinchfield Rail Road Co. v. Forbes*,¹⁴⁰ the court affirmed a \$75,000 award to a twenty-five year-old football player who suffered permanently disabling injuries and held that the trial judge did not commit error in permitting evidence of a professional football contract the plaintiff had signed with the Cleveland Browns on the issue of lost earning capacity.¹⁴¹ The defendant argued that the contract was not evidence of the plaintiff’s earning ability because it was contingent on his making the team and, since there was no evidence that the plaintiff possessed the necessary skill and ability to play professional football, the contract had no probative value and was speculative at best.¹⁴² However, the court noted that evidence had been presented to show that the plaintiff was an outstanding football player in college, including testimony from one of his coaches and other witnesses familiar with the game of football and the plaintiff’s playing ability that they considered

any actual earnings from wrestling at the time of his injury or at the time of the trial. *Id.* at 287–88.

¹³⁸ *Id.* at 288. The court approved, with some minor reservations, a jury instruction to the effect that

where a competitor in a sporting or athletic event, because of his superior ability in that field, has an opportunity of being awarded, with reasonable certainty or probability, a substantial benefit to him which may be of value to him in the future, and that he is deprived of this opportunity by another, through the other’s negligence, then the person so deprived thereof, may recover such damages which the evidence shows with reasonable certainty that he has suffered therefrom.

Id. at 290.

¹³⁹ *Id.* at 289–90. (“From our quite detailed review of the facts, it is clear that there was ample evidence to sustain the findings of the jury as to the talents, skill, experience, training, and industry in the pursuit of the wrestling sport and preparation for professional occupation and career in this area. The other evidence as to plaintiff’s age, life expectancy, health, and habits sustains the presence of all these elements required as to the proof of loss of earning capacity.”).

¹⁴⁰ *Clinchfield R.R. Co. v. Forbes*, 417 S.W.2d 210 (Tenn. Ct. App. 1966).

¹⁴¹ The court found that “[t]his contract was exhibited to the jury who were made aware of the contingency that Forbes did not receive any compensation until he made the team. It was for the jury to weigh this piece of evidence along with all the other competent evidence.” *Id.* at 215.

¹⁴² *Id.* at 214.

him an outstanding athlete, as well as evidence showing that many professional football teams were interested in his services prior to his signing the contract with the Browns.¹⁴³

Finally, in *Connolly v. Pre-Mixed Concrete Co.*, as a result of an accident in which considerable muscle tissue in the plaintiff's leg was destroyed, the court held that a jury award of \$95,000 for lost earning capacity damages to a twenty year-old woman who was a champion amateur tennis player with aspirations of becoming a professional tennis player was not excessive.¹⁴⁴ The plaintiff had "planned to go on a three-months' professional tennis tour, for which she had been offered a percentage of the receipts, with a guarantee of \$30,000."¹⁴⁵ In addition, there was expert testimony that: (1) the plaintiff had not yet reached her peak, (2) she could have, but for the accident, earned considerably greater amounts as a professional tennis player, (3) she would have received additional sums from endorsements of sporting goods and other articles, (4) her earnings during her first year as a professional alone would have been at least \$75,000, and (5) she could have expected at least seven or eight years of participation as a professional.¹⁴⁶

In the personal injury cases in which recovery of lost earning capacity damages was denied, involving amateur athletes claiming deprivation of a prospective professional sports career, the factual cause link was found wanting. But here, again, the

¹⁴³ *Id.* at 214–15. The court noted the testimony of two doctors who opined that he would suffer a permanent disability the remainder of his life . . . [that] would prevent him from playing football and . . . that if the plaintiff pursued a football coaching career, his permanent disability would affect his bodily movements and he would be unable to do the stooping, bending and other necessary physical movements a coach normally would do in their field.

Id. at 217.

¹⁴⁴ *Connolly v. Pre-Mixed Concrete Co.*, 319 P.2d 343 (Cal. 1957).

¹⁴⁵ *Id.* at 346.

¹⁴⁶ *Id.* The witnesses who testified as to the plaintiff's earning capacity consisted of (1) a six-year professional champion who had conducted two professional tours, (2) somebody who had been connected with tennis for thirty-six years, had been on the Australian Davis Cup team for a number of years and was a writer on tennis for a newspaper, and (3) the sports director for a broadcasting system who had been a professional athlete and was familiar with the earning capacity of champion tennis players. *Id.* According to the court, these witnesses "had extensive knowledge of professional tennis, and their opinions were based on their experience and information concerning the amounts earned by other tennis players." *Id.* See generally *Jones v. Iowa Cent. Cmty. Coll.*, 972 F.2d 354 (8th Cir. 1992) (unpublished opinion) (reversing the district court's determination that evidence was insufficient to support jury's award for loss of future earning capacity on belief that there was no evidence presented that plaintiff would have regained academic eligibility to play college basketball despite testimony from an assistant basketball coach at Syracuse University that if plaintiff had played college basketball for four years (combination of junior and four-year colleges) without getting hurt he could have played professional basketball in Europe earning \$75,000 per year for ten years).

courts did not provide a definitive standard or explanation regarding the factual cause link.

For example, in *Tanuvasa v. City and County of Honolulu*,¹⁴⁷ the court held it was prejudicial error for the trial judge to have given a jury instruction allowing a damages award to a college student for loss of the opportunity to play professional football, where (1) the evidence showed that, although the plaintiff had a brilliant career as a high-school football player, he played football in college largely as a substitute due to a series of problems arising in part from injuries he sustained while playing, (2) expert testimony demonstrated that the plaintiff stood a chance of playing professional football in the bottom twenty-five percent of the National Football League (NFL) or in the World or Canadian Leagues only if he were in shape and motivated, (3) no evidence was presented indicating that any NFL team that might have picked the plaintiff in the NFL draft did not do so because of the injury inflicted by the defendant, and (4) the plaintiff did not testify specifically that he did not attempt to try out as a free agent in any professional football league because of the injuries he incurred in the incident.¹⁴⁸ Although the plaintiff stated he was experiencing frequent headaches, dizziness, and trouble concentrating, the court found there was no evidence that as a direct and proximate result of the occurrence in question he was prevented from pursuing a professional football career.¹⁴⁹ Interestingly, the court flatly rejected a claim that, even if the plaintiff was not actually “prevented” from pursuing such a career, he *lost the chance* to try to pursue it.¹⁵⁰ Although the court acknowledged that “there is some evidence that [plaintiff’s] chances for pursuing a football career were diminished,” the jury instruction, “as worded, is equally susceptible of the construction that what was being claimed was the loss of a career.”¹⁵¹

In *Emoakemeh v. Southern University*, the court held that the trial court did not abuse its discretion in denying an award of

¹⁴⁷ *Tanuvasa v. City and County of Honolulu*, 626 P.2d 1175 (Haw. Ct. App. 1981). The plaintiff claimed to suffer headaches, dizziness and blurry vision on a frequent basis, perhaps every other day, as a result of a beating with a heavy flashlight by a police officer. *Id.* at 1178–79.

¹⁴⁸ *Id.* at 1179. According to the court, the only evidence anywhere to be found establishing a causal connection between the injuries sustained by the plaintiff and his ability to play professional football was in the cross-examination testimony of a medical expert retained by the defendants to examine him, who stated that he found no evidence that the plaintiff had sustained brain damage as a result of the incident and that he had advised the plaintiff that he had been injured so many times playing football that he should not attempt to play it anymore. *Id.* at 1179, 1184.

¹⁴⁹ *Id.* at 1184–85.

¹⁵⁰ *Id.* at 1185.

¹⁵¹ *Id.*

damages for lost earning capacity to a Nigerian national who was on a tennis scholarship and was injured by a gunshot wound to his thigh during an altercation in a dormitory.¹⁵² The plaintiff “sought to prove that he had the potential to play world class tennis that would have garnered him a top-notch teaching job at a prestigious racquet club.”¹⁵³ One witness who testified regarding the plaintiff’s potential to play professional tennis, and who played tennis against the plaintiff once and witnessed the plaintiff play during sporadic trips to Nigeria, admitted that questions regarding the plaintiff’s potential as a future tennis star were very difficult to answer, but that, because of his ability and the fact that he played in previous ATP tennis tournaments, one could “deduct that he has the potential of perhaps furthering his career in the professional field of tennis.”¹⁵⁴ However, nobody who had played tennis with the plaintiff, or had coached him, testified on his behalf regarding his alleged talent in the sport.¹⁵⁵ Further, although the plaintiff had been ranked 826th in the world when he was sixteen years of age, he was subsequently stripped of his ranking because he lost in the qualifying rounds of certain tournaments.¹⁵⁶ Therefore, noting that the plaintiff had the burden of proving loss of future earning capacity with reasonable certainty, the court found no error in the trial court’s conclusion that the totality of the evidence regarding the plaintiff’s tennis abilities was far “too speculative” to support such an award.¹⁵⁷

Lastly, *Clement v. Griffin* was an action brought by members of a college baseball team involved in a collision while riding in the school van.¹⁵⁸ The court found no error in the trial judge’s admission of evidence that one of the plaintiffs had the “dream” of pursuing a professional baseball career with a restriction that such evidence could only be used to establish the psychological impact that the loss of the opportunity to pursue that dream had on the plaintiff, including mental suffering and loss of enjoyment

¹⁵² *Emoakemeh v. S. Univ.*, 654 So.2d 474 (La. Ct. App. 1995).

¹⁵³ *Id.* at 479.

¹⁵⁴ *Id.* at 478. The court noted, however, that “[h]e could not state that the plaintiff had the potential to be a world class tennis player, but only that the potential ‘was there.’” *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 479. See generally *Weddle v. Phelan*, 177 So. 407 (La. Ct. App. 1937) (holding that, although an injured twenty-two year-old semi-professional baseball player was awarded damages for loss of expected future employment as such a player, evidence as to his alleged loss of earnings as a prospective professional baseball player in the major leagues was too speculative to be considered).

¹⁵⁸ *Clement v. Griffin*, 634 So.2d 412 (La. Ct. App. 1994).

of life.¹⁵⁹ Further, the trial judge instructed the jury that no evidence had been presented that the plaintiff would have become a professional baseball player.¹⁶⁰

B. Step Two: Proving the Amount of the Loss to a Reasonable Degree of Certainty

Recall the Restatement's illustration involving D's tortious interference causing B to break his contract with A to promote a boxing match between B and C.¹⁶¹ The pertinent question regarding the amount of A's lost future profits is, what would A have earned from the promotion of the boxing match absent D's tortious interference? It would be impossible to establish with *complete* certainty A's lost profits from a boxing match that A was unable to promote due to D's interference. Indeed, because it involves interference with an intangible right—a business opportunity or transaction—the amount of the lost profits may be difficult to prove with *any* degree of certainty. However, the law only demands that lost profits be proven with *reasonable* certainty, which can be evidenced by books of account, records of previous transactions, tax returns, or profit history of similar businesses.¹⁶² Similar to proving the value of a tangible item, if the market value of the business or enterprise interfered with could be approximated, then the value before and after the loss could be shown. Alternatively, if market value could not be approximated, then the income before and after the loss could be shown. In cases involving a lost business opportunity, a reasonable approximation of the value of the loss will often suffice even if a claim for lost profits would be speculative.¹⁶³

¹⁵⁹ *Id.* at 445–46.

¹⁶⁰ *Id.* at 446. *See also* Harvey v. Ouachita Parish Sch. Bd., 674 So.2d 372, 379 (La. Ct. App. 1996) (affirming trial court's award for loss of the opportunity to fully participate in competitive college football based upon the clear preponderance of the evidence showing that plaintiff was a highly recruited football player in high school, "was almost certainly headed towards a collegiate football program," and trial court's rejection of lost earning capacity in a professional career as "remote" and "insufficiently proved to be more probable than not").

¹⁶¹ *See supra* note 43 and accompanying text.

¹⁶² "Reasonable certainty as to the amount of lost profits can be shown by books of account, records of previous transactions or tax returns, or the 'profit history from a similar business operated by the plaintiff at a different location.'" Felder v. Physiotherapy Assoc., 158 P.3d 877, 887 (Ariz. Ct. App. 2007) (internal citation omitted) (quoting Rancho Pescado, Inc. v. Nw. Mut. Life Ins. Co., 680 P.2d 1235, 1245 (Ariz. Ct. App. 1984)).

¹⁶³ *See* Air Tech. Corp. v. Gen. Elec. Co., 199 N.E.2d 538, 548 (Mass. 1964) (citing Chaplin v. Hicks, [1911] 2 KB 786, 791–801 and stating that the "problem is to determine the value of the opportunity to which AT was entitled as a contract right, even if AT's lost profits cannot be ascertained. A reasonable approximation will suffice"). *See also* Snow v. Villacci, 754 A.2d 360, 365 (Me. 2000) (acknowledging that recovery of prospective, hypothetical earnings presented special evidentiary challenges, and holding that a

1. The Calculations and Data

The fundamental question in any case in which an athlete is claiming lost earning capacity in a professional sports career is, what would the plaintiff have earned as a professional athlete absent the defendant's conduct? The answer to that question can generally be thought of in terms of three basic calculations:

(1) First, calculate an amount that the plaintiff could reasonably have expected to earn in a prospective professional career *immediately preceding* the defendant's actions, taking into account not only the plaintiff's unique athletic skills and physical and intangible attributes, but also any risks and contingencies that would otherwise exist to impact the plaintiff's ability to earn those dollars in the future.

(2) Then, calculate an amount that the plaintiff can reasonably expect to earn in a professional career *now as a result of* the defendant's actions.

(3) Then, subtract the amount in step 2 from the amount in step 1.

In a case where the diminished chance based on a percentage can be determined with a reasonable degree of confidence, thus making the proportional damages method more palatable, step 2 would entail a calculation of the plaintiff's percentage chance both before and after the breach and in step 3 the difference in percentage would be multiplied by the amount calculated in step 1.

The more established the athlete is as a professional with a history of earnings, i.e., at the higher end of the EPR, the greater the degree of certainty with which the athlete's lost earning capacity can be determined, because a salary record provides a benchmark at which to calculate future earnings with more precision.¹⁶⁴ Such an example can be seen in former Miami Dolphins wide receiver O.J. McDuffie's recent malpractice lawsuit against former team physician John Uribe for the handling of an injury McDuffie incurred to his big toe in the tenth game of the 1999 season, which ultimately led to the end of

plaintiff may recover damages based on lost earning opportunity if supported by an adequate evidentiary foundation).

¹⁶⁴ See Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 80 (1994) ("[T]he most common starting point for calculating the lost earning capacity of adults is the plaintiff's established earnings record. Current earnings are then used as the basis for projecting future earnings levels.").

his career.¹⁶⁵ McDuffie was cut before the 2002 off-season with three years left on his contract following a successful career in the NFL.¹⁶⁶ In May of 2010, a jury awarded McDuffie \$10 million in lost earnings.¹⁶⁷

However, salaries of professional athletes are hardly stagnant, and there are extreme variances in compensation among athletes based upon varying levels of individual performance as well as external factors such as league rules that artificially restrict a player's salary for a period of years or allow a player to earn a salary at market value via free agency or salary arbitration. As such, the common methodologies used by forensic economists to determine lost earning capacity in most occupations are not very conducive to determining an expectable future earnings stream for an athlete in a professional sports career.¹⁶⁸ In short, there is no single method, measure or formula that applies uniformly to all cases for calculating lost future earnings in a professional sports career because athletes are unique and fall in different places along the EPR. Further, the extent of the lost opportunity can vary depending upon the flagrancy of the defendant's conduct and the resulting injury or damage, thus making the calculation a very fact-intensive

¹⁶⁵ See David J. Neal, *Former Miami Dolphins' O.J. McDuffie Gets \$11.5 Million*, MIAMI HERALD, May 6, 2010, at 6D, available at <http://www.miamiherald.com/2010/05/06/1615345/former-miami-dolphins-oj-mcduffie.html>. McDuffie alleged that Uribe advised him he could continue to play even though the MRIs showed tendon damage. *Id.*

¹⁶⁶ *Id.* McDuffie was the Dolphins' first-round pick out of Penn State in 1993, led the NFL with ninety receptions for 1,050 yards and seven touchdowns in 1998, and had career totals of 415 receptions for 5,074 yards and twenty-nine touchdowns, but he had only forty-three receptions for 516 yards and two touchdowns in 1999 and fourteen receptions for 143 yards and no touchdowns in 2000. *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Many economists, for example, measure lost future earnings or earning capacity based upon an estimate of three joint probabilities—the probability of life, the probability of labor force participation, and the probability of employment—using published data on participation rates by age, gender, education, and race, which estimates the joint probability that the individual will be alive, in the labor market, and actually employed at any future age. See William Jennings & Penelope Marcurio-Jennings, *A Critique of the Joint Probability of Life, Participation and the Employment Approach*, 8 J. LEGAL ECON. 61, 62 (1998). The joint probability estimate at each future age is then multiplied by the corresponding expected earnings to produce a stream of future expected lost earnings throughout an individual's anticipated work life, typically through at least age seventy-five, is then reduced to present value. *Id.* See also Laura Greenberg, *Compensating the Lead Poisoned Child: Proposals for Mitigating Discriminatory Damage Awards*, 28 B.C. ENVTL. AFF. L. REV. 429, 443–45 (2001) (discussing child-plaintiff cases in which experts rely on objective factors such as “gender, age, and race-based tables to predict the number of years that the plaintiff would have remained in the labor force and to determine his or her expected average wages” as well as subjective data whereby the expert “evaluates the plaintiff on educational capacity through IQ and aptitude tests, examines the socio-economic status of the plaintiff's family, including the education and work history of the plaintiff's parents and siblings, and analyzes the family's economic ability to provide higher education”).

inquiry.¹⁶⁹ The key to any calculation is the reliability of the evidence upon which it is based, and, to satisfy the admissibility standard under Rule 702, the evidence must assist the trier of fact and the expert's methodology must be sufficiently reliable.¹⁷⁰

2. Using Comparable Players: The Appraisal Method

A future earnings assessment of an athlete in a professional career in some respects resembles an appraisal because a professional athlete, although legally characterized as an employee for a professional club, is an asset or an investment that yields a certain return over time.¹⁷¹ An appraisal of an asset or a business seeks to determine the fair market value of the asset or business if it were sold, and there are a variety of methods that may be utilized.¹⁷² Under the sales comparison approach, an estimate of a property's fair market value is based on a comparison of the subject property to similar properties that were recently sold or that are currently pending for sale.¹⁷³ The more accurate the comparables, the more confidence we have that previous sales and pending purchase agreements reflect the appraised asset's fair market value.¹⁷⁴ The sales comparison approach is appealing for its reliance on the market itself, but its reliability is heavily dependent on the reliability of the available information in the marketplace.¹⁷⁵ The cost approach is based upon the cost to develop a property comparable to the subject property as it currently exists, and is premised on the theory that "[a]ll things being equal, no one will pay more for an existing property than it would cost to develop a similar property to one's

¹⁶⁹ "No single model is the best method for determining the present value of lost earnings in all situations." James E. Ciecka, *A Survey of the Structure and Duration of Time Periods for Lost Earnings Calculations*, 4 J. LEGAL ECON. 39, 49 (1994) (discussing eight different techniques commonly used by forensic economists to estimate lost earnings focused entirely on the timing and duration of loss periods and not on other aspects of present value calculations such as discount rates, growth rates for earnings, or age earnings adjustments).

¹⁷⁰ See *supra* note 50 and accompanying text.

¹⁷¹ See Matuszewski, *supra* note 25 (debating the value of the Cleveland Cavaliers with and without LeBron James).

¹⁷² See generally Alex E. Sadler, Note, *The Inherent Ambiguity of Commercial Real Estate Values*, 13 VA. TAX REV. 787 (1994).

¹⁷³ See *id.* at 802. See also Leslie Kent Beckhart, Note, *No Intrinsic Value: The Failure of Traditional Real Estate Appraisal Methods to Value Income-Producing Property*, 66 S. CAL. L. REV. 2251, 2265 (1993) (citing AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, *THE APPRAISAL OF REAL ESTATE* 340 (9th ed. 1987): "The sales comparison approach assumes that the market value of the subject property is related to the prices of comparable properties in the same or a similar marketplace.").

¹⁷⁴ Beckhart, *supra* note 173, at 2265 ("The sales comparison approach is based on the principle of substitution. This principle states that when several similar or commensurate commodities, goods, or services are available, consumers will demand the one with the lowest price and cause it to be distributed most widely.").

¹⁷⁵ See Beckhart, *supra* note 173, at 2268-69.

own specifications.”¹⁷⁶ Just as there is no single method that uniformly applies to the calculation of lost earnings in all cases, there is no single method that applies to the appraisal of assets.¹⁷⁷

Athletes possess unique skills and can be likened to a unique business for appraisal purposes, in which sales of comparable businesses are often used to assess value.¹⁷⁸ For example, in affirming the trial court’s determination of the net asset value of the 1976 New England Patriots for purposes of ascertaining the fair value of its stock in an appraisal proceeding, the Supreme Court of Massachusetts in *Sarrouf v. New England Patriots Football Club, Inc.*¹⁷⁹ highlighted the uniqueness of a professional sports team from other businesses in that it is “not only a business venture, but, as the judge pointed out, a sportsman’s endeavor.”¹⁸⁰ According to the court, an owner of a professional team is a “celebrity” and a “member of an exclusive club” who, through the use of his wealth and capital, becomes an “armchair athlete” in the “public spectacle of professional sports.”¹⁸¹ The business’ uniqueness is further evident in the prices these extremely wealthy individuals are willing to pay to own an NFL team outright, which are largely independent of earning potential.¹⁸² As such, the court held that the trial judge was entitled to use evidence of prices paid for new franchises as a starting point in his valuation of the net assets of the New England Patriots Football Club.¹⁸³ The trial judge also evaluated several factors that made the club even more valuable, including evidence that (1) the club enjoyed a monopoly over the entire New England area, (2) over the previous two years, the club’s operating revenue rose seventeen percent and its operating

¹⁷⁶ Beckhart, *supra* note 173, at 2269.

¹⁷⁷ See ASWATH DAMODARAN, INVESTMENT VALUATION: TOOLS AND TECHNIQUES FOR DETERMINING THE VALUE OF ANY ASSET 1–6 (2d ed. 2002) (noting how different valuation methods require unique information and procedures for various assets).

¹⁷⁸ Doe v. McFarlane, 207 S.W.3d 52, 69–70 (Mo. Ct. App. 2006) (“In fact, the Restatement (Third) of Unfair Competition recognizes that expert testimony concerning the licensing fees paid to similarly-situated persons for comparable uses is relevant to determine the fair market value of a defendant’s unauthorized use of a plaintiff’s name in a right of publicity case.”).

¹⁷⁹ Sarrouf v. New England Patriots Football Club, Inc., 492 N.E.2d 1122 (Mass. 1986).

¹⁸⁰ *Id.* at 1128.

¹⁸¹ *Id.*

¹⁸² *Id.* (“Most teams are owned outright by extremely wealthy individuals. The value they place on ownership of an NFL team is discernable in the prices they are willing to pay, which are largely independent of earning potential.”).

¹⁸³ *Id.* (“In 1974, two new NFL franchises were sold in Tampa, Florida, and Seattle, Washington. The price for the franchises in these new markets was \$16,000,000, though the agreement for payment brought the real cost down to a present value in 1974 of \$12,500,000 for each franchise.”).

income rose twenty-five percent, (3) the stadium lease was a valuable additional asset, and (4) television broadcasts were profitable to networks and it was reasonable to believe that the new television contract would enhance team revenues.¹⁸⁴

An athlete's value in professional team sports is essentially the compensation a team is willing to pay and that the athlete is willing to accept, for the athlete's services pursuant to a player contract, subject to any league rules that would restrict the ability of a team and player to freely negotiate a wage at market rates.¹⁸⁵ Similar to an appraisal sales comparison approach, evaluating past and current earnings of comparable players can assist teams and player agents in determining a player's fair market value in the context of contract negotiations or salary arbitration.¹⁸⁶ So, in these respects, the sales comparison method for determining the value of an asset in an appraisal resembles the method used to assess an athlete's value. However, an appraisal values an asset as if it were being sold *today*; lost earning capacity calculations determine an athlete's value (or future earnings) over a period of years in the future, increased for inflation and reduced to present value.

A calculation of future lost earnings of an athlete in a professional sports career should take into account, to the extent available and reliable, all of the following data:

- (1) The athlete's established history of professional earnings, if any;
- (2) The average or median earnings of all similarly situated players;¹⁸⁷
- (3) The actual earnings of comparable players;¹⁸⁸ and

¹⁸⁴ *Id.* ("Among other factors considered by the judge were the concessions contracts, tax and other local financial incentives, competition from other professional and collegiate sports, interest and fan support in the community, value of player contracts and the caliber of the players, and the current record and prospects of the team.").

¹⁸⁵ See, e.g., Matuszewski, *supra* note 25.

¹⁸⁶ But see Michael A. McCann, *It's Not About the Money: The Role of Preference, Cognitive Bias, and Heuristics Among Professional Athletes*, 71 BROOK. L. REV. 1459 (2006) (discussing the potential influence of behavioral tendencies on professional athletes in contemplation of contract offers).

¹⁸⁷ "[S]tatistics concerning the average earnings of persons in the victim's field might be used to estimate the quantity of his lifetime earnings potential." Joseph A. Kuiper, Note, *The Courts, Daubert, and Willingness-To-Pay: The Doubtful Future of Hedonic Damages Testimony Under the Federal Rules of Evidence*, 1996 U. ILL. L. REV. 1197, 1246 (1996). See also *Nolan v. Jefferson Downs, Inc.*, 592 So.2d 831, 840-41 (La. Ct. App. 1991) (finding that the evidence presented which showed that jockeys average \$35,000 to \$65,000 annually if they are up and comers, supported expert's choice of \$35,000 to represent jockey's earning capacity in the future as not unreasonable).

¹⁸⁸ See Chamallas, *supra* note 164, at 80 ("When plaintiffs have an established work history, the process of calculating loss of future earning capacity may be individualized, at least to the extent that projections are based on the specific occupation in which plaintiff

(4) The average professional career length of players in the athlete's sport or, more specifically, by position within the sport.¹⁸⁹

Because each player is unique, identifying the specific players who are most similarly situated or comparable to the plaintiff from whom a calculation of the plaintiff's lost future earnings may be based is critical. Any evidence, including expert testimony, regarding similarly situated or comparable players and the methodology used to calculate lost future earnings must of course satisfy Rule 702.¹⁹⁰

3. The Evidence and Expert Testimony in *Felder v. Physiotherapy Associates*¹⁹¹

The scope of comparable players was a point of contention in the *Felder* case.¹⁹² The expert testimony proffered at trial to establish the lost earning capacity of a AAA minor league player in the Brewers' organization, who had no record of any earnings at the major league level, consisted of two experts.¹⁹³ Al Goldis, who was the special assistant to the general manager of the New York Mets and had twenty-seven years experience in drafting, scouting, and developing players for major league baseball teams, testified about Felder's prospects for playing in the major leagues and the expected length of his career.¹⁹⁴ In Goldis' opinion, not only would Felder have made it to the major leagues, but he would have been the type of player expected to hit home runs and who other teams would pitch around.¹⁹⁵ To support his opinion, Goldis reviewed the Brewers' pre-draft scouting reports and minor league coaching reports on Felder.¹⁹⁶ He compared Felder

was employed. Economists will look to plaintiff's own earnings record as well as the average earnings in that occupation to determine both the base annual income and the projected increases in earnings.").

¹⁸⁹ See, e.g., *Albrecht v. Indus. Comm'n*, 648 N.E.2d 923, 926 (Ill. App. Ct. 1995) (considering evidence of the average career length of an NFL offensive lineman in the determination of future earnings of an NFL offensive lineman for purposes of wage-loss differential under workers' compensation statute); *Nolan*, 592 So.2d at 840–41 (considering evidence that jockeys can ride into their forties and fifties so long as they are not injured and keep their weight down); Plaintiff-Appellant Chicago Bears Football Club's Reply Brief, *Chicago Bears Football Club v. Indust. Comm'n*, 726 N.E.2d 223 (1997) (No. 96 L 50719), 1997 WL 33767139 (arguing that player's "reasonable career expectancy" was eight years in workers' compensation case).

¹⁹⁰ See *supra* note 50 and accompanying text.

¹⁹¹ For a discussion of the causation issue in *Felder*, see *supra* Part II.A.2.

¹⁹² *Felder v. Physiotherapy Assoc.*, 158 P.3d 877, 882–83 (Ariz. Ct. App. 2007)

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 882.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* Goldis also noted that "the Brewers had promoted Felder all the way up from the rookie league to the AAA level, and that his next step would have been the major leagues." *Id.*

to major league players who hit fifteen home runs or more per season from 1981–1990 and he testified that Felder had more power than Frank Thomas, whom Goldis had drafted.¹⁹⁷ Based upon the fact that Thomas had been playing for approximately seventeen years, “Goldis testified that Felder’s career would have lasted between twelve and fifteen years.”¹⁹⁸

The other expert witness for Felder was player agent Slade Mead, who provided trial testimony regarding economic damages and the range of player salaries.¹⁹⁹ Mead testified that “he knew who Felder was even though he was not Felder’s agent, because as a first-round draft choice, Felder was a ‘very high-profile baseball player back when . . . he was being drafted and coming out of [Florida State University].’”²⁰⁰ In support of his calculation of Felder’s expected future earnings, Mead selected two “comparable minor league players” who had moved on to the major leagues: Jeremy Burnitz and Geoff Jenkins.²⁰¹ Similar to Felder, Burnitz and Jenkins “were college outfielders, first-round draft picks, power hitters, and played for the Brewers.”²⁰² However, Burnitz and Jenkins had established themselves as successful major league players. Based on these two comparables, Mead estimated a seven year career for Felder and calculated his lost earnings to be \$27,790,440.²⁰³

In addressing what constitutes “reasonable certainty,” the Arizona Court of Appeals stated that the amount “must be supported by the best evidence available and the essential consideration is that ‘the jury must be guided by some rational standard.’”²⁰⁴ The Court of Appeals further explained:

For damage to a sports career, the evidence reasonably available will generally be what was presented at trial in this case—qualified expert testimony concerning the athlete’s prospects, statistics showing past performance, and comparative data concerning other athletes. We need not detail all of the evidence concerning Felder’s career. Suffice it to say that the jury learned in detail about his batting averages, fielding performances, and injuries between 1992 and 1998. The jury was provided with evaluations from minor league coaches and opinions from several experts with major league player development experience. The jury also heard about the economics of baseball

¹⁹⁷ *Felder*, 158 P.3d at 882–83.

¹⁹⁸ *Id.* at 883.

¹⁹⁹ *Id.* at 882.

²⁰⁰ *Id.* at 883 (quoting the testimony of Slade Mead).

²⁰¹ *Id.*

²⁰² *Id.* “Mead also presented evidence of how Felder’s minor league performance differed from Burnitz and Jenkins.” *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 887–88 (quoting *Short v. Riley*, 724 P.2d 1252, 1255 (Ariz. App. 1986)).

compensation, including how long a professional's career might be and what similar players were being paid.²⁰⁵

According to Professor Roger Abrams, the court's decision to uphold the jury's verdict and damage calculation is "not surprising" under this "permissive standard" and there was "no basis in the evidence" for the jury to select a \$7 million figure for Felder's lost future earnings.²⁰⁶ Abrams further notes that the record is devoid of any explanation of the basis for Goldis' estimate,²⁰⁷ that the court's opinion fails to indicate the precise data Mead relied upon, and whether there were other comparable players in addition to Burnitz and Jenkins who, like Felder, were first round draft choices with college experience.²⁰⁸

Nevertheless, both Goldis and Mead possessed knowledge and experience beyond that of the average juror and were certainly qualified to be expert witnesses.²⁰⁹ Further, their testimony, including the data and methodology they used, should have relatively easily satisfied both prongs of Rule 702 as their opinions were derived by reliable methodologies and assisted the trier of fact in making an assessment of Felder's lost earning capacity damages.²¹⁰ Once the requirements of Rule 702 are satisfied, it is up to the fact finder to weigh the credibility of the witnesses' testimony and the accuracy and reliability of the data

²⁰⁵ *Id.* at 888.

²⁰⁶ Abrams, *supra* note 14, at 201. In his article, Professor Abrams explains in detail the data compilation and methodology he used (relying heavily on performance statistics of existing major league players) in a wrongful death products liability suit against a drug manufacturer to calculate \$35,203,277 in non-discounted lost future earnings of a pitcher who was previously drafted in the third round and whose entire major league career consisted of a total of four and two-thirds innings in three relief appearances. *Id.* at 209–21.

²⁰⁷ *Id.* at 200. "Goldis's affidavit simply concludes that in his judgment Felder would have made it to the Major Leagues." *Id.* at n.35.

²⁰⁸ *Id.* at 200 n.36. Professor Abrams also notes that "Goldis in his deposition offered his opinion that Felder would have had a major league career of 10–15 years, significantly more than the average player career of 7–8 years for someone who has had a full year of Major League service." *Id.*

²⁰⁹ "The function of an expert is to 'provide testimony on subjects that are beyond the common sense, experience and education of the average juror.'" Felder, 158 P.3d at 888 (quoting *Adams v. Amore*, 895 P.2d 1016, 1018 (Ariz. Ct. App. 1994)).

²¹⁰ *Doe v. McFarlane*, 207 S.W.3d 52, 64 (Mo. Ct. App. 2006) ("If the subject on which the expert intends to testify is one which lay jurors are not inclined to be familiar with, so the opinion would be helpful to the jury, it is not a valid objection that the expert's opinion goes to the ultimate issue for the jury to decide, or that the expert's opinion invades the province of the jury. On the other hand, if the subject is one of everyday experience, where the jurors are competent to decide the issues, then opinion testimony is properly rejected.") (quoting *Guzman v. Hanson*, 988 S.W.2d 550, 554 (Mo. Ct. App. 1999) and noting that the subject about which expert testified—the use of celebrities to endorse or otherwise gain commercial advantage in the marketplace—is not a subject of everyday experience with which a lay juror would be inclined to be familiar, and thus it is not a valid objection that his opinion embraced issues of ultimate fact such as intent).

and methods upon which the calculations are based.²¹¹ Given that Mead's estimate of Felder's lost future earnings was just under \$28 million, it appears that the jury was skeptical of the comparables used by Goldis and Mead because it awarded Felder only one-fourth of that amount (\$7 million), and reduced it by thirty percent to account for Felder's comparative fault.²¹² Perhaps the jury believed that a AAA minor league player who was a former first round draft pick was higher on the EPR than most minor leaguers, but was also lower on the EPR than the two established and successful major leaguers being used as comparables. The jury may also have been persuaded by the testimony of the defendant's experts, who both testified that Felder did not have "a bright future in baseball" and that "Felder's chances of making the major leagues were slim."²¹³

To rebut the testimony of Goldis and Mead regarding Felder's baseball career and earnings, defendant's expert Steve Phillips compiled data from 1993–2004 of more than four hundred "outrighted" players who were cut from a team's major league forty-man roster, and which evidenced that "only 21.3% of outrighted players advance to the major leagues and only 3.4% of outrighted players remained in the major leagues for more than three years."²¹⁴ In other words, because Felder had been previously outrighted, the defendant chose to compare Felder to other outrighted players and believed them to be the most similarly situated players.²¹⁵ Felder objected to this evidence on relevance grounds, arguing that it was a "statistical analysis which talks about odds" and a general manager "does not draft or refuse to draft a player based on the odds."²¹⁶ Felder also argued

²¹¹ See, e.g., *Logerquist v. McVey*, 1 P.3d 113, 131 (Ariz. 2000) ("Questions about the accuracy and reliability of a witness' factual basis, data, and methods go to the weight and credibility of the witness' testimony and are questions of fact It is the jury's function to determine accuracy, weight, or credibility."); *McFarlane*, 207 S.W.3d at 67 (finding it reasonable, in a right of publicity case, for expert "to use the experiences of other celebrities—both of whose endorsement careers, [the expert] testified, had started out similarly to [the plaintiff's] with local appearances—to form an opinion about [the plaintiff's] potential endorsement opportunities. That his testimony about [their] experiences was anecdotal and not verified by documentation may affect the weight to be given [the expert's] opinion, it does not destroy the reliability of that information as a source for comparison").

²¹² *Felder*, 158 P.3d at 884.

²¹³ *Id.* at 883. The defendant's expert witnesses were Eddie Epstein, who worked for several teams in major league baseball and had experience evaluating players' performance by statistical calculation, and Steve Phillips, who was formerly the General Manager of the New York Mets. *Id.*

²¹⁴ *Id.* at 889.

²¹⁵ The defendant argued to the trial judge: "We've chosen [to] compare him to other outrighted players. We believe those are similarly situated players. And if you don't allow it, you substitute your judgment for the jurors'." *Id.*

²¹⁶ *Id.*

that the players were not comparable to Felder because they did not have the same skill sets, they did not play the same position, all were not first-round draft picks, and some of them played in college, some in high school, and some neither.²¹⁷ The trial court excluded the outright data comparison, expressing concern that Felder would not have had a chance to review and analyze the underlying data supporting the data compilation due to the timing of the defendant's motion to admit the evidence shortly before the trial began.²¹⁸ Even though the trial court excluded the data compilation, the trial court permitted Phillips to testify about "the significance of being dropped from the 40-man roster and that few outrighted players have ever advanced to the major leagues."²¹⁹ As such, and given that the outright data comparison included players from different positions and sixty-three percent of the players on the chart were pitchers, the court concluded that the trial court did not abuse its discretion in excluding the data compilation.²²⁰

However, the trial court's questioning of the relevance of the data essentially because it presented the "odds" of an outrighted player advancing to the major leagues is rather curious. In cases involving lost earning capacity damages, expert economists frequently use published data on labor participation rates by age, gender, education, and race to show the probability or odds that the plaintiff "will be alive, in the labor market, and actually employed at any future age."²²¹ Indeed, all data used as a basis for an estimate of an athlete's future earnings, including player comparables, in essence presents the "odds" that the plaintiff will eventually have a successful career as a professional athlete.²²² Moreover, comparing a minor league baseball player to specific players who have had successful careers at the major league level might actually be less reliable in answering that question than evidence of a percentage chance or odds. The more pertinent question concerns the reliability of the data; data showing all outrighted players and the percentage of those players who advanced to the major leagues, and then the percentage of those who stayed in the majors longer than three years, is certainly

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 889–90.

²²⁰ *Id.* at 890.

²²¹ See Jennings & Marcurio-Jennings, *supra* note 168, at 62.

²²² *Felder*, 158 P.3d at 889 ("[W]e have to look at [Felder] as an individual. And the only way to do that is to compare him to the players that are most similar to him as opposed to a wide universe of people dropped from the 40-man roster [Physiotherapy's] witness has not done a player by player comparison I don't think we ought to get into the statistics because they're not meaningful. There's no way that the jury can use or interpret those statistics.").

relevant, but the data would be more *reliable* if it was limited to outrighted players who shared substantially similar attributes and skills as Felder (i.e., were outfielders, power hitters, former first round draft picks, and played the same number of years in the minor leagues). Nevertheless, these are matters of weight, not admissibility, and can be fully explored in cross-examination.²²³

For a comparable player grouping to be reliable, it must not be too broad or too narrow and the fact finder must feel comfortable that the plaintiff is in the same “galaxy” as the comparable players. A very narrow scope of comparable players, for example the two players chosen by Felder’s experts, does not give the fact finder much flexibility in formulating an assessment of damages. Conversely, if the scope of player comparables is too broad, for example the *entire list* of players who were outrighted over an eleven-year period, the fact finder can be left with too much leeway and nothing more than “a shot in the dark” at the plaintiff’s lost future earnings. Lastly, depending on the particular case, data of individual comparable players may not even be the best available evidence to support an estimate of lost future earnings with reasonable certainty, as will be seen in the discussion of the calculation of Oliver’s damages in the next section.

If nothing else, *Felder* demonstrates how vital it is for experts to be thorough and precise in the specific data being used, the compilation of that data, and the methodology employed to calculate an athlete’s lost earning capacity. Further, to the extent the expert uses and relies on comparable or similarly situated players to support an estimate of future earnings, the specific players chosen by the expert can make or break the jury’s willingness to accept that expert’s estimate. It is also helpful to a jury if the expert estimates a low and high end range of future lost earnings with a detailed explanation of how both ends of the range were calculated, as opposed to providing one specific lump sum estimate, given that such a very small percentage of highly talented athletes even end up establishing careers as elite professional athletes and the wide disparities in compensation earned by those few individuals.

²²³ See *Doe v. McFarlane*, 207 S.W.3d 52, 67 (Mo. Ct. App. 2006) (“[T]o the extent there were things about Greer’s and Bernstein’s experiences that differed from Twist’s potential experiences or other evidence—like Twist’s actual endorsement deals or the deals of other hockey players—that tended to discredit Brooks’s testimony, those are matters of weight that were fully explored on cross-examination.”).

III. CALCULATING LOST EARNING CAPACITY IN *OLIVER V. NCAA*

This Section explains the data compilation and methodology I used to calculate Andy Oliver's lost earning capacity as a result of his wrongfully being declared ineligible to play college baseball for Oklahoma State University (OSU) because he had a lawyer represent him in negotiations with the professional club that drafted him out of high school two years earlier. I was retained as an expert witness to opine at trial on the legality of the no agent rule, including the legality of its application to Oliver, and to opine on the lost earning capacity damages incurred by Oliver as a result of having been declared ineligible to compete.²²⁴ The lawsuit began almost an entire year in advance of the 2009 Major League Baseball amateur draft for which Oliver would have been draft-eligible as a junior. The judge held a bench trial six months prior to the draft, during the week of January 5, 2009, to decide on both: (1) Oliver's request for declaratory judgment that the no agent rule is invalid on its face or that the rule's application to Oliver was arbitrary and capricious or a breach of the obligation of good faith and fair dealing owed to him, and (2) Oliver's request for injunctive relief to reinstate his eligibility.

From a lost earnings standpoint, Oliver's situation is distinguishable from that of Felder's in two very important respects. First, Oliver was a college baseball player without any professional playing experience whatsoever. Second, Oliver's claim involved a *diminished* opportunity to earn as a professional whereas Felder's claim presented a *lost* opportunity (because his eye injury prevented him from ever playing again). As was the case in *Felder*, the damages analysis did not require an economist, accountant, or income/wages expert; it required somebody possessing knowledge about valuing the marketability of a baseball player for the draft and the factors that go into scouts' evaluations of baseball players—just as a valuation or appraisal of a house does not require an economist or accountant, but rather somebody with knowledge about determining the market value of homes and the various tangible and intangible factors that would affect its marketability if it were sold (i.e., location, décor, lots of kids in the neighborhood, swimming pool, landscaping, etc.). Determining Oliver's damages was akin to an asset valuation or appraisal based upon a reasonable estimate of the market value of the asset if it were sold, and in Oliver's situation, if he were drafted.

²²⁴ Much of the information in this Part was extracted from the various expert witness reports prepared and filed in the case, on file with author.

The two-step burden of proof discussed in Part III presented the two overarching issues I had to address from a lost future earnings standpoint: (1) determining whether the suspension in fact caused a reduction of Oliver's opportunity to earn money as a professional baseball player, and, if so, (2) determining the present value of that reduced chance with reasonable certainty.

A. Proving the Factual Cause Link

Oliver was suspended indefinitely by OSU at the end of his sophomore season in the spring of 2008 for a violation of the NCAA's no agent rule that occurred in 2006 when he was originally drafted out of high school; he was suspended from competing in the post-season that year. In October of 2008, OSU requested reinstatement of Oliver's eligibility, and in December the NCAA rendered its reinstatement decision whereby it suspended him from competition for the entire 2009 baseball season and charged him with a year of eligibility.²²⁵ This "sit a year/charge a year" penalty meant that Oliver would have had only one year of eligibility remaining after the 2009 season, which would have effectively made him what is known as a "senior sign" for the 2010 draft, thus substantially reducing his value for that draft because drafted seniors do not have the leverage that a drafted junior has of being able to go back to school for his senior year. The suspension of Oliver for an entire season during his draft-eligible year and the charging of him with a year of eligibility *solely* on the basis that his lawyer was present with members of Oliver's family at a meeting in 2006 with personnel of the club that drafted him to discuss the prospects of signing a contract, was unprecedented.²²⁶

The NCAA's reinstatement decision presented an interesting hypothetical: Assuming that the no agent rule was found to be invalid and/or invalidly applied to Oliver, what impact, if any, would a wrongful suspension in which Oliver was and would be unable to compete cause a reduction in Oliver's value in the upcoming draft?²²⁷ The hypothetical posed here also presented

²²⁵ See NCAA Eligibility Case Report dated December 3, 2008 (on file with author).

²²⁶ At the time when Oliver's lawyer had contact with the club that drafted Oliver in 2006, it appears that the NCAA had previously applied its no agent rule to a college baseball player only one time, and that was five years prior thereto where a player was only suspended for six regular season games at the beginning of his freshman year. For a discussion of the NCAA's application of the no agent rule and how it detrimentally impacts college baseball players more so than players in other sports that have a draft, see Richard T. Karcher, *The NCAA's Regulations Related to the Use of Agents in the Sport of Baseball: Are the Rules Detrimental to the Best Interest of the Amateur Athlete?*, 7 VAND. J. ENT. L. & PRAC. 215 (2005).

²²⁷ Oliver needed to be prepared for the possibility that the judge could rule in his favor on the declaratory action but deny his request for injunctive relief, which would

an interesting factual cause issue at the time of trial. At first glance it may seem counterintuitive to be inquiring about whether Oliver would lose any value in a draft that had yet to occur, not knowing where he would be drafted, but it is essentially no different than determining unknown future pain and suffering, future medical expenses or future lost wages in a personal injury case where the injury has already occurred and liability has been established.

The question at the time of trial was whether and to what extent Oliver had been and would be damaged as a result of wrongfully being declared ineligible, which could be determined based upon an estimation of both (1) where Oliver would have been drafted absent the wrongful suspension, and (2) the suspension's effect on his "draft stock" (i.e., the number of draft slots affected). Interestingly, the answer to that question is the same both before and after the draft and does not vary depending upon where Oliver would ultimately be drafted. In other words, knowing where Oliver would ultimately be drafted provides little assistance because, regardless of where he would ultimately be drafted, the factual dispute is the same—the dispute centers around where Oliver *would have been drafted* absent the suspension and *how many slots lower* he was drafted because of the suspension. So even if, at the time of trial, we could determine the precise round and slot where Oliver would be drafted and whether he would ultimately sign a professional contract and for how much, it still would not answer the questions of whether the suspension diminished his chance of being drafted higher and how much that diminished chance is worth.²²⁸

In the days, weeks, months, and years leading up to each annual draft, scouts from all thirty MLB clubs evaluate all of the draft-eligible prospects throughout the United States, Canada, and Puerto Rico. As part of that evaluation process, scouts assess and heavily scrutinize prospective draft candidates' "tools" as well as their makeup and character (i.e., "intangibles").²²⁹

require an assessment of his damages for being wrongfully withheld from competition during his *entire* draft-eligible junior season.

²²⁸ It is worth noting that Oliver was not claiming an interest in a future professional sports career; he was seeking compensation for the damages incurred from unfairly and unjustly being declared ineligible. Therefore, any authority for the proposition that an interest in a future professional career does not rise to the level of a legally protected right or a constitutionally protected property right is not applicable because Oliver was not claiming a property interest or a property right subject to constitutional due process protection.

²²⁹ See *supra* Part I.B. for a discussion of the various factors that determine a player's tools and intangibles.

With so much competition for the few slots at the top of the draft, scouts look for any reason they can to draft one player over another, and a player's intangible values impact those decisions.²³⁰ The better the draft prospect (i.e., the higher the player is on the EPR), the more important the intangibles become to the clubs.²³¹ It is true that every player's draft stock can be and is affected by any number of future contingencies and factors, both tangible and intangible, that may or may not occur (for example, injuries, improvement or diminishment of skills, good or bad performance, false allegations of criminal activity, etc.).²³² However, those contingencies and factors have no bearing whatsoever on any damage attributed to being declared ineligible due to a wrongful suspension. The task was to isolate the impact of the suspension on Oliver's draft stock, all other things being equal. If a suspension of a top draft prospect during his draft-eligible year in fact causes *some* harm to a player's draft stock, the amount of the harm would certainly vary depending upon the length of the suspension.

Although Oliver was an amateur college baseball pitcher, as a top draft prospect he was fairly high on the EPR at the time of trial. Oliver was drafted out of high school and was heavily recruited by the top college baseball programs. As a six-foot three-inch left-handed pitcher who throws consistently in the low- to mid-ninety miles per hour range, Oliver was undoubtedly considered a top prospect by professional scouts for the 2009 draft.²³³ Three weeks before the draft, he was highlighted on

²³⁰ See *supra* note 38 and accompanying text.

²³¹ Charles Robinson, *Social Networking a Potential Trap for Prospects*, YAHOO! SPORTS (April 7, 2010, 3:35 PM), <http://sports.yahoo.com/nfl/news?slug=cr-socialnetworking040709> ("One [professional football] coach said his team has gotten particularly adept at collecting information from networking sites. The team combs through pictures, goes through archived 'comments' sections, breezes through friend lists for other potential contacts, and spends untold amounts of time dissecting pages of information based on the potential draft status of a player.").

²³² See, e.g., Associated Press, *Jury Awards \$225,000 to Former Michigan Player*, ESPN.COM (Feb. 19, 2009), <http://sports.espn.go.com/espn/wire?section=nfl&id=3920026> (discussing a former Michigan football player and 2005 first round draft pick of the Indianapolis Colts, Marlin Jackson, who was awarded \$225,000 in a lawsuit against a fellow student who claimed the football player assaulted him with a bottle in 2003; Jackson claimed that the false accusation hurt his reputation in NFL pre-draft interviews, and according to his attorney, "the jury award is roughly equivalent to the difference in income from being picked one or two spots higher in the draft").

²³³ Major League Baseball's 2009 scouting reports summarized Oliver as follows:

Oliver got a lot of attention when he was suspended by the NCAA for being represented by an agent, then got the suspension overturned in court. He's had an up-and-down junior season performance-wise, but scouts love his fastball-changeup mix. He can crank the heater up to 98 mph and the change is a plus pitch as well. More than anything, his fastball command is what makes him so intriguing, and it's his bread-and-butter, making up for the lack

MLB.com as one of the top two left-handed college pitchers available for selection.²³⁴ In his freshman season in 2007, Oliver had a 6-1 win-loss record and a 5.52 ERA.²³⁵ The following summer he pitched in the prestigious Cape Cod League where he had a 1.41 ERA and fifty-four strikeouts in forty-five innings and was named the tenth-best professional prospect in the league by *Baseball America*, the most widely-recognized and reputable amateur baseball publication.²³⁶ In his sophomore season in 2008, he was one of the nation's top college pitchers when he earned first-team All-Big 12 honors, was named a second-team All-American by *Rivals.com*, ranked third in the Big 12 and sixteenth nationally with a 2.20 ERA, and led Oklahoma State (and ranked third in the Big 12) with ninety-six strikeouts.²³⁷ The following summer he pitched for Team USA and had a 2-0 record with a 0.93 ERA in four starts, recorded twenty-four strikeouts in 19.1 innings, and helped lead the United States to a 24-0 record and a gold medal at the world championships.²³⁸ *Baseball America's* college player ranking for the 2009 draft, as of September 19, 2008, had him ranked eighth out of all college players.²³⁹ Taking into account high school players, it would be reasonable to assume that, as of that point in time, he would be ranked fourteenth, fifteenth, or sixteenth among college and high school draft eligible players combined.

Given all of this evidence, it was reasonable to conclude that Oliver's intangibles value would be reduced as a result of being declared ineligible by the NCAA for violating the no agent rule. Oliver was suspended from competing in the 2008 college post-season and lost the opportunity to perform for scouts in an intense, competitive, and high-pressured post-season environment. Scouts were left wondering how he would have compared

of a breaking ball. Lefties who throw that hard and command the ball that well aren't common, so he should go quickly on Draft day.

2009 Draft Reports, MLB.COM (Apr. 24, 2009), <http://mlb.mlb.com/mlb/events/draft/y2009/reports.jsp?content=oliver>.

²³⁴ See Jonathan Mayo, *Draft Report: Scouting for Southpaws; Oklahoma State's Oliver Taking Long, Winding Road to Pros*, MLB.COM (May 13, 2009, 10:00 AM), http://mlb.mlb.com/news/article.jsp?ymd=20090513&content_id=4720060&vkey=news_mlb&fext=.jsp&c_id=mlb.

²³⁵ Andrew Oliver Pitching Statistics, THE BASEBALL CUBE, <http://www.thebaseballcube.com/pitching/O/Andrew-Oliver.shtml> (last visited Sept. 28, 2010).

²³⁶ For information about *Baseball America's* content, see <http://www.baseballamerica.com/help/about-us/> (last visited July 3, 2010).

²³⁷ Player Bio: Andrew Oliver, http://www.okstate.com/sports/m-basebl/mtt/oliver_andrew00.html (last visited Sept. 28, 2010).

²³⁸ *Id.*

²³⁹ *Prospects Plus*, BASEBALL AMERICA (Sept. 19, 2008), <http://prospectsplus.baseballamerica.com/college/2009/267141.html> (subscription required).

against other players whom they had the opportunity to see compete in that environment and what exactly Oliver did wrong such that the NCAA would take the drastic measure of declaring him ineligible and suspending him in his draft-eligible junior season. Moreover, associating with sports agents has a negative connotation and Oliver was disciplined by the national collegiate sports governing body because of it, and it received national media attention.²⁴⁰ Such attention causes an athlete's stock to drop in the eyes of potential employers.²⁴¹ An amount that would compensate Oliver for his reduced intangibles value would reflect the difference between his 2009 draft status with and without the reduction.

As far as an evidentiary basis for estimating Oliver's draft value, I determined that the use of comparables would not be a practical or reliable basis for estimating an amateur baseball player's draft value. Performance statistics of amateur baseball players are not very predictive of future performance or success as a professional and cannot be compared to the performance statistics of professional players in any meaningful way. Also, each draft year is different, with a different pool of draft-eligible players, which includes both high school and college players of all positions, and some draft years have a much stronger talent pool than others. Moreover, because baseball has a minor league system in which drafted players typically spend a few years developing their skills, clubs do not tend to select players in the draft based upon current needs on their major league rosters; they select the next best available player regardless of position. Thus, attempting to draw any meaningful comparisons between a top college pitching prospect and players drafted in previous years or current professional players tends to be an exercise in futility.

I relied on *Baseball America's* most recent rankings of college and high school baseball prospects for the 2009 draft, which are based upon the editors' evaluations of players as well as input from professional scouts and college coaches. For the purpose of computing damages in this case, the rankings data served as a

²⁴⁰ Indeed, the attention given to the suspension is the first statement made in the summary section of Major League Baseball's scouting report on Oliver. *2009 Draft Reports*, supra note 233.

²⁴¹ See, e.g., *NFL Draft Prospect Andre Smith Fires Alvin Keels as Agent*, SPORTS BUSINESS DAILY (April 14, 2009) ("[Andre] Smith was originally viewed as one of the top picks in the Draft, but his stock has dropped after he was held out of the Sugar Bowl for alleged contact with an agent and after he left the NFL Combine early. In early February, Smith was ranked No. 2 by Web site NFLDraftBlitz.com, but yesterday he was ranked No. 6 and is not among the nine players who have accepted invitations to the NFL Draft.").

substitute for individual scouting reports on Oliver and was actually a more reliable source because *Baseball America* compiles numerous scouting reports on all of the top prospects eligible for the draft, and the rankings are a culmination of all of those scouting reports. The rankings provide the most objective source for evaluating what is otherwise a highly subjective draft selection process. Thus, the rankings provide a *reasonable* basis and quite possibly “the best evidence available” to estimate where Oliver would be drafted absent any suspension, assuming all other things being equal and that Oliver continued to perform as he had been. In both its September and November rankings, *Baseball America* had Oliver projected to be drafted in the middle of the first round.²⁴²

B. Proving the Amount of the Lost Future Earnings with Reasonable Certainty

1. Lost Signing Bonus

I calculated the damages based upon an estimation that Oliver’s reduced intangibles value would lower his draft status by a range of a quarter of a round (approximately seven slots) to three-quarters of a round (approximately twenty-two slots). I deemed this to be a conservative estimate, as there are fifty rounds in the draft. Also, with such a huge pool of draft-eligible players to choose from, which includes high school seniors and junior college players, a player’s intangibles are often the key factor that separates one player from another on a club’s draft board, especially when it comes to players at the top of the draft board. Using *Baseball America*’s ranking of the middle of the first round as a starting point, which would be the fifteenth slot, and reducing it by a range of seven to twenty-two slots, Oliver’s adjusted draft status would place him in the range of the twenty-second slot to the thirty-seventh slot (in the supplemental first round) for the 2009 draft.

To determine a range of compensation that would compensate Oliver for his reduced intangibles value in the 2009 draft, I used the signing bonuses from the 2008 draft and adjusted them by ten percent for inflation. Ten percent was used because over the previous three drafts, first round signing bonuses had increased by an average of ten percent annually. The fifteenth pick in the 2008 draft received a signing bonus of

²⁴² In the November rankings, Oliver was No. 16 overall (including both high school and college draft prospects) and No. 8 on the college list. Oliver was ranked No. 8 on the college list in the September rankings as well. See Jim Callis, *Ask BA*, BASEBALL AMERICA (Oct. 6, 2008), <http://www.baseballamerica.com/today/prospects/ask-ba/2008/266992.html>.

\$1,730,000, which, adjusted for inflation, would be equivalent to a signing bonus of \$1,903,000 for the 2009 draft. The twenty-second pick in the 2008 draft received a signing bonus of \$1,419,000, which, adjusted for inflation, would be \$1,560,900 in the 2009 draft. The thirty-seventh pick in the 2008 draft received a signing bonus of \$970,000, which, adjusted for inflation, would be \$1,067,000 in the 2009 draft. Therefore, I estimated Oliver's lost signing bonus to be in the range of \$342,100 (\$1,903,000 minus \$1,560,900) and \$836,000 (\$1,903,000 minus \$1,067,000).

2. Lost Wages

Because it was unknown whether Oliver would prevail on his request for injunctive relief to restore his eligibility for the 2009 season, a calculation needed to be made to reflect Oliver's damages in the event he only prevailed on the declaratory action and lost on his claim for injunctive relief, which then would not have reinstated Oliver's eligibility. Based upon all of the evidence that Oliver was considered to be a top draft prospect, I opined that it was more likely than not that Oliver's sitting out from competition during the entire season of his draft-eligible year would have a substantial detrimental impact on his draft status that would cause him to slip in the draft beyond the first round.²⁴³ In that event, the available data evidences that Oliver's opportunity of reaching the major leagues would become substantially reduced, such that it would no longer be probable. Data compiled by *Baseball America* in 2002 of all players drafted from 1965 to 1995 shows that a majority—64.9%—of players drafted in the first round played in the major leagues.²⁴⁴ However, the percentage chances of playing in the major leagues significantly drops to 41.6% in the second round, 31.1% in the third round, 23.8% in the fourth round, 23.1% in the fifth round, 15.5% in the sixth through tenth rounds, and 8.6% in the eleventh through fifteenth rounds.²⁴⁵ Therefore, an estimate of Oliver's damages in the event he remained suspended for the

²⁴³ Approximately one week after the preparation and filing of my damages report, the NCAA heard Oklahoma State University's appeal to have Oliver reinstated. As a result of that appeal, Oliver's eligibility was restored and his suspension was reduced from a full season to seventy percent of a season, which would have required him to sit out forty games of a fifty-six game season. See Aaron Fitt, *Headed to Trial: Oliver Case May Have Lasting Ramifications*, *BASEBALL AMERICA* (Dec. 22, 2008), <http://www.baseballamerica.com/today/college/on-campus/2009/267366.html>.

²⁴⁴ *Will He Play in the Big Leagues?*, *BASEBALL AMERICA ONLINE—2002 DRAFT PREVIEW* (compiled by Allan Simpson) (on file with author).

²⁴⁵ *Id.*

season had to reflect not only the loss in draft signing bonus²⁴⁶ but also the loss of wages over the course of a major league career.

If Oliver did not compete during his entire draft-eligible season, there was a high probability that he would have been drafted lower than the second round.²⁴⁷ Based upon the statistics showing that it was no longer probable that Oliver would make it to the major leagues, an estimate of Oliver's future lost wages would approximate his future lost salary income for each year of lost service time in the major leagues. For purposes of determining this amount, a few reasonable assumptions had to be made: (1) Oliver would have at least average skill as a pitcher over the course of his career, (2) Oliver would receive at least an average salary for a pitcher for each year of service time in the major leagues, and (3) Oliver would serve at least the average number of years of service time in the major leagues for a pitcher.

The USA Today Baseball Salaries Database²⁴⁸ contains year-by-year data of salaries for all major league baseball players on opening day rosters and disabled lists.²⁴⁹ Using the data from the 2008 season, I calculated the average salary for a pitcher based upon number of years of service in the major leagues, which is set forth in the chart below. For the first three years of

²⁴⁶ Adjustments were also made to the estimated range of Oliver's lost signing bonus to reflect the difference between the signing bonus he would receive absent any suspension (that of a fifteenth pick) and the signing bonus he could reasonably expect to receive if he remained ineligible for the *entire* 2009 season.

²⁴⁷ See *Hall v. Univ. of Minn.*, 530 F. Supp. 104, 106 (D. Minn. 1982). The impact on a player's draft stock of not playing for an entire season is evidenced by the fallout of a lawsuit involving James Paxton, a hard-throwing left-handed college pitcher like Oliver. Paxton was drafted by the Blue Jays in the supplemental first round as the thirty-seventh overall pick in the 2009 draft, elected not to sign, and returned to the University of Kentucky (UK) for his senior year. Based upon a blog post ambiguously suggesting that an agent acting on Paxton's behalf may have communicated with the Blue Jays about a contract, UK insisted that Paxton submit to questioning by the NCAA or face expulsion from the team. Before the start of the season, Paxton was rated by Baseball America as the seventh-best college baseball prospect available for the 2010 MLB Draft. Paxton ended up leaving UK and playing for an independent league team where he had limited playing time in which to showcase his talents in time for the 2010 draft. As a result, Paxton ended up slipping to the fourth round in the June 2010 draft. See Patrick Sullivan, *Paxton Gives Up Fight, Leaves UK*, LEXINGTON HERALD-LEADER (Feb. 27, 2010, 8:07 AM), <http://www.kentucky.com/2010/02/27/1159206/pitcher-who-sued-uk-leaves-team.html>; *Baseball America Names Paxton a Top Pro Prospect*, LEXINGTON HERALD-LEADER (Feb. 27, 2010, 8:07 AM), <http://www.kentucky.com/2009/09/18/940423/baseball-america-names-paxton.html>.

²⁴⁸ USA TODAY SALARIES DATABASE, <http://content.usatoday.com/sports/baseball/salaries/default.aspx> (last visited June 20, 2010).

²⁴⁹ *Id.* ("Figures, compiled by USA TODAY, are based on documents obtained from the MLB Players Association, club officials and filed with Major League Baseball's central office. Deferred payments and incentive clauses are not included. Team payrolls do not include money paid or received in trades or for players who have been released.").

service, I omitted players signed from Japan, as many of them have signed multi-million dollar major league contracts far beyond the wages paid pursuant to the league's minimum salary rules that bind players during their first three seasons under what is known as the "reserve system."²⁵⁰

Years of Service	Number of Pitchers	Average Salary
1	91	\$429,260
2	79	\$467,927
3	49	\$581,175
4	37	\$1,810,698
5	31	\$2,683,387
6	23	\$4,694,420
7	21	\$5,531,547
8	22	\$6,906,479
9	14	\$4,253,452
10	17	\$6,873,529
11	10	\$7,240,617
12	4	\$8,000,000
13	9	\$5,385,022
14	4	\$8,901,781
15	3	\$7,604,450
16	3	\$8,925,061
17	2	\$5,835,514
18	2	\$4,500,000
19	1	\$8,000,000
20	3	\$9,533,515
21	3	\$10,666,667

Research shows that the average number of years of total service time for a major league player is 5.6 years.²⁵¹ In accordance with the assumption that Oliver would serve the average number of years in the major leagues for a pitcher, an amount representing his future lost wages would be the sum total of the average annual salaries for a major league pitcher for the first five years of service time. Further, I made an

²⁵⁰ For an excellent summary of the rules pertaining to Major League Baseball's reserve system, salary arbitration system, and free agency system, see Abrams, *supra* note 14, at 205–09.

²⁵¹ Sam Roberts, *Just How Long Does the Average Baseball Career Last?*, N.Y. TIMES, (July 15, 2007), <http://www.nytimes.com/2007/07/15/sports/baseball/15careers.html>. See Abrams, *supra* note 14, at 216 (finding the mean career of a pitcher on a Major League Roster to be seven years and 124 days, based on all pitchers who ended their Major League careers after 2002 season who had at least ten starts in one Major League season).

assumption that the plaintiff would spend three years in the minor leagues and thus would not have started his major league career until four years later (in the year 2012). Therefore, Oliver's future lost wages would be the total of the annual salaries he would receive in each of years 2012, 2013, 2014, 2015, and 2016.

Research also showed that major league salaries had increased each year for the previous four years, and the average increase over the previous four seasons was 5.75% annually.²⁵² Using the 2008 average salary figures in the chart above and compounding those figures at an annual rate of 5.75% to account for inflation, I estimated Oliver's salary for his first five years of major league service to be as follows:

Year	Service Time	Salary
2012	1 year	\$536,836
2013	2 years	\$618,842
2014	3 years	\$812,810
2015	4 years	\$2,677,988
2016	5 years	\$4,196,877

The total future lost wages were then reduced to present value based upon a conservative low-risk investment rate of return. As of December 5, 2008, the five-year U.S. government bond yield was 1.67%.²⁵³ The future lost wages, reduced to present value based upon a 1.69% yield and compounded each year, was as follows:

Year	Salary
2012	\$501,455
2013	\$568,287
2014	\$733,795
2015	\$2,376,799
2016	\$3,661,911

²⁵² 2008 salaries increased from the previous year by 3.6%; 2007 salaries increased from the previous year by 4.6%; 2006 salaries increased from the previous year by 8.9%; and 2005 salaries increased from the previous year by 5.9%. While I briefly mention the calculations made in the *Oliver* case to adjust his future earnings for inflation and present value, an in-depth discussion of this subject is beyond the scope of this Article.

²⁵³ Historical Five Year Bond Data, FED. RES., http://www.federalreserve.gov/releases/h15/data/Business_day/H15_TCMNOM_Y5.txt (last visited Oct. 6, 2010).

Therefore, I estimated Oliver's total future lost wages, increased for inflation and reduced to present value, at \$7,842,247.

A fair criticism of this estimate of future lost major league wages would be that it assumes a player with more than a fifty percent chance of making the major leagues (those drafted in the first round) *will* make the major leagues and a player with less than a fifty percent chance (those drafted in the second round or lower) *will not*. This estimate also awards the *full* amount of the estimated future lost wages and thus does not accurately reflect the extent to which the suspension caused a *reduction* in Oliver's chances of making the major leagues. In some respects, this resembles the "all or nothing" rule.²⁵⁴ My estimation of Oliver's lost future wages, from a causation standpoint, is the result of a straight application of the traditional but for test. In other words, but for the wrongful suspension, Oliver would not have lost the chance at a major league career, which seems to be the standard that was utilized in *Felder*.²⁵⁵

However, a more precise application of loss of chance principles would calculate Oliver's lost future wages to reflect the reduced chance of making the major leagues that resulted from the suspension. As discussed in this Article, assessing diminished chance in terms of a percentage with any degree of precision is usually extremely difficult, if not impossible, to do. But here, the available data particularly lends itself to a reasonable approximation of a loss of chance percentage using a proportional damages method as follows:²⁵⁶

- (1) Calculate the total wages Oliver could reasonably have expected to earn before the suspension, which equals the total future lost wages, increased for inflation and reduced to present value, of \$7,842,247 (as determined above).
- (2) Calculate the reduced chance percentage. Before the suspension, Oliver's percentage chance of making the average major league salary was 64.9% (as a projected first round pick).²⁵⁷ After the suspension, based upon an estimate of being drafted lower than the first round, his percentage

²⁵⁴ For a discussion of how the lost chance doctrine alleviates the perceived unfairness of the all or nothing rule of tort recovery, which provides that the plaintiff may only recover if she can prove that the defendant's conduct more likely than not caused the unfavorable outcome, see *supra* Part II.A.1. If the plaintiff meets this burden she recovers one hundred percent of her damages, and if she does not meet this burden she recovers nothing.

²⁵⁵ For a discussion of the but for test, see *supra* Part II.A.2.

²⁵⁶ See *supra* Part II.B.1.

²⁵⁷ See *supra* Part IV.B.2.

chance of making the average major league salary dropped to anywhere from 41.6% to 8.6% depending upon the round.²⁵⁸ The difference results in a diminished chance in the range of 23.3% to 56.3%.

(3) Multiply the amount determined in step one by the reduced chance percentage determined in step two, which equals a range of \$1,827,243 to \$4,415,185.²⁵⁹

C. The Settlement Entered After the Draft

On February 12, 2009, the trial court granted Oliver's request for declaratory and injunctive relief, invalidating the no agent rule and immediately restoring Oliver's eligibility for the 2009 season.²⁶⁰ The judge thereafter scheduled a trial to determine damages for mid-October, four months after the 2009 June draft.

Oliver was drafted in the second round with the fifty-eighth pick by the Detroit Tigers.²⁶¹ While it is very typical for top college draft prospects to progressively improve their performance each year in college, Oliver's performance in 2009 was much worse than in 2007 and 2008. In 2009, Oliver posted a 5-6 record with a 5.30 ERA and opponents batted .274 against him.²⁶² A worse performance during the season of any player's draft-eligible year than in previous years can cause a player to be drafted lower than he otherwise would have been drafted, and how much lower would depend upon the extent of the worse performance. A player's statistics can influence a scout's evaluation of a player's potential to play in the major leagues.²⁶³

²⁵⁸ See *supra* Part IV.B.2.

²⁵⁹ An alternative calculation in step three would be to determine a range for each year separately (for 2012, 2013, 2014, 2015, and 2016) by multiplying the diminished chance percentage range by the average salary for each year, because the average salary for each year was increased for inflation and reduced to present value on a compounded basis.

²⁶⁰ See *supra* note 6 and accompanying text. The NCAA filed a motion *in limine* before trial to exclude my testimony on the grounds that it did not meet the admissibility standard under Rule 702 and further on the basis that I was not qualified as an expert. See Defendant National Collegiate Athletic Association's Motion in Limine to Exclude Purported Expert Testimony, *Oliver v. NCAA*, 920 N.E.2d 203 (Ohio Ct. Common Pleas 2008) (No. 2008-CV-0762). The trial court denied the motion, noting that "the admissibility of expert testimony must be made on a case-by-case basis, reviewing the expert's knowledge, skill, experience, training and education" and "the determination of whether a witness possesses the qualifications necessary to give expert testimony and introduce evidence also lies within the sound discretion of this Court." Judgment Entry, *Oliver v. NCAA*, 920 N.E.2d 203 (Ohio Ct. Common Pleas 2009) (No. 2008-CV-0762).

²⁶¹ See *Andrew Oliver Pitching Statistics*, *supra* note 235.

²⁶² *Id.*

²⁶³ See Alan Schwarz, *The Great Debate*, *BASEBALL AMERICA* (Jan. 7, 2005), <http://www.baseballamerica.com/today/features/050107debate.html>. In a 2005 interview conducted by *Baseball America*, two longtime scouts and two baseball statistics experts

Oliver's uncharacteristically poor performance could explain why he was drafted much lower than projected at the start of the season, and even lower than the lowest pick I estimated he would have been drafted taking into account the reduced intangibles value (the thirty-seventh slot). Thus, Oliver's reduced intangibles value, combined with a worse than expected performance during his draft-eligible season, caused him to drop from a projected middle of the first round pick at the start of the season to the fifty-eighth pick in the 2009 draft.

Oliver signed with the Tigers and received a \$1,495,000 signing bonus.²⁶⁴ Oliver and the NCAA reached a settlement one week before the scheduled damages trial, whereby Oliver was paid \$750,000 and the trial court's order invalidating the no agent rule was vacated.²⁶⁵ Thus, we will never know whether a jury would have decided that the NCAA's wrongful suspension in fact caused Oliver a diminished chance of being drafted higher or what value the jury would have placed on that loss of chance. Nevertheless, it provides a unique case study for discussing the computation of lost earning capacity damages of an amateur player fairly high on the EPR. In the end, Oliver's gross compensation equaled what he would have received had he been drafted as originally projected because his signing bonus and settlement amount, combined, equates roughly to the signing bonus a player drafted in the middle of the first round can reasonably expect to receive. Oliver was called up by the Tigers and had his first start in the major leagues just one year after being drafted, which, if nothing else, proves that all the scouting reports on him were accurate.

CONCLUSION

Athletes claiming damages for lost earning capacity in a professional sports career have a steep burden to overcome—which I have delineated in this Article as a two-step burden. Demonstrating that they possess substantial prospects as a professional athlete in the court room as opposed to on the court is a whole different ball game. Claims for lost future earnings in

discussed the value of player statistics to scouts in evaluating players. *Id.* According to Gary Hughes, the Cubs' assistant general manager and a scout for more than thirty years with many clubs, "[y]ou show up at a game and the first thing you get is a stat sheet and you look at it." *Id.* Eddie Bane, the Angels' scouting director and a former top pitching prospect himself, agrees: "I'm going to pick up the stat sheet—I'm going to look at the strikeouts and walks. I'm going to look at the batting average. I'm going to know all that stuff because I've been on the computer." *Id.*

²⁶⁴ See *Andrew Oliver Pitching Statistics*, *supra* note 235.

²⁶⁵ See Associated Press, *Oliver Receives \$750,000 Settlement*, ESPN.COM (Oct. 8, 2009), <http://sports.espn.go.com/ncaa/news/story?id=4543864>.

a professional sports career involve making predictions about a future career that only a small fraction of the population is able to attain. However, the athlete need not prove that he *would* attain it, but only that he once had the *chance* to attain it and that chance was either lost or reduced. Courts have struggled with articulating any definitive standard for determining when the defendant's actions in fact caused a loss, but their holdings seem to suggest an application of the traditional but for analysis. As discussed in this Article, the athlete's claim can be viewed with more precision within the constructs of the loss of chance doctrine, assessing the athlete's chances before and after the breach, which can also accomplish a more fair and adequate allocation of fault in proportion to the extent of the harm.

Determining the amount of lost future earnings, by definition, is "speculative" and simply cannot be proven with complete certainty. Recognizing this, the law imposes a lesser, but nebulous, standard of "reasonable certainty." As the cases referenced in this Article demonstrate, it is an extremely fact-intensive inquiry whereby the devil is in the details: the reliability of the evidence, the knowledge of the experts, the methodology, procedures, and calculations used by the experts, and the data compilations upon which they are based. In some cases, the athlete may be so high on the earning potential range (EPR) with an established earnings history that it can be relatively easy to meet both burdens or, conversely, the athlete may be so low on the EPR that doing so is nearly impossible. While a future earnings assessment of an athlete in a professional sports career is, in many respects, akin to an appraisal process, and thus the use of player comparables is a viable methodology in some cases, the *Oliver* case demonstrates the complexities inherent in calculating lost future earnings for top draft prospect amateur athletes who are shown to be fairly high on the EPR.

Internet Radio Disparity: The Need for Greater Equity in the Copyright Royalty Payment Structure

Jessica L. Bagdanov*

INTRODUCTION

When Radiohead released the album “In Rainbows” in 2007, they provided a downloadable version on the band’s website for which buyers could pay whatever price they wanted, even zero.¹ Commentators noted, “[f]or the beleaguered recording business Radiohead has put in motion the most audacious experiment in years.”² Although some fans downloaded the album for free, many paid money for it,³ and the album made more money than the band’s two previous albums combined, which were never offered for free.⁴ Not many musical artists could get away with the creative antics of Radiohead,⁵ but this novel marketing

* J.D. candidate 2011 Chapman University School of Law. B.A. 2007 Westmont College. I am incredibly grateful to Chapman University School of Law Professors Heidi Brown and John Tehranian for their thoughtful editorial input on this Comment; to my colleagues on *Chapman Law Review* for their tireless efforts and hours of work; also to my parents, Doug and Connie Baird, for always encouraging me to pursue what inspires me; and finally, to my husband, Tim Bagdanov, for his unfailing love and constant support.

¹ Jon Pareles, *Pay What You Want for This Article*, N.Y. TIMES, Dec. 9, 2007, (Arts & Leisure), at 1, available at <http://www.nytimes.com/2007/12/09/arts/music/09pare.html?ex=1354856400&en=ec2f1c29937292be&ei=5090&partner=rssuserland&emc=rss&pagewanted=all>.

² *Id.*

³ About sixty-two percent of those who downloaded “In Rainbows” paid nothing; seventeen percent paid between one cent and four dollars; twelve percent paid between eight and twelve dollars; six percent paid between four dollars and eight dollars; and four percent paid between twelve and twenty dollars. Greg Sandoval, *Free beats fee for Radiohead’s ‘In Rainbows’*, CNET NEWS BLOG (Nov. 5, 2007, 11:30 AM), http://news.cnet.com/8301-10784_3-9811013-7.html. However, Radiohead produced the album independently and was not sharing revenue with its old record label, EMI. *Id.*

⁴ Eric Pfanner, *Radiohead Blazes a Marketing Trail*, N.Y. TIMES (Aug. 24, 2009), http://www.nytimes.com/2009/08/24/business/media/24iht-cache24.html?_r=1&scp=2&sq=radiohead&st=cse.

⁵ Steven Corn noted that Radiohead already had an extremely loyal fan base when they released “In Rainbows” as a pay-what-you-want download, and that it would not be so easy for smaller, less visible music groups. Steven Corn, *The Digital Lowdown*, ROYALTY WEEK, Oct. 30, 2007, at 7, available at http://www.aarcroyalties.com/new/media/royalty_week_103007.pdf.

strategy demonstrates the changing nature of the recording industry and illustrates that record labels may need to change their business models in order to stay afloat in an industry driven by Internet streaming and advertising. Thom Yorke, lead singer of Radiohead, said to *Time Magazine*, "I like the people at our record company, but the time is at hand when you have to ask why anyone needs one. And, yes, it probably would give us some perverse pleasure to say 'F___ you' to this decaying business model."⁶

The introduction of the Internet brought new ways for music lovers to listen to their favorite artists without having to purchase full albums. New methods of broadcasting music, such as Internet⁷ and satellite radio,⁸ changed the face of radio and broadcast licensing.⁹ Musical recordings began to stream online "by transmissions that are akin to radio broadcasts over the Internet, whether to the public at large or directly to individuals upon request, called webcasting."¹⁰ Many record companies and other musical copyright holders became concerned that copyright laws could not sufficiently protect their copyrighted content¹¹ and that such entities and individuals would lose large percentages of revenue due to Internet radio and piracy.¹² Indeed, the recording industry has suffered financially due to the digital age.¹³ It has been noted, however, that if properly managed, Internet radio

⁶ Josh Tyrangiel, *Radiohead Says: Pay What You Want*, TIME (Oct. 1, 2007), <http://www.time.com/time/arts/article/0,8599,1666973,00.html>.

⁷ Simply defined, Internet radio is the "continuous transmission of streaming audio over the Internet." ERIC LEE, HOW INTERNET RADIO CAN CHANGE THE WORLD 11 (2005).

⁸ Satellite radio stations, like Sirius and XM Radio, broadcast crystal clear music from satellites in space and are often offered on a subscription basis. *See generally What is XM*, XM RADIO, <http://www.xmradio.com/whatisxm/index.xmc> (last visited Sept. 29, 2010). This Comment is solely focused, however, on the legal issues pertaining to Internet radio, and does not provide legal insight into the realm of satellite radio.

⁹ *See generally* MICHAEL C. KEITH, THE RADIO STATION (8th ed. 2010).

¹⁰ Bob Kohn, *A Primer on the Law of Webcasting and Digital Music Delivery*, 20 ENT. L. REP. 4, 4 (1998). "Webcasting" and "Internet radio" are used interchangeably throughout this paper. Internet radio is one type of webcasting. Some webcasters are companies that operate Federal Communications Commission-licensed radio stations and stream their programming over both the Internet and traditional AM/FM stations, and others broadcast solely over the Internet. Cydney A. Tune & Christopher R. Lockard, *Navigating the Tangled Web of Webcasting Royalties*, 27 ENT. & SPORTS LAW., no. 3, 2009 at 20.

¹¹ Kohn, *supra* note 10.

¹² Andrey Spektor, *How "Choruss" Can Turn Into a Cacophony: The Record Industry's Stranglehold on the Future of Music Business*, 16 RICH. J. L. & TECH. 1, 6-8 (2009), <http://law.richmond.edu/jolt/v16i1/article3.pdf>.

¹³ The recording industry brought in forty billion dollars in annual sales ten years ago, and now it only brings in half of that. Brad Stone & Claire Cain Miller, *Music Forecast: In a Cloud*, N.Y. TIMES, Dec. 16, 2009, at B1, available at <http://www.nytimes.com/2009/12/16/technology/internet/16tune.html?dbk>.

may also be a significant way for record companies to *increase* record sales.¹⁴ Kurt Hanson, founder and CEO of AccuRadio (a small online radio site),¹⁵ explained, “Internet radio is one of the few bright spots in the music industry, giving airplay to dozens of genres and thousands of artists that never received airplay before.”¹⁶ Although not a perfect substitute for purchasing music, webcasting makes it easier for listeners to buy music from artists they like than other forms of radio do.¹⁷

The major issue in the statutory regulation of Internet radio has been the performance right: who has one, who should get one and how much it should cost.¹⁸ Those who own a “performance right” are entitled to receive royalties whenever someone else—like a webcaster—broadcasts the copyrighted material.¹⁹ Throughout recent history, copyright law related to performance rights has changed dramatically.²⁰ Although the current system has continued to achieve significant improvements, is still unfair to webcasters. While terrestrial broadcast radio stations pay minimal royalties for the music they play,²¹ webcasters often must pay at least twenty-five percent of their yearly revenue in royalties.²² This Comment advocates for a more balanced

¹⁴ “Online listening has become an increasingly valuable outlet for music companies and artists. Internet radio services can appeal to niche audiences by tailoring individual streams, and they feature independent artists who might never get played on broadcast stations.” Claire Cain Miller, *Music Labels Reach Deal With Internet Radio Sites*, N.Y. TIMES, July 8, 2009, at B2. See also David Oxenford, *Copyright Royalty Board Releases Music Royalties for Internet Radio Streaming for 2006–2010*, DAVIS WRIGHT TREMAINE LLP (Apr. 12, 2007), <http://www.dwt.com/LearningCenter/Advisories?find=24816>.

¹⁵ AccuRadio purports to currently reach approximately four-hundred thousand listeners per month, compared to forty million Pandora users reported for 2009. *Compare The AccuRadio Story*, ACCURADIO, <http://www accuradio.com/aboutaccuradio/> (last visited Oct. 1, 2010), with Alexandra Osorio, *Has Pandora Finally Arrived? Latest Stats Looking Quite Impressive*, DIGITAL MUSIC NEWS (Jan. 4, 2010), <http://www.digitalmusicnews.com/stories/121609pandora>.

¹⁶ Miller, *supra* note 14.

¹⁷ Webcasting is not a complete substitute for purchasing music, although it has certainly posed a threat to the recording industry. In most cases, webcasting services do not allow a user to choose a particular song at a particular time. The user may choose a specific genre, or a type of music preferred, but is left with a playlist of music chosen at random by the programming of the webcasting service. See, e.g., PANDORA RADIO, <http://www.pandora.com> (last visited Oct. 1, 2010). For a very detailed account of how a webcasting service akin to Pandora scientifically works, see *Arista Records LLC v. Launch Media, Inc.*, 578 F.3d 148, 162–64 (2nd Cir. 2009).

¹⁸ Robert Ashton, *Artists vs Radio: America's Battle Royal for Royalties*, MUSIC WEEK, Jan. 19, 2008, at 14. See also Part I, *infra*, which discusses the difference between a musical work and a sound recording, and the statutory process of granting both copyrights a performance right.

¹⁹ See *infra* Part I.

²⁰ See *infra* Part I.

²¹ See *infra* note 174 and accompanying text.

²² See *infra* Part II.

structure, where Internet radio is less-heavily burdened, especially considering the significant advertisement advantages it has over other forms of broadcast radio.

In order to fully understand the problems associated with the current structure of broadcast copyright laws, particularly as applied to Internet radio, one must appreciate the history of the law and its evolution over time. Part I of this Comment provides an overview of current copyright law applicable to webcasting and Internet radio.²³ Part II discusses current royalty rate structures that apply to different webcasting business models. Part III notes the unfairness of the current rate structure and discusses new issues it must face because of the continued advancement of technology. Finally, Part IV proposes that to create a more balanced system, Congress should pass the Performance Rights Act, which would amend current copyright law to require terrestrial broadcast stations to compensate artists, just like all other mediums of radio broadcasting.²⁴ The Act should require that SoundExchange²⁵ create an opt-out database where artists can waive royalty payments.²⁶ Hence, while actually raising royalty revenue coming to artists with the Performance Rights Act, broadcasters could enjoy an efficient way to reduce royalty payments.

I. CURRENT COPYRIGHT LAW APPLICABLE TO WEBCASTING AND INTERNET RADIO

Regulation of Internet radio, like other copyright issues, derives from the Copyright Act of 1976 (Copyright Act).²⁷ Two amendments to the Copyright Act significantly determined the future of Internet radio and webcasting: the Digital Performance Right in Sound Recordings Act of 1995²⁸ and the Digital Millennium Copyright Act of 1998.²⁹ This statutory framework,

²³ This Comment does not purport to provide an exhaustive account of copyright law or even a complete explanation of all copyright issues pertaining to the Internet. Rather, the sole purpose of this Comment is to explore the law surrounding and governing Internet radio.

²⁴ See *infra* Part IV.A.

²⁵ SoundExchange is "an independent, nonprofit performance rights organization" that acts as the sole collection agency of statutory royalties on behalf of featured artists and the owners of sound recording copyrights. The Copyright Royalty Board (CRB) appointed SoundExchange to collect and distribute these digital performance royalties. SOUNDEXCHANGE, <http://soundexchange.com> (last visited Oct. 1, 2010).

²⁶ See *infra* Part IV.B.

²⁷ The Copyright Act of 1976 was enacted as Pub. L. No. 94-553, 90 Stat. 2541 on Oct. 19, 1976, and is codified in Title 17 of the United States Code.

²⁸ See *infra* Part I.B.

²⁹ See *infra* Part I.C.

set in place long before webcasting existed, determines the methods used to calculate royalty rates and licensing schemes for the new business models of the twenty-first century.

A. The Copyright Act of 1976

Section 102 of the Copyright Act grants copyright protection to works that are categorized as, among other things,³⁰ “musical works”³¹ and “sound recordings.”³² A “musical work” refers to the notes and lyrics of a song,³³ whereas a “sound recording” results from “the fixation of a series of musical, spoken, or other sounds.”³⁴ A song that is sung and performed by an artist constitutes a sound recording, whereas the person who wrote the song is the creator of a musical work.³⁵ While the holder of a musical work copyright retains a right of performance—meaning the person will be paid in royalties whenever that composition is performed—the holder of a sound recording right will not.³⁶ As a consequence of this lack of protection, other artists may perform their own versions of a musical work and thereby produce their own sound recording.³⁷ Often a record label owns the copyright in a sound recording,³⁸ and the composer of the piece assigns his

³⁰ Section 102 also affords copyright protection to literary works, dramatic works, pantomimes and choreographic works, pictorial, graphic and sculptural works, motion pictures, and other audiovisual works and architectural works. 17 U.S.C. §§ 102(a)(1), (3)–(6), (8) (2006).

³¹ § 102(a)(2).

³² § 102(a)(7) (2010).

³³ Digital Performance Right in Sound Recordings and Ephemeral Records, 72 Fed. Reg. 24,084, 24,086 (May 1, 2007) (to be codified at 37 C.F.R. pt. 380).

³⁴ 17 U.S.C. § 101.

³⁵ “For example, in the piece ‘Let It Be’ recorded by the Beatles, only John Lennon and Paul McCartney originally held a ‘musical work’ copyright as the song’s composers, while John, Paul, Ringo Starr and George Harrison all originally held a ‘sound recording’ copyright as performers of the recorded work.” Paul Musser, *The Internet Radio Equality Act: A Needed Substantive Cure for Webcasting Royalty Standards and Congressional Bargaining Chip*, 8 LOY. L. & TECH. ANN. 1, 5 (2009).

³⁶ Digital Performance Right in Sound Recordings and Ephemeral Records, 72 Fed. Reg. at 24,086.

³⁷ *Id.* For a practical example of the relationship between a musical work and a sound recording, and the impact of the distinction on performance rights, see Henry H. Perritt, Jr., *New Architectures for Music: Law Should Get Out of the Way*, 29 HASTINGS COMM. & ENT. L. J. 259, 272–73 (2007).

³⁸ Digital Performance Right in Sound Recordings and Ephemeral Records, 72 Fed. Reg. at 24,086. Sound recording copyright owners are typically record labels, and they have the right to license the public performance of a sound recording by means of a digital audio transmission. *What is a Sound Recording Copyright Owner*, SOUNDEXCHANGE, <http://soundexchange.com/category/faq/general-questions/#question-454> (last visited Oct. 1, 2009). The “Big Four” music companies—Universal, Sony/BMG, Warner, and Electric & Musical Industries Ltd. (EMI)—have both record label and music publishing arms. *About EMI*, <http://www.emi.com/page/emi/AboutEMI> (last visited Nov. 6, 2009). For example, EMI Group’s record labels include Capitol and Virgin, and its New Music department “finds and develops new, exciting and successful music.” *Id.* Its music

interest in the musical work to a music publisher in exchange for a continued interest in royalties drawn from it.³⁹

Under section 102 today, licensing revenues for both musical works and sound recordings flow whenever such items are sold as compact discs (CDs) or Internet downloads, or when they are used in television and Internet commercials.⁴⁰ Revenues also accrue for a musical work when it is “performed publicly through radio, television, and Internet broadcasting . . . and venues of every kind where music is played.”⁴¹ However, no similar performance right generated licensing revenues for holders of sound recording rights under the Copyright Act until 1995.⁴² Essentially, if a song was broadcasted over the radio, the composer enjoyed copyright compensation, but the artist performing the song and the record label did not.⁴³ The commencement of the digital age, specifically the ability to stream music over the Internet, posed a serious financial threat to record labels by offering consumers a replacement for purchasing compact discs.⁴⁴ In response, copyright holders—specifically artists holding sound recording rights—looked to Congress for more protection of their ownership rights.

publishing arm “is in the business of acquiring, protecting, administering and exploiting the rights in musical compositions.” *Id.* Active songwriters under EMI Music Publishing include Amy Winehouse, Kanye West and Jay-Z. *Id.*

³⁹ AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 408 (3d ed. 2002). According to the Music Publishers Association, a music publisher seeks out new and talented songwriters and composers and supports them as they develop their talents. A music publisher is also responsible for distributing copyright royalties to its supported songwriters and composers. See *What is Music Publishing?*, MUSIC PUBLISHERS ASS’N ONLINE, <http://www.mpaonline.org.uk/FAQ> (click “What is Music Publishing?”) (last visited Oct. 1, 2010).

⁴⁰ Kevin C. Parks, *Black Hole or Celestial Jukebox? Section 114 and the Future of Music*, 1 LANDSLIDE, no. 2, 2008 at 46, 47.

⁴¹ *Id.*

⁴² See *infra* Part I.B. Historically, radio broadcasters opposed the recognition of a performance right in sound recording copyrights. See Musser, *supra* note 35, at 5–6.

⁴³ Steven M. Marks, *Entering the Sound Recording Performance Right Labyrinth: Defining Interactive Services and the Broadcast Exemption*, 20 LOY. L.A. ENT. L. REV. 309, 310 (2000). Historically, this inequity between the musical work and sound recording copyrights “was maintained by virtue of the powerful lobbying efforts of the broadcasting industry . . . which successfully resisted legislation that would have cost its members much in the way of additional operating costs by imposing a requirement that performance royalties be paid to labels and recording artists.” Parks, *supra* note 40, at 48. See also Musser, *supra* note 35, at 5.

⁴⁴ See Parks, *supra* note 40, at 48.

B. The Digital Performance Right in Sound Recordings Act⁴⁵

In 1995, Congress granted sound recording copyright owners a limited right of public performance in the Digital Performance Right in Sound Recordings Act (DPRA).⁴⁶ Congress finally recognized that the then-current state of the Copyright Act did not sufficiently protect such copyright holders from commercial exploitation.⁴⁷ The congressional committee in charge intended to “control the distribution of [copyright holders’] product by digital transmissions . . . without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings.”⁴⁸ The statute provides in pertinent part:

Subject to sections 107 through 122, the owner of a copyright under [Title 17 of the United States Code] has the exclusive rights to do and to authorize any of the following . . . in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.⁴⁹

The purpose of the DPRA was to ensure that performing artists, record companies and others “whose livelihood depends upon effective copyright protection for sound recordings, [would] be protected as new technologies affect the ways in which their creative works are used.”⁵⁰

The DPRA created a *limited* right, rather than an exclusive right, to transmissions⁵¹ in order to balance various “industry interests.”⁵² It also created a compulsory license for certain

⁴⁵ Digital Performance Right in Sound Recording Act of 1995 (DPRA), Pub. L. No. 104-39, 109 Stat. 336 (codified in scattered sections of 17 U.S.C.).

⁴⁶ See Kohn, *supra* note 10, at 6; Musser, *supra* note 35, at 6.

⁴⁷ S. REP. NO. 104-128, at 15 (1995), *reprinted in* 1995 U.S.C.C.A.N. 356, 362. The “copyright holders” referred to by the DPRA are holders of sound recording copyrights, rather than musical work rights, which have enjoyed significant protection since the original Copyright Act of 1976. See *supra* Part I.A.

⁴⁸ S. REP. NO. 104-128, at 15.

⁴⁹ DPRA § 2; 17 U.S.C. § 106(6) (2006).

⁵⁰ S. REP. NO. 104-128, at 10.

⁵¹ Congress created a “limited public performance right exclusive to the digital medium.” Musser, *supra* note 35, at 6. It shied away from creating an exclusive right of public performance because Congress wanted to ensure that the new act would not unnecessarily infringe on the performance of musical works. *Id.* See also S. REP. NO. 104-128, at 16.

⁵² W. Jonathan Cardi, *Über-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835, 850 (2007). The DPRA attempted to balance the interests of the Copyright Office, record producers, performers, music composers, publishers, and broadcasters “without upsetting the longstanding business and contractual relationships” between these entities. S. REP. NO. 104-128, at 13.

transmissions, depending on the type of service provided.⁵³ Although it gave the exclusive right of performance to sound recording copyright holders, the DPRA created a complex “three-tiered system,”⁵⁴ categorizing license requirements into separate rates for: (1) interactive services, (2) non-interactive subscription transmissions, and (3) non-subscription digital audio transmissions of sound recordings.⁵⁵ The DPRA tailored licensing requirements to these different types of service providers, depending on the likelihood of an effect on record sales⁵⁶ or on the likelihood that “infringing reproductions” would be created.⁵⁷

Owners of interactive services⁵⁸ are responsible for the most stringent level of copyright licensing requirements and cannot receive a compulsory license.⁵⁹ The DPRA defined an interactive service as “one that enables a member of the public to receive . . . on request . . . a transmission of a particular sound recording . . . selected by or on behalf of the recipient.”⁶⁰ Interactive services do not qualify for the simple statutory license structure “because of the ability of listeners to select specific music that will be included in the stream”⁶¹ Instead, they must negotiate performance licenses with both the owners of the copyrights in the transmitted musical compositions and also the owners of the sound recordings.⁶²

Non-interactive transmissions⁶³ are subject to compulsory licensing⁶⁴ only if they conform to specific statutory require-

⁵³ A “compulsory license” means that if a webcaster meets specific statutory requirements, it may use a particular sound recording without having to obtain permission directly from the copyright holder, so long as it pays a statutory rate. *Tune & Lockard, supra* note 10, at 21.

⁵⁴ *Bonneville Int’l Corp. v. Peters*, 153 F. Supp. 2d 763, 767 (E.D. Pa. 2001); *Cardi, supra* note 52, at 850.

⁵⁵ *Cardi, supra* note 52, at 850–52.

⁵⁶ *Bonneville Int’l Corp.*, 153 F. Supp. 2d at 767.

⁵⁷ *Cardi, supra* note 52, at 850.

⁵⁸ Grooveshark is a good example of an interactive service. It lets a user choose a particular song to hear on request, and the user may personalize song playlists. See *Grooveshark*, <http://www.grooveshark.com> (last visited Oct. 1, 2010).

⁵⁹ *Musser, supra* note 35, at 8.

⁶⁰ *Marks, supra* note 43, at 313 (quoting 17 U.S.C. § 114(d)(1) (Supp. III 1997) (codified as amended at 17 U.S.C. § 114(j)(7))).

⁶¹ *Oxenford, supra* note 14.

⁶² *Cardi, supra* note 52, at 851. See also Kellen Myers, *The RIAA, the DMCA, and the Forgotten Few Webcasters: A Call for Change in Digital Copyright Royalties*, 61 *FED. COMM. L. J.* 431, 440 (2009).

⁶³ In a non-interactive service, a user may not choose a specific song and have it played immediately, but rather a user can choose a genre of music one prefers. *Spektor, supra* note 12, at 29. Pandora is a good example of a non-interactive transmission because, although it allows limited control over which artists and songs a user hears, it does not allow users to choose “more than three tracks from the same album or more than

ments;⁶⁵ otherwise, they must negotiate privately with sound recording copyright holders just like interactive services are required to do.⁶⁶ If private negotiations fail between these entities, an arbitration panel organized by the Copyright Office⁶⁷ determines the royalty rate for the compulsory license.⁶⁸ It is this compulsory license that allows Internet services to use legally recorded sound recordings in their webcasts⁶⁹ without seeking permission directly from the copyright owners.⁷⁰

Non-subscription digital audio transmissions⁷¹ of sound recordings are those not controlled or limited to certain recipients⁷² and are totally exempt from the sound recording performance right.⁷³ This third type of transmission constitutes the most important exemption in the DPRA⁷⁴ and includes radio and television broadcasts that are “available free of charge”⁷⁵ to

four tracks by one recording artist.” Myers, *supra* note 62, at 440. *See also* Arista Records LLC v. Launch Media, Inc., 578 F.3d 148, 154 (2d. Cir. 2009). This case dealt with the webcasting service LAUNCHcast which is similar to Pandora, and the Second Circuit held that, as a matter of law, LAUNCHcast was not an interactive service within the meaning of 17 U.S.C. § 114. *Id.* at 164.

⁶⁴ See *supra* note 53 for an explanation of “compulsory licensing.”

⁶⁵ Such requirements include that the service not be interactive, not pre-announce the broadcast of a particular song, and must include information about the recording broadcasted. 17 U.S.C. § 114(d)(2)(C); Tune and Lockard, *supra* note 10, at 21–22.

⁶⁶ See Allison Kidd, Recent Development, *Mending the Tear in the Internet Radio Community: A Call for a Legislative Band-Aid*, 4 N.C. J.L. & TECH. 339, 348 (2003).

⁶⁷ Arbitrations of this kind were completed through a Copyright Arbitration Royalty Panel (CARP) when Congress enacted the DPRA. *See* Amy Duvall, Note, *Royalty Rate-Setting for Webcasters: A Royal(ly) Mess*, 15 MICH. TELECOMM. & TECH. L. REV. 267, 271 (2008). However, the rate-setting process was reexamined in 2004, and Congress passed the Copyright Royalty and Distribution Reform Act (CRDRA), which replaced the CARP adjudicators with a full-time, three-judge panel, now known as the Copyright Royalty Board (CRB), which currently sets royalty rates. *Id.* at 278.

⁶⁸ Public Performance of Sound Recordings: Definition of a Service, 65 Fed. Reg. 77,292, 77,294 (Dec. 11, 2000) (to be codified at 37 C.F.R. pt. 201).

⁶⁹ David Oxenford, *SoundExchange to Audit Internet Radio Royalty Payments of Last.FM—What is the Value of Music?*, BROADCAST LAW BLOG (Mar. 28, 2008) <http://www.broadcastlawblog.com/2008/03/articles/internet-radio/soundexchange-to-audit-internet-radio-royalty-payments-of-lastfm-what-is-the-value-of-music/>.

⁷⁰ Cydney Tune, *Webcaster Music Royalty Rates—in Flux and on the Rise*, 1401 CLIENT ALERT 1, 1 (June 15, 2007), <http://www.pillsburylaw.com/siteFiles/Publications/5EA3137178E2E2204487E5B973E75B47.pdf>.

⁷¹ Examples include local AM/FM radio stations, some Internet radio stations, and television broadcasts. Emily D. Harwood, Note, *Staying Afloat in the Internet Stream: How to Keep Web Radio from Drowning in Digital Copyright Royalties*, 56 FED. COMM. L. J. 673, 680 (2004).

⁷² S. REP. NO. 104-128, at 16 (1995), *reprinted in* 1995 U.S.C.C.A.N. 356; Kohn, *supra* note 10, at 12.

⁷³ 17 U.S.C. § 114(d)(1)(A)–(B) (2006).

⁷⁴ H. R. REP. NO. 104-274, at 14 (1995); S. REP. NO. 104-128, at 16.

⁷⁵ Harwood, *supra* note 71, at 680.

the public. Non-subscription transmissions include “any transmission that is not a subscription transmission.”⁷⁶

This complex method for determining licensing requirements and royalty rates became even more difficult for new companies to navigate after the rising popularity and sophistication of the Internet in and after 1998,⁷⁷ and copyright holders again called for greater copyright protection—as well as clarification—from Congress.

C. The Digital Millennium Copyright Act

The Digital Millennium Copyright Act (DMCA) was enacted in October of 1998⁷⁸ in response to claims that the DPRA did not adequately respond to the application of royalty rates to Internet radio.⁷⁹ Record companies and the Recording Industry of America Association (RIAA) expressed concerns that labels were not sufficiently protected from Internet piracy under the DPRA.⁸⁰ Since webcasters were not included in the DPRA provisions, “webcasters and the recording industry fought over whether webcasters should qualify for the limited public performance right or be treated as an interactive service” and be required to negotiate privately with copyright holders.⁸¹ Specifically, the recording industry and the RIAA complained that webcasting services of the non-subscription nature diminished record sales, cut into profits, and hindered growth of the recording industry.⁸² Convinced, Congress enacted the DMCA in line with its historical

⁷⁶ 17 U.S.C. § 114(j)(9) (2006).

⁷⁷ The late 1990s saw a rapid growth and improvement in webcasting and streaming technologies. Myers, *supra* note 62, at 438.

⁷⁸ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998), codified in part in 17 U.S.C. § 114 (2006).

⁷⁹ Kidd, *supra* note 66, at 349.

⁸⁰ *Arista Records LLC v. Launch Media, Inc.*, 578 F.3d 148, 153 (2d. Cir. 2009). This recent case constitutes one of the more in-depth judicial analyses of the DMCA, relating it to a specific non-subscription webcasting service, LAUNCHcast. After the ruling, P2P defense lawyer Ray Beckerman “thanked” Sony BMG music for appealing the trial court decision, claiming that the Second Circuit’s determination that, as a matter of law, LAUNCHcast was not interactive, created a “safe harbor for a whole industry and business model.” Ray Beckerman, *RIAA Loses Its Case Against Yahoo’s Launch Media Internet Radio Station Provider*, RECORDING INDUSTRY VS THE PEOPLE BLOG (Aug. 22, 2009), <http://recordingindustryvspeople.blogspot.com/2009/08/riaa-loses-its-case-against-yahoos.html>.

⁸¹ Duvall, *supra* note 67, at 272.

⁸² *Arista Records*, 578 F.3d at 154. See also Kimberly L. Craft, *The Webcasting Music Revolution is Ready to Begin, as Soon as We Figure Out the Copyright Law: The Story of the Music Industry at War With Itself*, 24 HASTINGS COMM. & ENT. L. J. 1, 12 (2001). With the DMCA, Congress targeted services like Napster, which provide users with “a degree of predictability—based on choices made by the user—that approximates the predictability the music listener seeks when purchasing music.” *Arista Records*, 578 F.3d at 161.

policy of “preventing the diminution in record sales through outright piracy of music or *new digital media that offered listeners the ability to select music in such a way that they would forego purchasing records.*”⁸³ The DMCA expanded the class of transmissions that are subject to compulsory licenses, namely the non-interactive subscription services.⁸⁴ Although “Congress did not alter the section 114(d)(1)(A) exemption for ‘nonsubscription broadcast transmission[s],’”⁸⁵ the newly expanded category subject to compulsory licenses included services previously categorized as non-subscription broadcasts.⁸⁶ Some webcasts were no longer considered part of the third category exempt from statutory licenses.⁸⁷ With this expansion, Congress was merely trying to “clarify that webcasters are subject to the sound recording performance right.”⁸⁸ Indeed, the DMCA left webcasters “clearly subject to royalty payments.”⁸⁹

The DMCA amended the Copyright Act to broaden the sound performance right to include a more expansive definition of an “interactive service” as it pertains to individual licensing.⁹⁰ As webcasting continued to gain popularity, the DPRA’s definition of “interactive service” began to break down.⁹¹ Section 114 of the

⁸³ *Arista Records*, 578 F.3d at 157 (emphasis added).

⁸⁴ *Bonneville Int’l Corp. v. Peters*, 153 F. Supp. 2d 763, 769 (E. D. Pa. 2001); Brian Flavin, Recent Development, *A Digital Cry for Help: Internet Radio’s Struggle to Survive a Second Royalty Rate Determination Under the Willing Buyer/Willing Seller Standard*, 27 ST. LOUIS U. PUB. L. REV. 427, 436 (2008).

⁸⁵ *Bonneville Int’l. Corp.*, 153 F. Supp. 2d at 769 (citing 17 U.S.C. § 114(d)(1)(A)).

⁸⁶ *Id.* An eligible non-subscription transmission is defined in the DMCA as follows:

A noninteractive nonsubscription digital audio transmission not exempt under subsection (d)(1) that is made as part of a service that provides audio programming consisting, in whole or in part, or performances of sound recordings, including retransmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.

17 U.S.C. § 114(j)(6) (2006). This definition is synonymous with the definition of “commercial webcaster” provided by SoundExchange. See *Commercial Webcaster*, SOUNDEXCHANGE, <http://soundexchange.com/service-provider/service-category/im-not-sure-help-me-figure-it-out/quiz-commercial-webcaster/> (last visited Oct. 1, 2010).

⁸⁷ *Bonneville Int’l. Corp.*, 153 F. Supp. 2d at 769. Webcasters had begun offering custom genre channels of sound recordings while still maintaining a non-subscription relationship with users. *Id.*

⁸⁸ Marks, *supra* note 43, at 327.

⁸⁹ Spektor, *supra* note 12, at 10.

⁹⁰ Stephen Kramarsky, *Second Circuit Finds Internet Radio Not Interactive Service*, N.Y. L.J., Sept. 15, 2009, at 5.

⁹¹ Marks, *supra* note 43, at 314. For example, some services “allowed users to create their own programs by selecting and rating particular artists,” and hence could create personalized programs in ways that were not anticipated by the intent of “interactive” when Congress enacted the DPRA. *Id.*

DMCA addressed the perceived deficiency in the DPRA, providing:

An ‘interactive service’ is one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient.⁹²

This definition altered what the DPRA considered “interactive” because it no longer required a user to have a personal choice in what songs are played throughout a webcast. As long as “the user has influenced the program in such way that the ‘recipient might identify certain artists that become the basis of the personal program,’”⁹³ the service would be considered interactive within the meaning of the statute.⁹⁴ Internet radio webcasts, however, do not typically fall under the DMCA definition of “interactive service”⁹⁵ and are either subject to the compulsory licensing scheme determined by the Copyright Arbitration Royalty Panel (CARP),⁹⁶ or must privately negotiate with copyright holders. CARP was supposed to “establish rates and terms that most clearly represent[ed] the rates and terms that would have been negotiated in the marketplace between a

⁹² 17 U.S.C. § 114(j)(D)(7) (2006).

⁹³ Michael Lang, Comment, *The Regulation of Shrink-Wrapped Radio: Implications of Copyright on Podcasting*, 14 COMMLAW CONSPPECTUS 463, 481 (2006) (quoting H. R. Rep. No. 105-796, at 87 (1998) (Conf. Rep.)).

⁹⁴ A service would be interactive if it

allowed a small number of individuals to request that sound recordings be performed in a program specially created for that group and not available to any individuals outside of that group. In contrast, a service would not be interactive if it merely transmitted to a large number of recipients of the service’s transmissions a program consisting of sound recordings requested by a small number of those listeners.

H.R. Conf. Rep. 105-796, at 87–88, *reprinted in* 1998 U.S.C.C.A.N. 639 (1998). Compare this explanation with that of the U.S. Court of Appeals for the Second Circuit in *Arista Records*, 578 F.3d at 162–64.

⁹⁵ The definition of “interactive service” states:

The ability of individuals to request that particular sound recordings be performed for reception by the public at large . . . does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings that are performed within 1 hour of the request.

17 U.S.C. § 114(j)(7). See also Duvall, *supra* note 67, at n.182. Pandora, for example, does not allow a user to choose the next song on his current channel, but the user may skip songs or approve of songs to “shape future listening.” *Id.*

⁹⁶ CARP was established to facilitate arbitration between broadcasters and sound recording copyright holders. Recall that the CRB currently oversees such negotiations and sets royalty rates. See *supra* note 67 and accompanying text.

willing buyer and a willing seller.”⁹⁷ The DMCA requires Internet webcasters to obtain licenses and pay royalties to both the performance rights organizations⁹⁸ as well as to the owners of the copyrights of sound recordings and musical works, because each of these entities has an ownership right in a given song or other musical work.⁹⁹

II. CURRENT ROYALTY RATE STRUCTURE

As we have seen, Internet webcasters—just like other broadcasters—must pay royalties for the musical recordings performed on their online stations or channels. This section considers the most current protections afforded to performance rights holders by the federal government and explores what webcasters must pay in royalties to keep their businesses running. The Copyright Royalty Board (CRB)¹⁰⁰ set highly controversial royalty rates in 2007, and experienced intense backlash from webcasters as a result.¹⁰¹ More recent attempts to balance the rate structure for webcasting companies have been seen as an improvement over the 2007 rates, but are still questionable and continue to favor other forms of broadcast radio, such as terrestrial broadcasting stations.¹⁰²

A. The 2007 Royalty Rates Set by the Copyright Royalty Board

When the DPRA was enacted in 1995, CARP—and subsequently the CRB¹⁰³—designated SoundExchange¹⁰⁴ as the administrative agency responsible for collecting and distributing compulsory performance royalties for sound recording copyright

⁹⁷ Duvall, *supra* note 67, at 272 (quoting Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2895–96 (1998)).

⁹⁸ Tune & Lockard, *supra* note 10, at 20. The performance rights organizations (PROs) consist of the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc., and SESAC. *Id.* These organizations represent all “songwriters, composers, and music publishers in the United States for purposes of licensing and collecting royalties from any public performance of a song.” *Id.*

⁹⁹ *Id.*

¹⁰⁰ The Copyright Royalty Board (CRB) was established by the U.S. Copyright Office and consists of three full-time copyright royalty judges, whose responsibility it is to “make determinations and adjustments of reasonable terms and rates of royalty payments as provided in [17 U.S.C. § 114].” 17 U.S.C. § 801(b)(1) (2006). For more information on the CRB and governing laws, see COPYRIGHT ROYALTY BOARD, <http://www.loc.gov/crb> (last visited Oct. 1, 2010).

¹⁰¹ See *infra* Part II.A.

¹⁰² See *infra* Part II.B.

¹⁰³ See *supra* notes 67 and 100 for information on the CRB and its predecessors.

¹⁰⁴ For information on SoundExchange, see *supra* note 25.

holders.¹⁰⁵ In March 2007, the CRB, together with SoundExchange, established a new royalty rate system under the authority of section 114 based on a “per performance” calculation.¹⁰⁶ The system set forth royalty rates¹⁰⁷ for commercial webcasters,¹⁰⁸ small commercial webcasters (less than \$1.2 million in revenue per year),¹⁰⁹ and noncommercial webcasters.¹¹⁰ The new rates for commercial webcasters and small commercial webcasters were set as follows: \$0.0008 per performance for 2006, \$0.0011 per performance for 2007, \$0.0014 per performance for 2008, \$0.0018 per performance for 2009, and \$0.0019 per performance for 2010.¹¹¹ The CRB also set a \$500 minimum fee per channel for broadcasters.¹¹² Under this structure, small webcasters did not pay different royalty rates than larger companies.¹¹³ In contrast, noncommercial webcasters were subject to a minimum annual fee of \$500 per channel or station.¹¹⁴ The high rates established for commercial and small commercial webcasters upset many and resulted in numerous attempts to negotiate different agreements with Sound-

¹⁰⁵ See Susan Butler, *CRB Appoints SoundExchange Sole ‘Collective,’* ALLBUSINESS (Mar. 8, 2007), <http://www.allbusiness.com/retail-trade/miscellaneous-retail-retail-stores-not/4394859-1.html>; Oxenford, *supra* note 14.

¹⁰⁶ This means that webcasters must pay royalties based on how many times a given recording is performed (or played over the stream). For example, if a given recording is played a total of one hundred times in one year, the webcaster responsible for those performances would have to pay the given royalty rate times one hundred. See generally Tune, *supra* note 70.

¹⁰⁷ SoundExchange participates in the royalty rate setting process, either through voluntary settlements between parties or proceedings before the CRB. See *The Law, SOUNDEXCHANGE*, <http://soundexchange.com/about/the-law> (last visited Oct. 1, 2010). For more about different types of negotiations between private parties, see *supra* Part II.B.

¹⁰⁸ “Commercial broadcaster” is synonymous with “eligible nonsubscription transmission.” See *supra* note 86.

¹⁰⁹ Tune, *supra* note 70, at 2.

¹¹⁰ A noncommercial webcaster is one that is exempt from taxation under section 501 of the Internal Revenue Code, or that is operated by a governmental entity, meaning it is a non-profit organization. Duvall, *supra* note 67, at 280; Steve Gordon, *Update on Webcasting Royalty Rates: Part Two of Two*, ENT. L. & FIN., Sept. 2004, at 3, 3–4, available at http://www.stevegordonlaw.com/update_webcast_royalty_rates2.htm. Non-commercial webcasters also tend to have different sources of funding, such as listener donations, corporate sponsorships and university funding. Duvall, *supra* note 67, at 280.

¹¹¹ Tune, *supra* note 70, at 2.

¹¹² Daniel Castro, *Internet Radio and Copyright Royalties: Reforming a Broken System*, INFO. TECH. & INNOVATION FOUND. 5 (May 10, 2007), <http://www.itif.org/files/InternetRadio.pdf>.

¹¹³ *Id.*

¹¹⁴ Tune, *supra* note 70, at 2.

Exchange.¹¹⁵ Complaints were not heard, however, because the CRB quickly rejected all rehearing proposals in April 2007.¹¹⁶

The rate schedule established in 2007 was the product of two years of litigation between SoundExchange and parties representing all types of webcasting and broadcasting services, where the parties appeared and argued before the CRB in order to determine a fair royalty structure. The CRB adopted significant rate increases on the advice of SoundExchange,¹¹⁷ over opposition by numerous digital broadcasters who argued that the proper structure should calculate royalties due based on a percentage of revenue, rather than the “per performance” structure advocated by SoundExchange.¹¹⁸ Webcasters argued that this effort by SoundExchange was nothing more than a “major label money grab—an attempt to revive a dying business model through exorbitant fee increases at the expense of technological developments and consumer interests.”¹¹⁹ The fees set by SoundExchange would exceed the total annual revenues for many Internet radio stations,¹²⁰ and although large

¹¹⁵ Many webcasting sites argued these unreasonable rates would eat up most of their revenue and would put Internet radio out of business. Miller, *supra* note 14. See also Oxenford, *supra* note 14.

¹¹⁶ Tune, *supra* note 70, at 2; Oxenford, *supra* note 14.

¹¹⁷ SoundExchange argued to the CRB that the per-performance rate for sound recording copyrights should be calculated based on the willing buyer/willing seller standards set forth concerning interactive services, whereas webcasters argued the benchmark should more look like the amount at issue in agreements between performance rights organizations. The CRB chose SoundExchange’s benchmark, which constituted a significant jump in per-performance rates. The CRB justified its decision based on, among other things, its understanding that the interactive webcasting market was similar in many ways to the non-interactive market. Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24,084, 24,095–96 (May 1, 2007) (to be codified at 37 C.F.R. pt. 380).

¹¹⁸ Parks, *supra* note 40, at 49. The CRB adopted SoundExchange’s position for these reasons:

(1) [P]er performance rates are directly tied to what is being licensed, (2) ease of measurement, (3) difficulties in tying revenue fees to the value of the licensed rights, (4) complexities in determining revenue from mixed format webcasters, and (5) the basic notion that the more that licensed rights are used, the more payments should increase in relation to use.

Duvall, *supra* note 67, at 279.

¹¹⁹ Parks, *supra* note 40, at 49.

¹²⁰ Marc Fisher, *Day of Silence: Internet Radio Goes Dark*, RAW FISHER BLOG (June 26, 2007, 7:05 AM), http://voices.washingtonpost.com/rawfisher/2007/06/day_of_silence_internet_radio.html. The reasoning behind the determination that many webcasters would have gone out of business under these rates goes as follows:

[B]ased on a webcaster playing an average of 16 songs per hour, royalties are 1.28 cents per listener-hour (based on 2006 rates). A well-run webcaster might have sold two radio advertising spots at a profit of 0.6 cents per listener-hour. In addition to video gateway ads, banner ads, and other web-based advertising, the total revenue for a well-run webcaster is still only between 1.0 and 1.2

companies “like AOL may [have been] able to afford the new rates, many smaller Internet radio stations [would have had] to shut down. The new rates could [have] actually reduce[d] the flow of royalties to musicians.”¹²¹ For example, after the adoption of these rates, Radio Paradise,¹²² a smaller Internet radio site, faced royalty costs of over 125% of its yearly revenue.¹²³ Even Pandora—considered to be an Internet radio giant—was on the verge of shutting down, with royalty fees constituting seventy percent of its projected revenue of twenty-five million dollars for 2008.¹²⁴ The uproar over the royalty rates set by SoundExchange even sparked a “day of silence”¹²⁵ for Internet radio stations and channels on June 26, 2007, which was designed to draw attention to what webcasters envisioned to be the government’s attempt to kill Internet radio.¹²⁶

In the ensuing months, webcasters united behind various legislative proposals to curb the effects of the SoundExchange rates. These efforts included the Internet Radio Equality Act¹²⁷ and the Performance Rights Act,¹²⁸ both of which, however,

cents per listener-hour. Thus, if a webcaster (and this is a well-run webcaster) must pay 1.28 cents per listener-hour, it is likely to go out of business.

Duvall, *supra* note 67, at 281; Daniel McSwain, *Webcast Royalty Rate Decision Announced*, RADIO AND INTERNET NEWSL. (Mar. 2, 2007), <http://www.kurthanson.com/archive/news/030207/index.shtml>.

¹²¹ Hiawatha Bray, *Royalty Hike Could Mute Internet Radio: Smaller Stations Say Rise Will Be Too Much*, BOSTON GLOBE, Mar. 14, 2007, at F1, available at http://www.boston.com/business/technology/articles/2007/03/14/royalty_hike_could_mute_internet_radio/.

¹²² RADIO PARADISE, <http://www.radioparadise.com> (last visited Oct. 1, 2010).

¹²³ Eliot Van Buskirk, *Royalty Hike Panics Webcasters*, WIRED (Mar. 6, 2007), <http://www.wired.com/entertainment/music/news/2007/03/72879>.

¹²⁴ Tim Bjarin, *Saving Internet Radio*, PC MAG. (Oct. 3, 2008), <http://www.pcmag.com/article2/0,2817,2331594,00.asp>; Peter Whoriskey, *Giant of Internet Radio Nears Its 'Last Stand': Pandora, Other Webcasters Struggle Under High Song Fees*, WASH. POST, Aug. 16, 2008, at D1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/15/AR2008081503367.html>.

¹²⁵ On June 26, 2007, Internet radio stations including Yahoo!, Pandora and Rhapsody stopped broadcasting for twenty-four hours. Kurt Hanson, *A Guide to Preparing for Tomorrow's "Day of Silence"*, RADIO AND INTERNET NEWSL., June 25, 2007, <http://www.kurthanson.com/archive/news/062507/index.shtml#Saga>.

¹²⁶ *Id.*

¹²⁷ Internet Radio Equality Act, H. R. 2060, 110th Cong. (2007), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h110-2060>. The bill intended to nullify the rate determinations set by the CRB in 2007 and replace them with the same revenue-based royalty balancing test found in section 801(b)(1) of the Copyright Act, currently used for satellite radio royalty determinations. Erich Carey, *We Interrupt This Broadcast: Will the Copyright Royalty Board's March 2007 Rate Determination Proceedings Pull the Plug on Internet Radio?*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 257, 302 (2008).

¹²⁸ Performance Rights Act, H. R. 4789, 100th Cong. (2007), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h110-4789>. This bill intended to provide platform parity in radio performance rights, establishing a flat annual fee for royalties and requiring terrestrial broadcasters to pay performance royalties just like

currently seem to have been abandoned somewhere in the dusty corners of Congress.¹²⁹ However, the idea behind the Performance Rights Act—that terrestrial radio should also be responsible for royalty payments to copyright holders—is still being considered in Congress and may become a reality in the months to come.¹³⁰ Webcasters have not given up, and since 2007, SoundExchange has continued to entertain other proposals and negotiations.¹³¹ One such negotiation, the Webcaster Settlement Acts of 2008 and 2009, provided certain webcasters relief from the exorbitant rates set by the CRB in 2007.

B. SoundExchange 2006–2015 Royalty Agreement Under the Webcaster Settlement Act

Near the end of 2008, webcasters enjoyed renewed hope that royalty conflicts would soon dissipate, or at least come to a reasonable compromise. Congress passed the Webcaster Settlement Act in October 2008,¹³² which gave SoundExchange and webcasters the opportunity to establish royalty rates for the performance of sound recordings over the Internet in lieu of compulsory license rates determined by the CRB.¹³³ Under this Act, SoundExchange had until February 15, 2009 to reach

satellite and Internet radio sites. *Id.*; Ashton, *supra* note 19; Parks, *supra* note 37, at 51. Under section 114, broadcast radio is exempt from paying performance royalties. See *supra* Part I.C.

¹²⁹ David Oxenford, *Webcaster Settlement Act—What Does it Mean?*, BROADCAST LAW BLOG (Oct. 1, 2008), <http://www.broadcastlawblog.com/2008/10/articles/internet-radio/webcaster-settlement-act-what-does-it-mean/>. However, the Performance Rights Act enjoys significantly more support than the Internet Radio Equality Act. See *infra* Part IV.A.

¹³⁰ See *infra* Part IV.A; David Oxenford, *The Broadcast Performance Royalty—Not Dead Yet, as Senate Judiciary Committee to Hold Hearing on Tuesday*, BROADCAST LAW BLOG (Aug. 2, 2009), <http://www.broadcastlawblog.com/2009/08/articles/broadcast-performance-royalty/the-broadcast-performance-royalty-not-dead-yet-as-senate-judiciary-committee-to-hold-hearing-on-tuesday/>.

¹³¹ For example, in August 2007, SoundExchange entered into a settlement agreement with the Digital Media Association (DiMA) that capped the minimum annual fee at fifty thousand dollars. Flavin, *supra* note 79, at 465. Under the 2007 CRB rates, webcasters had to pay a minimum of five-hundred dollars per year per channel offered, plus royalties on top of that minimum fee. *Id.* For many webcasters like Pandora which offer hundreds of custom channels, this minimum fee would likely be more expensive than the royalty rates. *Id.*

¹³² Webcaster Settlement Act of 2008, Pub. L. No. 110-435, 122 Stat. 4974 (2008). The original Webcaster Settlement Act amended the Small Webcaster Settlement Act of 2002, which allowed a settlement to bypass a CARP proceeding to set royalty rates between private parties. Carey, *supra* note 127, at 308; Oxenford, *supra* note 129. The Webcaster Settlement Act adopts the same procedure, except that now, the group settling must submit the settlement to the CRB to publish it in the Federal Register. Carey, *supra* note 127, at 308; Oxenford, *supra* note 129.

¹³³ See *supra* Part II.A. See also Parks, *supra* note 40, at 53.

agreements with webcasters or groups of webcasters,¹³⁴ and webcasters were required to expressly opt out of the CRB royalty rates set in 2007.¹³⁵ Although questions arose as to the likelihood of such settlements actually happening,¹³⁶ webcasters were mostly optimistic about this progress. However, SoundExchange encountered logistical problems in meeting the February 15 deadline,¹³⁷ and webcasters quickly appealed to Congress for an extension. The Webcaster Settlement Act of 2009¹³⁸ amended the Webcaster Settlement Act of 2008 and gave SoundExchange thirty additional days to “enter into settlement agreements with webcasters that would be legally binding on all sound recording copyright owners.”¹³⁹

The thirty-day extension seemed to provide just enough time for successful negotiations to take place. Under the Webcaster Settlement Act of 2009, SoundExchange and certain “pureplay”¹⁴⁰ webcasters reached an alternative agreement for royalty rates in July 2009, for the period of 2006–2015 (2014 for small pureplay webcasters).¹⁴¹ Webcasters that run online music for larger providers are not included.¹⁴² This agreement splits pureplay webcasters into three categories: (1) large, (2) small (defined as

¹³⁴ Pub. L. No. 110-435.

¹³⁵ *Id.* See also *supra* Part II.A.

¹³⁶ Webcasters were concerned that negotiations with SoundExchange were unlikely, because they had not entered into successful negotiations in years and voluntary settlements may have become difficult to obtain. See Oxenford, *supra* note 129.

¹³⁷ For example, negotiations between SoundExchange and DiMA fell through in February 2009 and did not meet the deadline set by the Webcaster Settlement Act of 2008. Staci D. Kramer, *Streaming Music Sites and SoundExchange Fail to Reach Royalty Deal*, PAID CONTENT (Feb. 18, 2009), <http://paidcontent.org/article/419-streaming-music-sites-soundexchange-fail-to-reach-royalty-deal>. Members of DiMA included Pandora, RealNetworks, and MTV. *Id.* The main disagreement between the parties centered around paying royalties for streaming music *only*, versus paying for streaming music as well as game and software revenue. *Id.*

¹³⁸ Webcaster Settlement Act of 2009, Pub. L. No. 111-36, 123 Stat. 1926 (2009).

¹³⁹ Tune & Lockard, *supra* note 10, at 23.

¹⁴⁰ “Pureplay” webcasters are those “that are willing to include their entire gross revenue in a percentage of revenue calculation to determine their royalties.” David Oxenford, *Pureplay Webcasters and SoundExchange Enter Into Deal Under Webcaster Settlement Act to Offer Internet Radio Royalty Rate Alternative for 2006–2015*, BROADCAST LAW BLOG (July 7, 2009), <http://www.broadcastlawblog.com/2009/07/articles/internet-radio/pureplay-webcasters-and-soundexchange-enter-into-deal-under-webcaster-settlement-act-to-offer-internet-radio-royalty-rate-alternative-for-20062015/>.

¹⁴¹ Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 34,796, 34,799 (July 17, 2009). Pureplay webcasters privy to this agreement included AccuRadio, Digitally Imported, and radioIO. Michael Schmitt, *SoundExchange and “Pureplay” Webcasters Announce 2006–2015 Royalty Agreement*, RADIO AND INTERNET NEWSL. (July 7, 2009, 12:17 PM), <http://textpattern.kurthanson.com/articles/719/rain-77-soundexchange-and-pure-play-webcasters-reach-royalty-agreement>. However, other Internet webcasters like Pandora are eligible to elect the substitute license arrangement. *Id.*

¹⁴² For example, CBS Radio runs online music services for both AOL and Yahoo! and therefore is not subject to this agreement. Miller, *supra* note 14.

those that earn \$1.25 million or less), and (3) others that offer bundled, syndicated, or subscription services.¹⁴³

Large webcasters are required to pay either a per-performance rate or twenty-five percent of their total revenue, whichever is higher.¹⁴⁴ However, larger webcasters are more likely to pay royalties on a per-performance basis than a percentage of revenue, since large webcasters have significantly higher numbers of users than smaller webcasters.¹⁴⁵ Also, large webcasters must pay a minimum royalty per year of \$25,000.¹⁴⁶ The deal offers a discounted royalty rate—a nearly fifty percent discount—compared with the CRB rates of 2007, with the maximum per-performance rate reaching only \$0.0014 by 2015.¹⁴⁷ In exchange for this discounted rate, the agreement requires more stringent reporting requirements¹⁴⁸ as well as revenue sharing.¹⁴⁹

Small pureplay webcasters pay the greater of either a percentage of revenues or a percentage of expenses, ranging between ten and fourteen percent for the period from 2006 to 2014,¹⁵⁰ and “in certain circumstances have less stringent play list reporting requirements in return for payment of an additional ‘proxy fee.’”¹⁵¹ Although the Executive Director of SoundExchange, John Simson, still considers the CRB royalty rates fair and reasonable,¹⁵² he expressed hope that this experimental revenue sharing model would benefit artists, rights holders, and webcasters simultaneously.¹⁵³ Pureplay webcasters seem satisfied as well and consider this royalty agreement to be a significant milestone as the first “reasonably viable [deal

¹⁴³ Schmitt, *supra* note 141.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ 74 Fed. Reg. 34,796, 34,799.

¹⁴⁷ *Id.* This works out to be a dramatic difference in cost compared to the maximum for the CRB royalty rates, reaching \$0.0019 per performance by 2010. See *supra* Part II.A.

¹⁴⁸ The new deal requires webcasters to “provide SoundExchange with census reports (‘actual recordings played and total listenership’) and retain server logs for at least [four] years.” Schmitt, *supra* note 141.

¹⁴⁹ This agreement helps pureplay webcasters “grow their businesses and develop business models while allowing artists and labels to share in the upside potential of webcasting that is driven by their recordings.” Brian Calhoun, *SoundExchange and “PurePlay” Webcasters Reach Unprecedented Experimental Rate Agreement*, SOUND EXCHANGE (July 7, 2009), <http://soundexchange.com/2009/07/07/soundexchange-and-pureplay-webcasters-reach-unprecedented-experimental-rate-agreement/>.

¹⁵⁰ Schmitt, *supra* note 141.

¹⁵¹ Calhoun, *supra* note 149.

¹⁵² *Id.*

¹⁵³ *Id.*

which] . . . extends for a reasonably-long period of time.”¹⁵⁴ However, the new system still contains elements of fundamental unfairness toward Internet radio that must be addressed before Internet radio will be able to flourish.

III. DIFFERENT STANDARDS FOR DIFFERENT MEDIUMS: A CONTINUING PROBLEM

Although the Webcaster Settlement Act of 2009 gave relief to many webcasters and represents one of the first positive settlements between SoundExchange and pureplay webcasters, terrestrial radio still pays nothing in sound recording performance royalties.¹⁵⁵ Internet radio continues to rise in popularity and will soon infiltrate every aspect of everyday life, including vehicles and homes. An exemption in royalty payments for terrestrial radio is unfair when one considers the current state of Internet radio and its future.¹⁵⁶ Because terrestrial radio is a continued presence in the transmission of performances, it should not be treated more favorably than Internet transmissions.

A. Looking Into the Future

According to Bridge Ratings,¹⁵⁷ the number of Internet radio listeners accessing wirelessly—using a personal computer or cell phone—will increase to seventy-seven million by 2010.¹⁵⁸ Pandora claims to already have thirty percent of its users connected via broadband cell phones, and the number of broadband subscribers continues to grow.¹⁵⁹ Pandora and other

¹⁵⁴ Paul Resnikoff, *Pure-Play Webcasters, SoundExchange Work it Out*, DIGITAL MUSIC NEWS (July 7, 2009), <http://www.digitalmusicnews.com/stories/070709webcaster/?searchterm=webcaster%20settlement%20act> (quoting Kurt Hanson, founder of RAIN and rate negotiator for AccuRadio). However, everyone was satisfied. *See, e.g.*, Bob Bellin, *Webcasters—Don't Be Fooled by the New Deal for Performance Royalty*, RADIO-INFO.COM (July 14, 2009), <http://www.radio-info.com/sections/1-features/columns/13-on-the-mic/essays/493-webcasters-dont-be-fooled-by-the-new-deal-for-performance-royalty>.

¹⁵⁵ *See infra* Part III.B.

¹⁵⁶ This section does not discuss the accompanying issues of satellite radio, which pays much less in royalties than Internet radio. The debate, in this author's view, centers on Internet and terrestrial radio because they are both non-subscription services offered to the public for free.

¹⁵⁷ Bridge Ratings is a media research company that tracks consumer behavior relating specifically to all types of radio, MP3 players, and even Podcasting. *Bridging the Gap*, BRIDGE RATINGS, <http://www.bridgeratings.com/about.htm> (last visited Oct. 6, 2010).

¹⁵⁸ *The Bridge Ratings Report—The Impact of Wireless Internet*, BRIDGE RATINGS (Mar. 21, 2007), http://www.bridgeratings.com/press_03.21.07-WiFi%20Impact.htm [hereinafter *Impact of Wireless Internet*].

¹⁵⁹ Stone & Miller, *supra* note 13, at B1.

webcasters¹⁶⁰ provide Internet radio applications (apps) for broadband phones that are so advanced that they replace listening to customized radio stations at a computer.¹⁶¹ The Apple iPad also provides a free, downloadable Pandora app, which provides extensive information and advertising for a musical artist with the touch of a finger.¹⁶²

Similarly, new vehicles will soon be equipped with digital and HD radio, which will include Internet radio options.¹⁶³ New cars will have Pandora—or other webcasting companies—built into the car and “bundled with either the price of the car or services associated with the car.”¹⁶⁴ Even if a vehicle does not have digital or HD radio, an iPhone or other broadband phone with Internet radio apps can hook into the vehicle’s stereo system, and the user can listen to Pandora while driving.¹⁶⁵ The adoption of in-car Internet radio seemingly would threaten traditional, terrestrial radio as well as satellite radio as stable competition in the years to come.¹⁶⁶

However, statistics also show that terrestrial radio listening has actually *increased* since 2008, and according to Bridge Ratings, such growth will continue into 2012.¹⁶⁷ Since 2006,

¹⁶⁰ Webcasters like Slacker, Imeem, and Last.fm also have similarly advanced cell phone apps. See, e.g., Paul Bonanos, *Imeem’s iPhone App Cometes with Apple on its Own Hardware*, GIGAOM (May 14, 2009, 11:53 AM), <http://gigaom.com/2009/05/14/imeems-iphone-app-competes-with-apple-on-its-own-hardware/> (discussing Imeem’s new app that offers its users radio streaming as well as a “My Music” section that offers access to a user’s own library of uploaded songs).

¹⁶¹ Eliot Van Buskirk, *5 Ways the Cellphone Will Change How You Listen to Music*, WIRED (Jan. 16, 2009), <http://www.wired.com/epicenter/2009/01/six-ways-cellph/>.

¹⁶² The iPad has a large High Definition viewing screen, on which a user can read a large amount of biographical or stylistic information about an artist. It goes further than other mobile devices have in the past—it provides “more real estate for display advertising.” Emily Bryson York, *Pandora: The iPad is Going to be Better than the iPhone for Ads*, BUS. INSIDER (June 14, 2010, 9:47 AM), <http://www.businessinsider.com/pandora-ipad-2010-6>.

¹⁶³ W. David Gardner, *Ford Vehicles to Get iTunes Tagging*, INFORMATIONWEEK (Dec. 29, 2009, 12:18 PM), <http://www.informationweek.com/news/services/data/showArticle.jhtml?articleID=222100216>; Antuan Goodwin, *2010 Car Tech and GPS Preview*, CNET.COM (Dec. 14, 2009, 10:30 AM), http://ces.cnet.com/8301-31045_1-10414355-269.html?tag=mncol%3bmlt_related.

¹⁶⁴ Stephen Williams, *Pandora by the Dashboard Light*, WHEELS BLOG (Dec. 11, 2009, 4:05 PM), <http://wheels.blogs.nytimes.com/2009/12/11/pandora-by-the-dashboard-light/>.

¹⁶⁵ The iPhone has allowed personalized Internet radio to become “fully mobile.” Jennifer Maerz, *The Decade in Ideas: Local Artists, DJs, Studio Heads, and Tech Geeks Discuss the Past and Present in Music*, S. F. WEEKLY (Dec. 23, 2009), <http://www.sfweekly.com/2009-12-23/music/the-decade-in-ideas-local-artists-djs-studio-heads-and-tech-geeks-discuss-the-past-and-present-in-music/>.

¹⁶⁶ *Impact of Wireless Internet*, *supra* note 158.

¹⁶⁷ *The Bridge Ratings First Look: The Future of Radio 2010*, BRIDGE RATINGS (Nov. 20, 2009), <http://www.bridgeratings.com/press.11.20.09.2012%20Listening%20Trends.htm>.

traditional terrestrial radio has been considered the most influential media source for consumers.¹⁶⁸ It is clear that Internet radio is driving the future of the radio broadcasting industry, and although terrestrial radio will face new challenges in competitive technology, it is certainly surviving as an industry. If the purpose of copyright regulation is to encourage innovation and “promote the Progress of Science and useful Arts,”¹⁶⁹ Internet radio is disproportionately burdened with royalty payments, and other broadcasting forms pay minimal royalties for the music they play. Traditional terrestrial radio has never and will never, in this author’s view, be sophisticated enough to provide musical artists with any advertising perks able to compete with the advanced advertising capabilities of webcasting, and yet Internet radio continues to pay astronomical royalty rates that are completely disproportionate to what terrestrial broadcasters pay.

B. Terrestrial Radio Exemption: Unfair and Illogical

The current royalty rate system favors satellite and terrestrial radio to the detriment of Internet radio. Although in theory the structure is efficient and fair when considering the differing levels of user interaction, “the standards used to derive the royalties differ among classes of broadcasters, creating ongoing controversy.”¹⁷⁰ Webcasters pay royalties set according to the willing buyer/willing seller standard,¹⁷¹ while satellite radio services pay rates determined under a multifactor test set forth in section 801(b) of the Copyright Act,¹⁷² and terrestrial

¹⁶⁸ *Id.*

¹⁶⁹ U. S. CONST. art. I, § 8, cl. 8.

¹⁷⁰ Parks, *supra* note 40, at 49.

¹⁷¹ See Duvall, *supra* note 67.

¹⁷² For satellite radio determinations, Copyright Royalty Judges must consider the following objectives:

- (A) To maximize the availability of creative works to the public;
- (B) to afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions;
- (C) to reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;
- (D) to minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

¹⁷ U.S.C. § 801(b)(1) (2006). Additionally, the rates set may be adjusted to reflect monetary inflation and other rate changes. § 801(b)(2).

radio stations pay no sound recording performance right at all.¹⁷³ In fact, terrestrial broadcasters only pay about 3.5% of revenue to the American Society of Composers, Authors and Publishers.¹⁷⁴ And, as of 2008, terrestrial radio still constituted a sixteen billion dollar market.¹⁷⁵ Scholars and webcasters have supported platform parity,¹⁷⁶ which is the notion that “all music services subject to the sound recording performance royalty should pay a royalty determined by the same standard, or perhaps even the same royalty.”¹⁷⁷ SoundExchange established the musicFIRST Coalition in 2007,¹⁷⁸ which has strongly advocated for broader performance rights in the form of platform parity.¹⁷⁹ Both the House of Representatives and the Senate are considering current versions of the original Performance Rights Act to establish platform parity between radio broadcasters.¹⁸⁰

An exemption for terrestrial broadcast radio to the detriment of Internet radio no longer makes sense, especially when Internet radio advances the interests of musical artists in ways that terrestrial radio cannot. Although the exposure of new artists and public access to music should never trump proper compensation for copyright holders, “Internet radio is not the old Napster.”¹⁸¹ File sharing constitutes the major cause for the recent decline in CD sales, not Internet radio.¹⁸² In fact, Internet radio has helped to *increase* artist’s revenues from digital

¹⁷³ Parks, *supra* note 40, at 49; Tim Westergren, *Important Update on Royalties*, PANDORA RADIO BLOG (July 7, 2009), http://blog.pandora.com/pandora/archives/2009/07/important_updat_1.html; Alex Nesbitt, *Future of Internet Radio*, DIGITAL PODCAST (Oct. 8, 2009), <http://www.digitalpodcast.com/podcastnews/2009/10/08/future-of-internet-radio-dmf>.

¹⁷⁴ Ty McMahan, *Royalty Deal with Music Labels Renews Internet Radio*, VENTURE CAPITAL DISPATCH BLOG (July 7, 2009), <http://blogs.wsj.com/venturecapital/2009/07/07/royalty-deal-with-music-labels-renews-internet-radio>.

¹⁷⁵ *SNL Kagan Forecasts Advertising Revenue Recovery for TV and Radio Stations in 2010*, ALLRADIONEW.COM (June 14, 2010), <http://allradionews.com/2010/06/14/snl-kagan-forecasts-advertising-revenue-recovery-for-tv-and-radio-stations-in-2010/>. The \$16 billion figure for 2008 represented a 17.7% drop from 2007, but radio revenue is projected to recover to \$17.1 billion in 2010. *Id.*

¹⁷⁶ Platform parity has also been described as the “full performance right” in sound recordings. *See* Parks, *supra* note 40, at 49.

¹⁷⁷ David Oxenford, *Senate Judiciary Committee Hearing on Radio Performance Royalty and Platform Parity for Webcaster Royalties*, BROADCAST LAW BLOG (Aug. 6, 2009, 8:45 PM), <http://www.broadcastlawblog.com/2009/08/articles/broadcast-performance-royalty/senate-judiciary-committee-hearing-on-radio-performance-royalty-and-platform-parity-for-webcaster-royalties/>. This was the idea behind the Performance Rights Act. *See supra* note 128.

¹⁷⁸ MUSICFIRST COALITION, <http://www.musicfirstcoalition.org> (last visited Oct. 6, 2010). “FIRST” is an acronym for “Fairness in Radio Starting Today.” *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *See infra* Part IV.A.

¹⁸¹ Spektor, *supra* note 12, at 87.

¹⁸² Castro, *supra* note 112, at 7.

downloads in ways that terrestrial radio cannot.¹⁸³ In 2006, RadioParadise¹⁸⁴ generated over \$260,000 in sales of CDs and other music through Amazon and \$28,000 in iTunes downloads.¹⁸⁵ In part, these sales can be attributed to the fact that on most webcasting stations, the artist's name, song name, and album name are displayed next to a purchase option, a feature not available on terrestrial radio stations.¹⁸⁶ In addition, Internet radio gives airtime to lesser-known artists that are not played on AM/FM radio, and therefore incentivizes artists to create more music.¹⁸⁷ With the numerous benefits Internet radio provides to both the public and to musical artists, the unbalanced royalty structure should be improved to include platform parity. To compensate broadcasters for increased royalty payments resulting from platform parity, it should be balanced with options to reduce royalty fees.

IV. PROPOSED SOLUTION: THE PERFORMANCE RIGHTS ACT WITH AN OPT-OUT DATABASE PROVISION

To address the unfairness of the current royalty structure, which continues to favor terrestrial and satellite radio over Internet radio, Congress should pass the new and revised Performance Rights Act.¹⁸⁸ However, the Act should be amended to include an option for artists to opt-out of royalty payments by registering with a government-run database. This way, artists will be compensated no matter how their music is broadcasted, and broadcasters can enjoy an efficient and streamlined way to reduce royalty payments owed to owners of sound recording copyrights.

A. The Full Performance Right Revisited

On February 4, 2009, a revived version of the original Performance Rights Act¹⁸⁹ was introduced into the Senate by Senator Patrick Leahy.¹⁹⁰ Known as "S. 379," or the

¹⁸³ See *supra* notes 14 & 16 and accompanying text.

¹⁸⁴ See *supra* note 122.

¹⁸⁵ Castro, *supra* note 112, at 8.

¹⁸⁶ Devices like the iPad, which have large interactive screens, have been revolutionary for music advertising. See *supra* note 162 and accompanying text.

¹⁸⁷ Spektor, *supra* note 12, at 81.

¹⁸⁸ Performance Rights Act of 2009, S. 379, 111th Cong. (Feb. 4, 2009), 2009 CONG US S 379 (Westlaw).

¹⁸⁹ See *supra* note 128.

¹⁹⁰ S. 379. There is also a version in the House of Representatives, introduced by Representative Conyers. See H.R. 848, 111th Cong. (Feb. 4, 2009), 2009 CONG US HR 848 (Westlaw). As of October 2010, the Act is still pending before Congress. S. 379:

“Performance Rights Act,” it would amend the Copyright Act to grant performers of sound recordings rights to compensation from terrestrial broadcasters, but would establish a flat annual fee in lieu of royalty payments for terrestrial broadcast stations making less than \$1.25 million in yearly revenue, a similar standard to the Webcaster Settlement Act of 2009.¹⁹¹ Because the economy is currently in a downturn, the legislation will not impose royalty payments until three years after enactment.¹⁹² On May 13, 2009, the House of Representatives Judiciary Committee approved the bill,¹⁹³ and the Senate Judiciary Committee approved the same legislation in October of 2009.¹⁹⁴ Next, the Senate must consider and vote on the legislation.

This new Performance Rights Act enjoys a considerable amount of support,¹⁹⁵ and should be adopted into law by Congress. Although both Internet radio and terrestrial radio are free to the consumer, Internet radio compensates performing artists in the form of advertising in ways terrestrial radio does not. These individuals should be compensated for their work, regardless of the medium in which it is performed.¹⁹⁶ Not surprisingly, the National Association of Broadcasters (NAB)¹⁹⁷ has vehemently opposed this legislation, calling it a “tax” on local radio stations.¹⁹⁸ The NAB claims that this tax would *reduce* the variety that music radio stations play,¹⁹⁹ but when one considers

Performance Rights Act, OPENCONGRESS, <http://www.opencongress.org/bill/111-s379/show> (last visited Oct. 4, 2010) [hereinafter *S. 379 Performance Rights Act*].

¹⁹¹ See *supra* Part II.B.

¹⁹² S. 379.

¹⁹³ David Oxenford, *Broadcast Performance Royalty Passes House Judiciary Committee—A Work in Progress*, BROADCAST LAW BLOG (May 13, 2009), <http://www.broadcastlawblog.com/2009/05/articles/broadcast-performance-royalty/broadcast-performance-royalty-passes-house-judiciary-committee-a-work-in-progress/>.

¹⁹⁴ See *S. 379: Performance Rights Act*, *supra* note 190; Juliana Gruenwald, *More Support for Royalty Bill*, NAT’L J. (Jan. 6, 2010, 10:09 AM), <http://techdailydose.nationaljournal.com/2010/01/more-support-for-royalty-bill.php>.

¹⁹⁵ Seventeen labor and civil rights organizations, including the AFL-CIO and the NAACP, urged Congress to adopt the bill. See *AFL-CIO, NAACP, Others Back Performance Rights Act*, MUSICFIRST (Dec. 7, 2009), <http://www.musicfirstcoalition.org/node/728>. Even the Intellectual Property division of the American Bar Association has come out in support of the bill. See Gruenwald, *supra* note 194. However, there is significant opposition to the bill as well, mainly from commercial television and radio stations. See *H.R. 848 – Performance Rights Act*, MAPLIGHT.ORG, <http://maplight.org/us-congress/bill/111-hr-848/358578/total-contributions> (last visited Oct. 18, 2010) (comparing the interest groups in support of and in opposition to the bill, as well as the relative financial contributions made by those groups to House members).

¹⁹⁶ Castro, *supra* note 112, at 1.

¹⁹⁷ NAT’L ASS’N OF BROADCASTERS, <http://www.nab.org> (last visited Oct. 5, 2010).

¹⁹⁸ See *No Performance Tax*, <http://www.noperformancetax.org> (last visited Oct. 5, 2010). This website is operated by the NAB. *Id.*

¹⁹⁹ *Radio at Risk*, NO PERFORMANCE TAX, <http://www.noperformancetax.com/Radio%20at%20Risk> (last visited Oct. 5, 2010).

the imminent rise of in-car Internet radio,²⁰⁰ these concerns may not be so terrifying. Although terrestrial radio provides artists with exposure to new audiences,²⁰¹ this alone should not justify an exemption when Internet radio gives similar—even better—exposure.

The Performance Rights Act may have some negative impacts on musicians and record companies,²⁰² but it would at least level the playing field of who pays royalties and create a more balanced royalty structure. Moreover, “the proposed act would result in additional revenue for record companies, musicians, and performers . . . [who] would receive an additional income stream. . . . [R]ecord companies could use the additional revenue to invest more heavily in the creative process of music.”²⁰³ The Act itself, however, does not address the issue of high royalty rates. Therefore, the Performance Rights Act should carry with it a simple way for webcasters and radio stations alike to reduce their royalty payments.

B. An Opt-Out Database for SoundExchange

Since the CRB determination of royalty rates in 2007,²⁰⁴ it has been assumed that artists could waive the collection of royalties if they felt it would be in their best interest to allow webcasters to play their music.²⁰⁵ SoundExchange currently allows sound recording copyright owners to negotiate directly

²⁰⁰ See *supra* Part III.

²⁰¹ At a House Judiciary Committee in 2007, congressmen on either side of the issue of full performance rights agreed that terrestrial broadcasts have been positive for musical artists. David Oxenford, *House Judiciary Committee Hearing on Broadcast Performance Right—No Breaks for the Broadcasters*, BROADCAST LAW BLOG (July 31, 2007), <http://www.broadcastlawblog.com/2007/07/articles/broadcast-performance-royalty/house-judiciary-committee-hearing-on-broadcast-performance-right-no-breaks-for-the-broadcasters/#more>.

²⁰² Matthew Lasar, *Performance Rights Act Might Shut Down Some Radio Stations*, ARS TECHNICA (June 8, 2010, 11:08 AM), <http://arstechnica.com/tech-policy/news/2010/06/gao-report-performance-rights-act-might-shut-down-some-radio-stations.ars> (stating that the act “could prompt some stations to make ‘adjustments’ . . . such as reducing staff levels, switching to a nonmusic format, and ceasing operation”) (citing U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-428R, PRELIMINARY OBSERVATIONS ON THE POTENTIAL EFFECTS OF THE PROPOSED PERFORMANCE RIGHTS ACT ON THE RECORDING AND BROADCAST RADIO INDUSTRIES 12 (2010)).

²⁰³ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-428R, PRELIMINARY OBSERVATIONS ON THE POTENTIAL EFFECTS OF THE PROPOSED PERFORMANCE RIGHTS ACT ON THE RECORDING AND BROADCAST RADIO INDUSTRIES 4 (2010).

²⁰⁴ See *supra* Part II.A.

²⁰⁵ See David Oxenford, *Music Waivers Dropped Amid Payola Allegations—What’s the Impact for Future Waivers for Webcasters?*, BROADCAST LAW BLOG (July 22, 2007), <http://www.broadcastlawblog.com/2007/07/articles/payola-and-sponsorship-identif/music-waivers-dropped-amid-payola-allegations-whats-the-impact-for-future-waivers-for-webcasters/>.

with webcasters, provided they give proper notice to the CRB and to SoundExchange.²⁰⁶ Also, if an artist does not collect the royalties owed to him after three years, SoundExchange keeps the money and adds it back into the general revenue pool.²⁰⁷ SoundExchange needs its own streamlined system for efficient use of royalty payments without requiring cumbersome individual negotiations between webcasters and copyright holders.

At a recent Senate Judiciary Committee hearing concerning performance royalties for radio, Texas Senator Cornyn suggested that, “rather than compelling a performance royalty, Congress should set up a ‘Do Not Play’ list, similar to a do not call list.”²⁰⁸ Such a list would be kept by SoundExchange—which already has a list of most copyright holders²⁰⁹—and would consist of those artists who do not consent to their music being played without the payment of a royalty.²¹⁰ If webcasters and radio stations wanted to play music from artists on the Do Not Play list, they would have to negotiate individually, but stations could play music from any other artists without a royalty.²¹¹ This idea, however, was dismissed quickly during the hearing for legitimate fears that such a system would tend to force less well-known musical artists and groups into a race to the bottom—giving up their copyrights in order to be heard—and that it would simultaneously prove difficult for smaller radio stations to carry major music stars, thus infringing on smaller sites’ ability to compete with larger ones.²¹²

However, the idea of creating a pool of royalty-free music is interesting and might prove a successful method for lowering royalty payments, which continue to cripple online radio stations. Instead of the system allowing royalty-free music by default, as Senator Cornyn suggested, SoundExchange should create its own

²⁰⁶ Eliot Van Buskirk, *Polka Players Want to Fold SoundExchange Royalties*, WIRED (July 19, 2007, 3:37 PM), http://www.wired.com/listening_post/2007/07/polka-players-w/.

²⁰⁷ Eliot Van Buskirk, *Webcasting Royalties: A Modest Proposal*, WIRED (July 23, 2007), http://www.wired.com/entertainment/music/commentary/listeningpost/2007/07/listeningpost_0723?currentPage=3. Van Buskirk suggests that, “[i]f SoundExchange is going to collect royalties without being asked to, it should make it easy to opt out of that system on a song-by-song basis.” *Id.*

²⁰⁸ Oxenford, *supra* note 177.

²⁰⁹ Performers and/or copyright owners must register with SoundExchange in order to “get paid when [they] get played.” *Register*, SOUNDEXCHANGE, <http://soundexchange.com/performer-owner/register-update-my-info/> (last visited Oct. 6, 2010).

²¹⁰ Oxenford, *supra* note 177.

²¹¹ *Id.*

²¹² *Id.*

“Please Play” or “opt out” list, where artists could waive the payment of royalties and consent to webcasters and radio broadcasters playing their music for free. This opt-out provision could easily be attached to the Performance Rights Act as an amendment and simply provide a method for broadcasters to mitigate the impact of platform parity. Such a system, operated by SoundExchange, would provide more artists with more security and discretion in choosing how to market themselves, and it would also create more revenue as users are prompted with a “Purchase” option next to the song played. Instead of requiring individual negotiations, artists could simply join the opt-out list, which would allow radio stations of all types to play the music without paying royalties.

Some artist communities, like the Polka America Corporation (PAC),²¹³ have already given Internet radio stations the right to play their music without royalties.²¹⁴ However, PAC had to create its own artist database without the help of SoundExchange.²¹⁵ Requiring webcasters to negotiate individually with music and recording organizations is as inefficient as requiring them to negotiate with individual music artists. With the right governmental protections in place, a system, operated by SoundExchange, would streamline negotiations between webcasters and sound recording copyright holders, as well as create an efficient way for webcasters to play free music to lessen their royalty obligations under the Copyright Act. This, coupled with a full performance right granted to holders of sound recording copyrights in the Performance Rights Act, seems to produce a fairer and more balanced structure that equally considers the interests of all parties involved: musical artists, the recording industry, webcasters, and terrestrial broadcasters.

CONCLUSION

The radio industry has changed dramatically over the past decade, and continued adaptation and flexibility will be needed to address future technological advances and evolving consumer habits. As the actions of Radiohead demonstrated in 2007, the market is changing, and everyone—musicians, music publishers,

²¹³ POLKA AMERICA CORPORATION, <http://www.polkaamericacorporation.org/> (last visited Oct. 1, 2010).

²¹⁴ Van Buskirk, *supra* note 206. Polka artists interested in joining the opt-out database must register with the Polka America Corporation, and then their music will be played for free on any webcaster or terrestrial radio broadcaster that plays more than fifty percent polka music. *Id.*

²¹⁵ *Id.*

performers, etc.—will need to get creative to stay in business. Internet radio represents the innovative forefront of the broadcasting industry. Therefore, a royalty regulation system that hinders technological advancement and ignores current consumer values is detrimental to the health of the music industry as a whole. It is not appropriate to allow terrestrial radio stations to pay nothing in royalties while webcasters must pay at least twenty-five percent in revenue. Indeed, “[c]opyright may be property, but like all property, it is also a form of regulation. It is a regulation that benefits some and harms others. When done right, it benefits creators and harms leeches. When done wrong, it is regulation the powerful use to defeat competitors.”²¹⁶ Congress should pass the Performance Rights Act, but should amend it slightly so that it includes an opt-out database requirement for SoundExchange in order to balance the interests of all parties.

The “great irony” of the debates among these groups—webcasters, the recording industry, musical artists, etc.—is that “most new devices only become popular because buyers really want them, which means they open whole new markets that can then be monetized by rightsholders.”²¹⁷ Copyright holders have been forced to accept industry-altering technology before, and have successfully met the challenge. Consider the gramophone, the VCR, and analog cassette tapes. Each time these technologies were introduced into the market, copyright holders feared that it would be the death of music.²¹⁸ Each time the industry survived. The recording industry will survive into the digital age, but only if it accepts change once again and adapts with new business and finance models.

²¹⁶ LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 194 (2004). This book measures the effect of the Internet on various aspects of our culture, including film, performance, radio, and television. Examining the relationship between what Professor Lessig calls “piracy” and “property,” he argues that, by bowing to the demands of media conglomerates, the government has allowed the law to hamper the innovations of the Internet and thus hinder culture’s ability to respond to change as we have always done—using “common sense.” *Id.* at 13.

²¹⁷ Nate Anderson, *100 Years of Big Content Fearing Technology—In Its Own Words*, ARS TECHNICA (Oct. 11, 2009, 11:00 PM), <http://arstechnica.com/tech-policy/news/2009/10/100-years-of-big-content-fearing-technologyin-its-own-words.ars/2>.

²¹⁸ *Id.*

“Make it Work”: *Project Runway* and Injunctive Relief in the Television Industry

Molly S. Machacek*

*Sure next season, whenever the hell it happens, will have Tim and Heidi and Michael and Nina and all that, but after all this bickering and tinkering and product placement and drama, I just doubt that anyone involved is going to feel that, in the end, the juice was worth the squeeze.*¹

—Gawker.com

*In order to be irreplaceable one must always be different.*²

—Coco Chanel

INTRODUCTION

In September 2008, fans and television industry members alike were shocked when the New York Supreme Court issued a preliminary injunction to prevent the airing of one of cable television's biggest hits, *Project Runway*.³ The case before the court involved a contractual dispute between NBC Universal (the parent company of Bravo, *Project Runway*'s old network) and the Weinstein Company, the producers of the show.⁴ The preliminary injunction prevented the Weinstein Company from moving the successful show to its new home on Lifetime Television because it was alleged that the Weinstein Company failed to honor the contractual right of first refusal held by NBC Universal.⁵ Most stunning to both the parties to the lawsuit and

* J.D. candidate 2011 Chapman University. B.F.A. 2004 New York University, Tisch School of the Arts. Adjunct Professor at Chapman University, Dodge College of Film and Media Arts. I would like to thank my family for their love and encouragement and for supporting all of my different career paths, my husband for always believing in me, and my fellow *Chapman Law Review* members for their amazing hard work and dedication. I also owe a debt of gratitude to Chapman University School of Law Professor John Tehranian, and to all of the others who helped make this article a reality.

¹ Richard Lawson, *The Project Runway Lawsuit: Nobody's Going to Win*, GAWKER.COM (Sept. 29, 2008, 10:58 AM), <http://gawker.com/5056266/the-project-runway-lawsuit-nobodys-going-to-win>.

² MARCEL HAEDRICH, *COCO CHANEL: HER LIFE, HER SECRETS* 255 (Charles L. Markmann trans., Little, Brown & Co. 1972).

³ See Bill Carter & Brian Stelter, *'Project Runway' Move to Lifetime is Blocked*, N.Y. TIMES, Sept. 27, 2008, at B9.

⁴ *Id.*

⁵ Bill Carter, *Bravo's Parent Sues for 'Runway' Rights*, N.Y. TIMES, Apr. 8, 2008, at C3; Carter & Stelter, *supra* note 3, at B9.

the entertainment industry as a whole, however, was the fact that a court would issue a preliminary injunction in an entertainment industry disagreement over an established television property—a fairly unusual occurrence.⁶ Courts commonly grant preliminary injunctions as a form of equitable relief in breach of contract cases if the plaintiff can show (1) that irreparable harm will occur if the injunction is not granted, (2) that the plaintiff would prevail on the merits of the case at trial, and (3) that the balance of potential harm to either side weighs in favor of relief.⁷ Courts, however, have rarely issued them in connection with media industry disputes due to the fact that money damages are almost always an adequate replacement for the loss of an entertainment property and a financial investment; accordingly, the moving party cannot establish irreparable harm.⁸

One could argue that a preliminary injunction is still available as a remedy in an entertainment case for a rare situation in which a dispute would center on unique and irreplaceable property for which no amount of money could substitute, such as television shows like *The Cosby Show*,⁹ or, more recently, *Friends*.¹⁰ However, such water-cooler shows that dominated the market share are no longer as frequent, and with all the changes in production, distribution, and advertising in television in the last decade,¹¹ it is harder to argue that a show is

⁶ Carter & Stelter, *supra* note 3, at B9 (“The decision stunned parties on all sides of the deal because such injunctions are so rarely granted in entertainment industry disputes.”). See also Bill Carter, *Weinstein Strikes a Deal in ‘Project Runway’ Lawsuit*, N.Y. TIMES, Apr. 2, 2009, at C3 (“NBC Universal won an injunction—highly unusual in the entertainment business—in September in State Supreme Court in New York. That decision prevented Lifetime from putting the show on.”).

⁷ Nobu Next Door, LLC v. Fine Arts Housing, Inc., 833 N.E.2d 191, 192 (N.Y. 2005) (“The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor.”); Robert A. Barker, *Requirements for a Preliminary Injunction*, N.Y. L.J., Dec. 16, 1996, at 3.

⁸ SportsChannel Am. Assocs. v. Nat’l Hockey League, 589 N.Y.S.2d 2, 3 (App. Div. 1992).

⁹ See Bill Carter, *In the Huxtable World, Parents Knew Best*, N.Y. TIMES, Apr. 26, 1992 (Arts & Leisure), at 1 (“The series was the most-watched show of the last decade, the comedy seen by more people than any other in television history, the show that resurrected the sitcom as television’s most popular genre and the first to portray mainstream black middle-class life.”).

¹⁰ See Bill Carter, *Friends’ Deal Will Pay Each of Its 6 Stars \$22 Million*, N.Y. TIMES, Feb. 12, 2002, at C1 (discussing that *Friends’* ratings in its second-to-last season were “the biggest in all of television”).

¹¹ AMANDA D. LOTZ, THE TELEVISION WILL BE REVOLUTIONIZED 1 (New York University Press 2007) (“[L]ong before viewers or television executives truly imagined the reality of downloading television shows to pocket-sized devices or streaming video online, it was apparent that the box that had sat in our homes for half a century was on the verge of significant change.”).

unique.¹² Audiences have become fickle as to both scripted and reality television, causing networks to leave shows on for only a couple seasons or even to pull the plug after only a few episodes.¹³ While turnover has always been a part of television, it is no longer likely that an average show will generate the large ratings and network market shares of previous decades.¹⁴ Because of this and improved technology for network revenue-tracking, it should be easier for courts to assign monetary compensation as a remedy, even if such calculations are complicated by increased advertising revenue streams.¹⁵ This Comment argues that preliminary injunctions are not an appropriate remedy for future television program lawsuits because of the time-sensitive nature of modern television shows, pop culture relevance, new media distribution, and product integration. Therefore, damages should be the compulsory remedy even if new technology makes damages potentially difficult to calculate.

Beginning with a background in legal remedies, Part I outlines the requirements of preliminary injunctions and how the courts view them. It also touches on how preliminary injunctions can be a drastic remedy and therefore should not be liberally applied.

Part II of this Comment delves into preliminary injunctions in the television industry. It examines prior cases that have dealt with motions for preliminary injunctions against television shows and television networks and the reasons they were denied. Part II also discusses the *Project Runway* legal battle, the issuance of the preliminary injunction, and the ramifications for all of the parties involved.

¹² *Id.* at 36 (“Television’s new abundant offerings make it difficult to determine a proper frame through which to examine programming and assess its significance.”).

¹³ Bernard Weinraub, *Wake Up and Knock the Lineup*, N.Y. TIMES, May 21, 2000, at A2 (“In their hunger to lure increasingly fickle audiences away from cable and the Internet, network executives said selecting and scheduling programs was a roll of the dice as well as a blend of considerations.”).

¹⁴ LOTZ, *supra* note 11, at 43 (“[I]n comparison with the network-era reach of television—when top shows were watched by 40 to 50 percent of television households—popular contemporary shows such as *American Idol* have a narrower scope—only 15.7 out of a universe of 109 million homes watch it. But even with only an average of 14 percent of U.S. television households watching the show, it is among the most widely viewed regular programs in a given year.”).

¹⁵ HOWARD J. BLUMENTHAL & OLIVER R. GOODENOUGH, *THE BUSINESS OF TELEVISION* 85 (3d ed. 2006) (“This type of advertising has a lot of buzz behind it, and it is growing rapidly. In the statistics-bound advertising industry, it seems likely that a meaningful measurement system will evolve as product placement becomes a more commonplace media buy.”).

Finally, Part III offers a proposal for making damages the standard remedy for entertainment industry disputes, focusing on television in particular. Part III focuses on the changing nature of television and posits that although these changes are altering the economic model of television, they should not alter how the courts determine remedies.

I. BACKGROUND: THE PROVISIONAL REMEDY OF PRELIMINARY INJUNCTIONS

Preliminary injunctions, as a form of equitable relief in breach of contract cases, are drastic remedies that are only available in certain situations.¹⁶ A preliminary injunction is a provisional remedy that the courts use mainly before a trial to maintain the status quo of a situation when there is a legitimate issue in dispute. It is an ideal remedy in situations involving real and intellectual property disputes where monetary damages cannot begin to replace the item or expression of an idea that was lost.¹⁷ In most cases, unless the situation includes unique goods or property, damages are a more appropriate remedy as long as they are somehow calculable.¹⁸ The types of cases where courts are willing to issue a preliminary injunction usually involve a specific type of irreplaceable property like land or unique possessions, or are license or patent cases where damages are not calculable.¹⁹ However, in 2006 the U.S. Supreme Court, in *eBay Inc. v. MercExchange, LLC*, radically changed the requirements for a preliminary injunction in intellectual property suits by finding against the automatic presumption of irreparable harm formerly used in patent cases.²⁰ In other types of cases where a

¹⁶ *Marietta Corp. v. Fairhurst*, 754 N.Y.S.2d 62, 64 (App. Div. 2003); Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 272 (1979) ("Under current law, courts grant specific performance when they perceive that damages will be inadequate compensation. Specific performance is deemed an extraordinary remedy, awarded at the court's discretion . . .").

¹⁷ See Trial Order at 35, *NBC Universal, Inc. v. Weinstein Co. LLC*, 2008 WL 4619203 (N.Y. Sup. Ct. Sept. 26, 2008) (No. 601011/08) [hereinafter Trial Order] ("[I]t should be noted that it is settled law that the grant or denial of a request for a preliminary injunction, a provisional remedy designed for the narrow purpose of maintaining the *status quo*, is not an adjudication on the merits . . .") (internal quotation marks omitted); Barker, *supra* note 7, at 3.

¹⁸ See *SportsChannel Am. Assocs. v. Nat'l Hockey League*, 589 N.Y.S.2d 2, 3 (App. Div. 1992); Schwartz, *supra* note 16, at 271 ("Although the damages remedy is always available to a disappointed promisee under current law, the remedy of specific performance is available only at the discretion of the court. Moreover, courts seldom enforce contract clauses that explicitly provide for specific performance in the event of breach.").

¹⁹ Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 355–56 (1978).

²⁰ *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 393–94 (2006) (reversing the Court of Appeals' automatic presumption of irreparable harm, and holding that, in intellectual property cases, "the decision whether to grant or deny injunctive relief rests

substantial equivalent for the property could be easily obtained elsewhere, money damages are an adequate substitute for relief.²¹ There are set requirements that a court must find in order to grant a preliminary injunction.²² The three-prong test requires the court to engage in a difficult analysis of the facts for each motion.²³ These requirements guide a court in weighing both parties' interests to determine the best possible outcome.

A. Preliminary Injunction Requirements

When a party seeks a preliminary injunction, the court must consider the evidence before trial to see if immediate action must be taken in the form of a preliminary injunction, or if damages would be easily calculable and therefore constitute a more appropriate remedy.²⁴ For a preliminary injunction to be granted, "[a] party seeking [this] drastic remedy . . . has the burden of demonstrating, by clear and convincing evidence, (1) a likelihood of ultimate success on the merits, (2) the prospect of irreparable injury if the provisional relief is withheld, and (3) a balancing of the equities in the movant's favor."²⁵

Different jurisdictions also require that the party seeking relief demonstrates either a combination of likely success on the merits and irreparable harm, or a showing that there are "serious questions going to the merits" for the court to consider and that the "balance of hardships tips sharply in his or her favor."²⁶ Courts do not view this "alternative standard" as a separate standard, but rather as a means of broadening the court's decision-making power.²⁷

within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards").

²¹ Kronman, *supra* note 19, at 358 (stating that "if the subject matter of a contract is such that its substantial equivalent for all practical purposes is readily obtainable from others than the defendant in exchange for a money payment, this fact will usually in the absence of other factors be sufficient to show that money damages are an adequate remedy for breach") (internal quotation marks omitted).

²² See *Berkoski v. Bd. of Trs. of Inc. Vill. of Southampton*, 889 N.Y.S.2d 623, 627 (App. Div. 2009).

²³ See *Barker*, *supra* note 7, at 3.

²⁴ See *Kronman*, *supra* note 19, at 362.

²⁵ *Berkoski*, 889 N.Y.S.2d at 627. See also *Int'l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir. 1993) (explaining that the preliminary injunction test is generally a three-prong test and a potential fourth prong: "depending on the nature of the case, (4) the public interest favors granting relief").

²⁶ *Int'l Jensen*, 4 F.3d at 822.

²⁷ *Id.*

1. Irreparable Harm

Courts have found that, of all of the preliminary injunction requirements, irreparable harm is the “single most important prerequisite for the issuance of a preliminary injunction.”²⁸ Regardless of the dispute at issue, the plaintiff seeking preliminary relief “must demonstrate that irreparable injury is *likely* in the absence of an injunction.”²⁹ Courts consider whether there are any other options, mainly monetary damages, which would maintain the status quo and sufficiently compensate the moving party.³⁰ There must be “an injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages.”³¹

In general, courts have found that if a party provides only evidence of loss of business resulting in provable monetary damages, a preliminary injunction is not appropriate.³² Similarly, in breach of contract cases where disputes arise over lost profits, the court can easily quantify the breach in monetary terms.³³ Even when courts find it difficult to calculate damages, or parties offer little evidence to illustrate the amount of future lost profits, they still may not necessarily find irreparable harm.³⁴ Without evidence of such injury, a court will deny a

²⁸ *Rodriguez v. DeBuono*, 175 F.3d 227, 233–34 (2d Cir. 1999) (holding that the moving party must first demonstrate likely irreparable injury before the court will consider the other requirements for a preliminary injunction); *accord Natsource LLC v. Paribello*, 151 F. Supp. 2d 465, 469 (S.D.N.Y. 2001).

²⁹ *Winter v. Nat. Res. Def. Council, Inc.*, 129 S. Ct. 365, 375 (2008) (emphasis in original). See also *Tom Doherty Assocs., Inc. v. Saban Entm't., Inc.*, 60 F.3d 27, 37 (2d Cir. 1995) (“Irreparable harm is an injury that is not remote or speculative but actual and imminent, and ‘for which a monetary award cannot be adequate compensation.’”); *Natsource*, 151 F. Supp. 2d at 469.

³⁰ *SportsChannel Am. Assocs. v. Nat'l Hockey League*, 589 N.Y.S.2d 2, 3 (App. Div. 1992) (stating that “[d]amages compensable in money and capable of calculation, *albeit* with some difficulty, are not irreparable”); Christopher T. Wonnell, *The Contractual Disempowerment of Employees*, 46 STAN. L. REV. 87, 142 (1993) (arguing that, in the context of employee breach of contract cases, “[c]ourts must . . . examine such agreements carefully, and grant relief from [an] injunction only if satisfied that it can calculate the defendant's profit with reasonable certainty”).

³¹ *Rodriguez*, 175 F.3d at 234. Even in intellectual property cases, where the property at issue is often considered irreplaceable, courts no longer automatically presume irreparable injury; instead, the determination lies solely within the discretion of the trial court. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 393–94 (2006).

³² See *Tom Doherty Assocs.*, 60 F.3d at 37.

³³ See Wonnell, *supra* note 30, at 141 (arguing that “[c]ourts should not impose injunctive relief when they can assess damages with reasonable certainty (where damages are liquidated in the contract, for example) and the defendant can post a bond sufficient to cover potential damage awards to employers”).

³⁴ See *Barker*, *supra* note 7, at 3 (“[M]oney damages could serve to remedy any loss [the plaintiff] may have suffered. This is true . . . even though the calculation of such damages might be fraught with some difficulty.”).

motion for a preliminary injunction.³⁵ The next prong for the court to consider—whether or not the party seeking the injunction will prevail on the merits—can be straightforward or complicated depending on the circumstances, because it requires an in depth look at the evidence presented.

2. Prevailing on the Merits

Prevailing on the merits is the determination by the court of whether or not the party seeking a preliminary injunction would likely be successful at a future trial.³⁶ This requirement varies in difficulty and requires case-by-case determinations, because the court is forced to make a preliminary determination of the merits without having a full record established, often before discovery even begins.³⁷ If the case is simple, then it is a relatively undemanding inquiry in which the court examines the evidence to determine whether or not a party can clearly prevail, or whether a showing of irreparable harm is present.³⁸ Additionally, “the degree of likelihood of prevailing on the merits that the plaintiff must demonstrate decreases the more heavily the balance of harms weighs in its favor.”³⁹ In contrast, if the facts heavily favor the opposing party, the court can readily determine that the moving party will not prevail at trial, and therefore an injunction would not be justified.⁴⁰ However, in

³⁵ *Rodriguez*, 175 F.3d at 233–34; 23A FEDERAL PROCEDURE: LAWYER’S EDITION § 54:422 (2001) (“A preliminary injunction will not be granted if the plaintiff is unable to establish a danger of irreparable harm, as where a plaintiff can be compensated by damages; however, it has been said that a reasonable apprehension of threatened injury will satisfy the ‘irreparable harm’ requirement.”).

³⁶ *E.g.*, 23A FEDERAL PROCEDURE: LAWYER’S EDITION § 54:422 (2001) (“[P]reliminary injunctions may be issued where the plaintiff demonstrates a likelihood of success on the merits . . .”); 87 C.J.S. *Trade-Marks, Trade-Names, and Unfair Competition* § 302 (2000) (stating that, in the context of trade-mark infringement, “[t]he likelihood of success sufficient to support a preliminary injunction exists if the party seeking the preliminary injunctive relief demonstrates that he or she has a better than negligible chance of succeeding on the merits of the underlying infringement claim”).

³⁷ *See Barker*, *supra* note 7, at 3.

³⁸ If a plaintiff has no chance of prevailing on the merits, he is highly unlikely to prevail on the other two factors, and thus will likely not be entitled to a preliminary injunction. *See id.*

³⁹ *Brunswick Corp. v. Jones*, 784 F.2d 271, 275 (7th Cir. 1986) (“Although the plaintiff must demonstrate some probability of success on the merits, the threshold is low. It is enough that the plaintiff’s chances are better than negligible . . .”) (internal quotation marks omitted).

⁴⁰ *See, e.g.*, *Fashion Television Assocs. v. Spiegel, Inc.* 849 F. Supp. 19, 21–22 (S.D.N.Y. 1994) (finding that the plaintiff did not create “a sufficient association in the public mind between the [service] mark and its source,” which indicated to the court that the plaintiff would not be able to prove these issues enough to prevail at a future trial); *Windows User, Inc. v. Reed Bus. Pub. Ltd.*, 795 F. Supp. 103, 108 (S.D.N.Y. 1992) (holding that the plaintiff had not demonstrated a likelihood that it would prevail on its claim because it could not establish the requisite first use of the service mark in question). *See also Barker*, *supra* note 7, at 3.

situations where facts are at issue, testimony is in dispute, or the court is asked to determine complex questions of law, the case will usually continue to trial without the protection of a preliminary injunction so that those core disagreements can be resolved.⁴¹ No matter the circumstances, a judge must determine whether or not the plaintiff has a strong enough case to prevail on the merits at trial.⁴² The remaining requirement can also be quite difficult to determine, depending on the circumstances.

3. Balancing of Potential Harm

The requirement that the court “balance the potential harm” is determined on a case-by-case basis and is often difficult to apply. The court must examine all possible consequences of a preliminary injunction, rather than just considering the evidence relevant to the dispute at issue.⁴³ This test, often called balancing of the equities, requires the court to “balance the competing claims of injury and [to] . . . consider the effect on each party of the granting or withholding . . . the requested relief.”⁴⁴ Most courts require the balance of hardships to “tip sharply” in the moving party’s favor, making this requirement exceedingly difficult to meet.⁴⁵ A plaintiff would at least have to establish that there are serious, unresolved, substantive issues in the case in order to prevail.⁴⁶

Courts also consider equity and common sense in a decision to grant or deny an injunction.⁴⁷ Public policy concerns factor into the court’s decision as well, because the public can be adversely affected by a preliminary injunction.⁴⁸ For example, courts consider the effect that such an injunction would have on the public if granted and whether such an effect would be unfair, especially in instances where a decision would negatively impact

⁴¹ *Brunswick Corp.*, 784 F.2d at 274 n.2 (“Whether the plaintiff can demonstrate a reasonable likelihood of prevailing on the merits, however, often requires determination of a question of law.”); accord 87 C.J.S. *Trade-Marks, Trade-Names, and Unfair Competition* § 302 (2000).

⁴² See *Brunswick*, 784 F.2d at 274.

⁴³ See *Barker*, *supra* note 7, at 3.

⁴⁴ *Chase-Riboud v. Dreamworks, Inc.*, 987 F. Supp. 1222, 1224 (C.D. Cal. 1997). See also *Barker*, *supra* note 7, at 3.

⁴⁵ *Int’l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir. 1993).

⁴⁶ *Windows User, Inc.*, 795 F. Supp. at 109.

⁴⁷ See, e.g., *Bertolli, U.S.A., Inc. v. Filippo Bertolli Fine Foods*, 662 F. Supp. 203, 205–06 (S.D.N.Y. 1987) (stating that sometimes, the granting of an injunction also benefits the enjoined party, because if that party eventually loses at trial, the injunction protects that party from “needlessly devot[ing] time, energy and financial resources to a futile endeavor”).

⁴⁸ See *Brunswick Corp. v. Jones*, 784 F.2d 271, 274 & n.1 (7th Cir. 1986) (requiring the moving party to establish that, if issued, the injunction would not harm the public interest).

numerous third parties, such as employees or television audiences.⁴⁹ Overall, it takes a great deal of evidence to prove the necessity of a preliminary injunction, which is understandable considering the extraordinary nature of the relief.⁵⁰

B. Preliminary Injunctions Are Drastic Remedies

Preliminary injunctions are provisional remedies that courts only issue as a last resort since most consider them a drastic remedy—because of this, it is a remedy that is not routinely granted.⁵¹ Money damages are the normal remedy for breach of contract, and courts only use preliminary injunctions in very special circumstances when there is no other option for the property or issue in question.⁵² For example, courts are more likely to use preliminary injunctions for claims concerning real estate, where the property in question is both unique and easily transferable.⁵³ The injury claimed cannot be merely theoretical, because preliminary injunctions freeze assets and render businesses temporarily useless, causing extreme problems and

⁴⁹ As the court in *Hastings-Murtaugh v. Texas Air Corporation* explained:

Considering the contingent nature of the employees' proposal, the history of the unions' refusal to grant further concessions, and the financial crisis that precipitated the Texas Air merger agreement, loss of the Texas Air proposal could result in the ruin of Eastern Air Lines. Such a result would be disastrous not only to the corporate entity, but also to the shareholders represented by five of the plaintiffs here and to Eastern's employees and unions.

Hastings-Murtagh v. Tex. Air Corp., 649 F. Supp. 479, 487 (S.D. Fla. 1986). *See also SportsChannel Am. Assocs. v. Nat'l Hockey League*, 589 N.Y.S.2d 2, 3 (App. Div. 1992) (finding that the lower court, in denying a preliminary injunction, properly balanced the interests of "NHL fans who would have been deprived of their right to watch the nationally televised hockey games if the NHL were forced to blackout its games for all or part of the 1992–1993 season . . . against SportsChannel," a television broadcast company); 23A FEDERAL PROCEDURE: LAWYER'S EDITION § 54:422 (2001) ("The court must also consider the interest of the public in maintaining the status quo pending the outcome of the litigation.").

⁵⁰ *See Metromedia Broad. Corp. v. MGM/UA Entm't Co.*, 611 F. Supp. 415, 427 (C.D. Cal. 1985).

⁵¹ *See Marietta Corp. v. Fairhurst*, 754 N.Y.S. 2d 62, 65–66 (App. Div. 2003) (noting that there are powerful public policy considerations against issuing preliminary injunctions in cases involving personal service contracts, even if a case involves confidentiality issues and trade secrets).

⁵² *See Hansen v. Ludera*, 325 N.Y.S.2d 78, 89 (Sup. Ct. 1971) (characterizing specific performance as "the most drastic and therefore most zealously guarded form of equitable relief"); Kronman, *supra* note 19, at 354 ("The normal remedy for breach of contract is, of course, money damages. Specific performance is exceptional. The Anglo-American law of contracts protects contract rights with a liability rule, only a few with a property rule.").

⁵³ Like preliminary injunctions, "[s]pecific performance is an appropriate remedy for a breach of contract concerning goods that are unique in kind, quality, or personal association where suitable substitutes are unobtainable or unreasonably difficult or inconvenient to procure." *Sokoloff v. Harriman Est. Dev. Corp.*, 96 N.Y.S.2d 425, 429 (2001) (internal quotation marks omitted).

financial losses for the parties involved.⁵⁴ If the dispute relates to a business, or the release of a movie or book where a significant investment has already been made, an injunction can damage the lives of more people than those involved in the original dispute, such as employees of a corporation or those involved in the production of a movie or television show, the public who uses a company's services, or the audience anticipating the item's release.⁵⁵

In some circumstances, the most damaging effect that preliminary injunctions can have is "to tie [the defendant's] hands with an injunction . . . , in effect, grant[ing] the ultimate relief plaintiff seeks without his having even to begin to make out a meritorious case."⁵⁶ Such a remedy could even bankrupt a defendant's company before the conclusion of trial.⁵⁷ Courts must guard against abuse of the remedy. Large, wealthy companies with endless resources could attempt to take advantage of the equitable remedy process by including preliminary injunction provisions or covenants not to compete in their contracts with smaller companies (or with individual employees), and then expect courts to enforce such injunctions.⁵⁸ Courts frequently hesitate to issue preliminary injunctions with employment contracts—especially at-will employment contracts—because such an injunction against an employee could prevent him or her from working elsewhere and could temporarily take away his or her livelihood.⁵⁹ Nevertheless, such

⁵⁴ *Metromedia*, 611 F. Supp. at 426–27 (determining that "claims [of] irreparable injury from loss of image, momentum, and goodwill as well as revenue from spot sales and barter" are merely theoretical and could not stand alone as the basis for a preliminary injunction); Barker, *supra* note 7, at 3 (recognizing the effect of a preliminary injunction on a defendant, stating: "were defendants' hands tied with the injunction they 'could not engage in any realistic agreement for the use of the premises'" (internal citations omitted)).

⁵⁵ See, e.g., *Chase-Riboud v. Dreamworks, Inc.*, 987 F. Supp. 1222, 1233 (C.D. Cal. 1997); *Hastings-Murtagh v. Tex. Air Corp.*, 649 F. Supp. 479, 487 (S.D. Fla. 1986); *Estate of Hemingway v. Random House, Inc.*, 268 N.Y.S.2d 531 (Sup. Ct. 1966).

⁵⁶ Barker, *supra* note 7, at 3.

⁵⁷ See, e.g., *Borey v. Nat'l Union Fire Ins. Co.*, 934 F.2d 30, 34 (2d Cir. 1991) (stating that evidence of irreparable harm to a party "might include, for example, proof that the monetary loss will probably force the party into bankruptcy"); *Hastings-Murtagh*, 649 F. Supp. at 487 (denying a preliminary injunction, and explaining that such relief would have been "disastrous not only to the corporate entity, but also to the shareholders . . . employees and unions").

⁵⁸ See Kronman, *supra* note 19, at 371. The court has broad discretion to consider contractual agreements in preliminary injunction hearings, but "[n]either party to a contract can insist, as a matter of right, upon a decree for its specific performance." *Id.* (quoting *Snell v. Mitchell*, 65 Me. 48, 50 (1876)).

⁵⁹ See Wonnell, *supra* note 30, at 141 ("If the contract involves an extended period of continuous labor, a court should not compel the employee to work. Rather, any injunction should be prohibitory in character and narrowly tailored to the situation. Courts should not enjoin the defendant from working for any employer other than the plaintiff during

negative injunctions occur with employee covenants not to compete and with entertainment industry talent, but agreement terms may keep the worker from pursuing gainful employment elsewhere only for a limited period of time.⁶⁰ Covenants not to compete are presumptively void in California, but since a 2008 decision by the California Supreme Court, the court has acknowledged certain statutory exceptions that allow such covenants to be enforced.⁶¹

Unlike real estate cases, in which each piece of disputed property is unique, in the television industry it can be difficult to determine if a property is unique enough to warrant the application of a preliminary injunction.⁶² A television program, similar to music, films, and books, is unique in the non-legal definition because it is a creative property that conceivably comes from an original idea and ostensibly is the only one of its kind;⁶³ but these characteristics do not mean that the issuance of a preliminary injunction is always an appropriate remedy when a television program is involved.

II. PRELIMINARY INJUNCTIONS IN THE TELEVISION INDUSTRY

The entertainment industry depends on a great number of contractual agreements, and breaches in those contracts are quite prevalent.⁶⁴ When a dispute arises concerning the ownership of the rights to a television show, book, or film, or to a copyright infringement claim, preliminary injunctions are often sought to keep one party from unfairly profiting off of the other

the contract term. Such an injunction would differ little in practical effect from a mandatory injunction and would raise the same normative and constitutional problems.”).

⁶⁰ See *id.* at 142 (“[T]he prohibitory injunction should seek to prevent the employee from pursuing the same occupation for as long as she had promised to work for the plaintiff.”). Similarly, in the case of entertainment talent, where the moving party can show that an actor’s services are “unusual, unique, or extraordinary, and that the damage to the plaintiff will be irreparable and unascertainable, the latter may enjoin the performer from appearing elsewhere during the period of his contract.” *Harry Rogers Theatrical Enters., Inc. v. Comstock*, 232 N.Y.S. 1, 4 (App. Div. 1928).

⁶¹ See *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 297 (Cal. 2008) (“Noncompetition agreements are invalid under section 16600 [of the Business and Professions Code] in California even if narrowly drawn, unless they fall within the applicable statutory exceptions.”).

⁶² Compare *LOTZ*, *supra* note 11, at 37 (stating that, considering the “ample variation in the availability and ubiquity of television programming,” it is becoming more difficult to assess each television show’s significance in today’s culture), with *Metromedia Broad. Corp. v. MGM/UA Entm’t Co., Inc.*, 611 F. Supp. 415, 427 (C.D. Cal. 1985) (finding that a television show, “like all works of art[,]” is unique).

⁶³ “Unique” is defined as “being the only one of its kind; unlike anything else.” *THE NEW OXFORD AMERICAN DICTIONARY* 1837 (Erin McKean ed., 2d ed. 2005).

⁶⁴ See, e.g., *Metromedia*, 611 F. Supp. at 427.

party's rightful property and future earnings.⁶⁵ Generally, courts deny preliminary injunctions in these cases, because the substantial investments that films and television programs require—even during the pre-production stage—usually make the balance of hardship tip toward the defendant.⁶⁶ In addition, preliminary injunctions are not routinely granted for television shows, because there is most likely a calculable financial burden involved in the balance of hardship.⁶⁷ Courts also give greater weight to the public interest because broadcasting is an inherently public act; the impact on the public is directly relevant to the determination.⁶⁸

Reviewing a motion for a preliminary injunction for a television show in 2009, a federal district court in Los Angeles found that:

Given that the evidence before the Court shows that if an injunction were to issue, Defendants would lose a "significant financial investment" in the Program and advertising revenue . . . as well as suffer reputational damage with viewers and advertisers, the Court finds that the likely harm to Defendants if the preliminary injunction is granted exceeds the potential harm to Plaintiff if the preliminary injunction is denied.⁶⁹

Television shows are creative property that can be considered unique. However, since television networks are in the business of determining the financial value of their properties in terms of constant ratings percentages and advertising sales figures, the damages can be easily determined in this industry without the need for more drastic remedies.⁷⁰ Thus, the

⁶⁵ For example, Barbara Chase-Riboud sought a preliminary injunction against Dreamworks, the producer of the movie *Amistad*, to protect the copyright and licensing income from her book, *Echo of Lions*, as well as to protect her future potential film market for the book's film rights. See *Chase-Riboud v. Dreamworks, Inc.*, 987 F. Supp. 1222, 1232–33 (C.D. Cal. 1997).

⁶⁶ *Id.* at 1233 (noting that Dreamworks had invested \$70–75 million in *Amistad*, and, "with the film's nation-wide release imminent, Plaintiff seeks to enjoin its release . . . [T]he Court cannot find on the record before it that Plaintiff has met her burden of demonstrating that the 'balance of hardships tips *sharply* in [her] favor") (emphasis in original). See also *Twentieth Century Fox Film Corp. v. Marvel Enters., Inc.*, 155 F. Supp. 2d 1, 44 (S.D.N.Y. 2001) (determining that a preliminary injunction should not be issued because the balance of the equities weighed against halting production of a television series for a film sequel that was barely in the planning stages).

⁶⁷ *Metromedia*, 611 F. Supp. at 427 (determining that Metromedia had already placed a value on all of the show *FAME* because of the offer it made to MGM/UA).

⁶⁸ See *SportsChannel Am. Assocs. v. Nat'l Hockey League*, 589 N.Y.S.2d 2, 3 (App. Div. 1992).

⁶⁹ Milord A. Keshishian, *Court Imparts Tough Love and Denies Preliminary Injunction*, L.A. INTELLECTUAL PROP. TRADEMARK ATTORNEY BLOG (Apr. 27, 2009), <http://www.iptrademarkattorney.com/2009/04/trademark-tough-love-preliminary-injunction-denied-vh1-mtv-toughlove.html>.

⁷⁰ See, e.g., Memorandum of Law in Support of Weinstein Co., LLC's Motions to (I) Dissolve and Vacate the September 26, 2008 Preliminary Injunction; and (II) Alter or

television industry is easily governed by the common practice of determining legal relief because, “when a party can be fully compensated for financial loss by a money judgment, there is simply no compelling reason why the extraordinary equitable remedy of a preliminary injunction should be granted.”⁷¹

As of October 2010, a high court has yet to examine a preliminary injunction dispute in television. However, lower courts in New York and Los Angeles have addressed this issue on numerous occasions.⁷² In the following two cases, the courts found that money damages were a more appropriate remedy for a television program than a preliminary injunction, and denied the motions in question.⁷³

A. *SportsChannel America Associates v. National Hockey League*

In *SportsChannel America Associates v. National Hockey League*,⁷⁴ the New York Appellate Division found that injunctive relief was not an option because money damages were an adequate remedy for sports television.⁷⁵ The National Hockey League (NHL) sold its broadcast rights to the television network ESPN for the 1992–1993 season, instead of remaining with SportsChannel, which had broadcasted the league’s games the previous season.⁷⁶ When SportsChannel sought a preliminary injunction barring the move because of a contractual right of first refusal, the lower court denied the injunction.⁷⁷ The appellate court affirmed the denial, holding that “[d]amages compensable in money and capable of calculation, *albeit* with some difficulty, are not irreparable.”⁷⁸ The court also found that even SportsChannel knew that an injunction would effectively give it the relief it sought and that by granting it, the network would be

Amend the Preliminary Injunction Pursuant to Rule 59(e) at 45, NBC Universal, Inc. v. Weinstein Co., LLC, 2008 WL 5262240 (S.D.N.Y. Nov. 3, 2008) (No. 08-CV-8911) [hereinafter Weinstein Co., LLC’s Motions] (“[T]he common practice in the television industry [is] to calculate the full value of a television show. Sophisticated analyses are commonplace in the industry and are used to calculate the value of adding or losing a show. Such analyses are also relied on by senior management in making decisions that lead to the financial success or failure of the network.”) (internal citations omitted).

⁷¹ Borey v. Nat’l Union Fire Ins. Co., 934 F.2d 30, 34 (2d Cir. 1991) (stating simply that “monetary loss alone will generally not amount to irreparable harm”).

⁷² See *Metromedia*, 611 F. Supp. at 427; *SportsChannel*, 589 N.Y.S.2d at 3.

⁷³ *Metromedia*, 611 F. Supp. at 427; *SportsChannel*, 589 N.Y.S.2d at 3.

⁷⁴ *SportsChannel*, 589 N.Y.S.2d at 2.

⁷⁵ *Id.* at 3.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

receiving a victory without the requirement of going to trial.⁷⁹ Therefore, the court found that it was not proper to issue a preliminary injunction for television programming where money damages were calculable, irreparable harm was not shown, there was no likelihood of prevailing on the merits, and fans would be adversely affected for an entire blacked-out NHL season.⁸⁰

B. *Metromedia Broadcasting Corporation v. MGM/UA Entertainment Company*

In *Metromedia Broadcasting Corp. v. MGM/UA Entertainment Co.*,⁸¹ Metromedia sought to enjoin the producer of *FAME*⁸² from taking newly produced episodes of the show to its competitors.⁸³ The district court denied the preliminary injunction, finding that the alleged breach would not threaten Metromedia as a company and that “the difference between advertising revenue generated on *FAME* and a replacement is measurable.”⁸⁴ The court went on to find that, since the show had been a part of the plaintiff’s network for some time, it had a track record for the ratings of the show and the time periods surrounding it, as well as other data that would help the court calculate the loss; a preliminary injunction was therefore not necessary.⁸⁵

The court also expanded on the idea of a show being a “unique” product that may be considered irreplaceable to its network’s success, but ultimately decided that an audience’s taste in television “is fleeting and there is nothing to show that a substitute may not catch on even more.”⁸⁶ Although a television show, like a work of art, can be considered a unique piece of property, the court found that this unique status was lost because another hit show could easily replace it.⁸⁷ The court

⁷⁹ *Id.* (“Injunctive relief is also inappropriate inasmuch as SportsChannel concedes that the injunction would have the effect of granting it the ultimate relief it seeks. In effect, SportsChannel is improperly seeking a decree of specific performance in the guise of an injunction pendente lite . . .”).

⁸⁰ *Id.* at 3–4.

⁸¹ *Metromedia Broad. Corp. v. MGM/UA Entm’t Co., Inc.*, 611 F. Supp. 415, 427 (C.D. Cal. 1985).

⁸² *FAME* was a U.S. television series originally produced between 1982 and 1987. The show was based on the 1980 movie *FAME* and was popular during its first few seasons. See generally INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0083412/> (last visited Sept. 11, 2010).

⁸³ *Metromedia*, 611 F. Supp. at 418.

⁸⁴ *Id.* at 426–27 (emphasis added).

⁸⁵ *Id.* at 427.

⁸⁶ *Id.* Therefore, the court found that the injury claimed was “theoretical and not properly the basis for preliminary relief.” *Id.*

⁸⁷ See *id.* (explaining that, “while *FAME* (like all works of art) is unique and its loss may affect Metromedia’s momentum, it also may not”).

reasoned that, because a television show was replaceable, the relief sought by the parties could be determined using network data, formulas and the show's previous financial track record that would accurately give a price tag for the loss created, and thus a preliminary injunction would not be appropriate.⁸⁸

C. Effect on the Television Industry

Both *SportsChannel* and *Metromedia* set a standard in the television industry for the denial of preliminary injunctions as a remedy when television shows are involved.⁸⁹ Both courts supported the idea that ratings and advertising were calculable damages, and that anything beyond that was merely speculative and therefore not a basis for a preliminary injunction.⁹⁰ However, the television industry is one of constant change and technological improvements. Therefore, hit shows are harder to come by and ratings are becoming less important, so it is more difficult to establish that a show is unique enough to deserve such equitable relief.⁹¹ While "unique" usually means "irreplaceable" or "without substitute," in the business world it is harder to define the concept because different companies measure what is "irreplaceable" by different standards.⁹² Like technology, which changes so rapidly that what is current today may be outdated tomorrow,⁹³ television programming is also a rapidly evolving arena. With over two hundred cable channels currently broadcasting twenty-four hours a day,⁹⁴ any show with a modicum of success can be deemed a hit—i.e., a potentially

⁸⁸ *Id.*

⁸⁹ See Weinstein Co., LLC's Motions, *supra* note 70, at 41.

⁹⁰ See *id.* (arguing that these two cases made it "clear that the loss of a television show does not constitute irreparable harm because damages arising from the loss of a television show are calculable and any alleged injury that does not accrue to those things that are calculable (ratings and advertising rates) are speculative and therefore not irreparable"); *Metromedia*, 611 F. Supp. at 418; *SportsChannel Am. Assocs. v. Nat'l Hockey League*, 589 N.Y.S.2d 2, 3 (App. Div. 1992).

⁹¹ LOTZ, *supra* note 11, at 37.

⁹² Kronman, *supra* note 19, at 358–59.

⁹³ *Windows User Inc. v. Reed Bus. Pub. Ltd.*, 795 F. Supp. 103, 109 (S.D.N.Y. 1992).

⁹⁴ See, e.g., DIRECT TV, <http://www.directtv.com> (last visited Sept. 11, 2010) (advertising that Direct TV has over 285 cable channels including pay cable channels and sports channels); LOTZ, *supra* note 11, at 52–53 (observing that, "[a]s a technology, cable substantially altered the viewers' experience with its introduction of a vast array of channels. In 1988, 50 percent of U.S. households subscribed to cable, which was the subscription base analysts believed necessary for cable operators to provide a large enough audience to achieve profitability. This subscription level marked an increase from just 19.9 percent in 1980, grew to 56.4 percent by 1990, and reached 68 percent in 2000. By 2000, nearly ten million additional households received programming via Direct Broadcast Satellite").

unique property—that is vital to the network.⁹⁵ One might think that the definition of “unique” would change in this current climate because a show can no longer acquire the large market shares that it did in the early days of television.⁹⁶ But nonetheless, the classification remains the same. There was a time when *The Cosby Show* was number one in the ratings with more than fifty percent of the viewing audience, a feat that is unlikely in today’s market.⁹⁷ Since the market has become saturated with hits of various levels, classifications, and target demographics, the viewpoint of a television show as a “unique” property might not be as helpful in determining the irreparable harm suffered by a network that has lost its television show.

The changing television industry has created problems in the definition of “unique,” which has led to lawsuits with inappropriate legal remedies being issued, even though damages might seem more appropriate. In 2008, the popular television show *Project Runway* was the subject of such a dispute and was kept from the airwaves due to the inappropriate granting of a preliminary injunction.

D. *Project Runway*’s Move to Lifetime and the Ensuing Legal Battle

In April 2008, television fans were abuzz with the news that cable network Bravo’s number one show, the critically acclaimed *Project Runway*,⁹⁸ would be airing on Lifetime, the network known for “victim-of-the-week movies and ‘Golden Girls’ reruns.”⁹⁹ Shortly after the producer of *Project Runway* (the Weinstein Company) announced the program’s shift to a competitor network, NBC Universal¹⁰⁰ (Bravo’s parent company)

⁹⁵ With the increasing number of cable channels and the escalating amount of programming on those networks, content must do more than air on television to distinguish itself in terms of cultural relevance. LOTZ, *supra* note 11, at 36.

⁹⁶ Brian Stelter, *Cable Networks Trying to Build on Their Gains in Ratings*, N.Y. TIMES, May. 26, 2008, at C5 (finding that cable networks have been steadily growing since the 1980s and taking ratings away from broadcast networks, thereby spreading ratings out over a larger field of eligible television shows); Brian Stelter, *In the Age of TiVo and Web Video, What is Prime Time?*, N.Y. TIMES, May 12, 2008, at C1 (noting that time shifting devices, on demand offerings, and cable television have drawn viewers away from traditional networks and first run television viewing).

⁹⁷ See Carter, *supra* note 9, at 1.

⁹⁸ Brian Stelter, *‘Project Runway’ Battle Dampens Fashion Week*, N.Y. TIMES, Feb. 21, 2009, at C3 (noting that *Project Runway* was the first reality show to win the Peabody Award in 2007).

⁹⁹ Allen Salkin, *In Bed with ‘Runway’: A Lifetime Story*, N.Y. TIMES, Apr. 13, 2008 (Style), at 2 (quoting blogger Tom Fitzgerald).

¹⁰⁰ BLUMENTHAL & GOODENOUGH, *supra* note 15, at 129 (“NBC operates not only the U.S. broadcast network, but also several cable networks, including Telemundo, which serves the increasingly profitable Hispanic audience. NBC also operates several cable networks, and maintains investment positions in others.”).

filed suit to halt the departure.¹⁰¹ *Project Runway* had already aired on Bravo for three successful seasons, with the fourth and fifth seasons airing on the network in 2008; in those “first five seasons on the Bravo cable channel, *Project Runway* increased its average audience to 4 million viewers an episode from 1 million an episode, making the most recent season its biggest ever.”¹⁰² NBC Universal moved for a preliminary injunction, alleging that by taking *Project Runway* to Lifetime for its sixth season, the Weinstein Company had breached its contractual right of first refusal for future seasons.¹⁰³ This right of first refusal, if valid, would allow NBC Universal to match another network’s bid for the show before the show could change networks.¹⁰⁴

The trial court held a hearing on the motions.¹⁰⁵ There was significant debate about the details of the parties’ yearlong contractual negotiations and whether or not there had been a true meeting of the minds. This led the court to conclude that there were serious enough questions to proceed to trial, but that NBC Universal had a likelihood of prevailing on the merits.¹⁰⁶ NBC Universal argued in its motion that *Project Runway* is a unique show, a fact that the Weinstein Company was willing to concede.¹⁰⁷ NBC Universal argued that that *Project Runway* was a “game-changer” and a “flagship show” for the Bravo Network and that it raised the ratings of the entire NBC Universal conglomerate, thus warranting a finding of irreparable harm.¹⁰⁸

The parties did not dispute that NBC Universal and the Weinstein Company had previously decided that *Project Runway* would no longer air on Bravo,¹⁰⁹ but NBC Universal had hoped that the show could continue on NBC or one of its other networks.¹¹⁰ NBC Universal argued it would be impossible to

¹⁰¹ Carter, *supra* note 5, at C3 (“NBC Universal has gone to court to try to prevent the owners of ‘Project Runway,’ one of the biggest hits in cable television, from relocating the show next fall from NBC Universal’s Bravo network to a competitor, Lifetime.”).

¹⁰² Edward Wyatt, *Legal Tangles of ‘Project Runway’ Keep it Frozen on the Catwalk*, N.Y. TIMES, Nov. 19, 2008, at C1.

¹⁰³ Carter, *supra* note 5, at C3.

¹⁰⁴ *Id.*

¹⁰⁵ While NBC moved for injunctive relief, The Weinstein Company moved to dismiss the case for failure to state a claim. The hearing on these motions was held on June 17, 2008. Trial Order, *supra* note 17, at 1–2.

¹⁰⁶ *Id.* at 1, 2, 15.

¹⁰⁷ Reply Memorandum of Law in Support of Plaintiffs Motion for Preliminary Injunction at 2, NBC Universal, Inc. v. Weinstein Co. LLC, 2008 WL 5044008 2 (N.Y. Sup. Ct., Sept. 26, 2008) (No. 601011/08) [hereinafter Reply Memorandum].

¹⁰⁸ *Id.* at 11.

¹⁰⁹ NBC Universal and the Weinstein Company had previously decided to move *Project Runway* off of Bravo and to a network where it could expand to larger audiences. See Carter, *supra* note 5, at C3.

¹¹⁰ Reply Memorandum, *supra* note 107, at 11.

predict what the hit show's future ratings might be in terms of calculating damages¹¹¹ and argued that the show created a "halo effect" for the entire network on which it aired.¹¹² This "halo effect" raised the ratings and value of other shows through promotional impact and allowed the network to increase the price of advertising on less desirable shows by packaging the advertisements together.¹¹³ Although the Weinstein Company conceded that *Project Runway* was a unique and valuable show,¹¹⁴ it countered that NBC Universal had already calculated its potential earnings based on over four seasons of ratings history and internal analyses to determine the existence of such a "halo effect."¹¹⁵ The Weinstein Company also asserted that the show would not retain that same flagship status on NBC as it did on Bravo because NBC, as a broadcast network, typically had significantly higher ratings for its programming than *Project Runway* had on Bravo, a cable network.¹¹⁶

In September 2008, the trial court granted NBC Universal's motion for a preliminary injunction, enjoining the Weinstein Company and Lifetime from the promotion, marketing, and exhibition of *Project Runway*.¹¹⁷ The court acknowledged that *Project Runway* was a significant "critical and commercial hit" when it aired on Bravo,¹¹⁸ and that it had considerable valuable

¹¹¹ *Id.* at 12.

¹¹² The "halo effect" is the impact that a successful show has on the others shows on the network. This includes both a literal ratings effect on the adjacent show, and a more speculative promotional impact on other shows, where the successful show "increases the ratings of 'shows on the weekly schedule' and the impact on 'average spot prices' as a result of the 'opportunity to package less desirable shows' with hit shows." *Id.*

¹¹³ *Id.*

¹¹⁴ See *supra* note 107 and accompanying text.

¹¹⁵ Weinstein Co., LLC's Motions, *supra* note 70, at 45; Reply Memorandum, *supra* note 107, at 12.

¹¹⁶ Broadcast networks—networks that are available without the need for cable television—such as NBC, ABC, CBS, FOX, and the CW, command a larger share of the television audience and usually bring in ratings significantly larger than cable networks, which are generally only available via cable or satellite television. For a comparison of television show ratings that appear on broadcast networks versus cable networks, see THE FUTON CRITIC, <http://thefutoncritic.com/> (last visited Oct. 15, 2010). *Project Runway*'s ratings on Bravo were such that they would not compare to the ratings of NBC's other shows, which capture a much larger audience. See Weinstein Co., LLC's Motions, *supra* note 70, at 47–48.

¹¹⁷ The court ordered that the plaintiff's motion for a preliminary injunction be granted to the extent that the Weinstein Company cannot promote, market, or exhibit *Project Runway* or any spin off of *Project Runway* on Lifetime. Additionally, although the Weinstein Company had requested a \$200 million bond, the court set the bond at only \$20 million. Trial Order, *supra* note 17, at 1–2, 34.

¹¹⁸ *Id.* at 4 (explaining that the show became the first reality show to win a Peabody Award, was nominated for an Emmy Award in 2005, 2006, and 2007, and "ha[d] developed a 'fervent fan base' and ha[d] become 'appointment television,' meaning television that people will go out of their way to watch") (internal citation omitted).

marketing opportunities and product integration possibilities.¹¹⁹ The court ultimately concluded that this was unlike other television program situations: “To be clear, the loss of any successful television program will not constitute irreparable harm. In this instant matter, the evidence submitted by both parties has shown that *Project Runway* is not an average successful television program.”¹²⁰ Distinguishing this case from *SportsChannel*, the court found that because of the program’s game-changing status and ability to anchor a network, damages were not calculable and thus irreparable harm was found.¹²¹ The court also determined that, unlike in *SportsChannel*, where the NHL fans would be deprived of an entire hockey season,¹²² *Project Runway* remaining off the air during a preliminary injunction would not cause substantial harm to the show because it had previously been off the air for as long as thirteen months, and this “rest period” was common for the show.¹²³ However, the court did state that, “[w]hile it appears that resting *Project Runway* for a period of time will not cause harm to the show, the court must ensure that it is not off the air for an excessive period of time,” and the court attempted to expedite the matter.¹²⁴

The Weinstein Company challenged the court’s conclusion that *Project Runway* was not an average television show and was therefore unique enough to necessitate a preliminary injunction.¹²⁵ After the trial court granted the preliminary injunction, and Lifetime filed to remove the case to federal court in October 2008 after arguing that it involved a federal question regarding copyright issues,¹²⁶ the Weinstein Company filed a

¹¹⁹ *Id.* (“Product integration is an entertainment industry term to describe a form of advertising in which products and services are featured within a television program.”).

¹²⁰ *Id.* at 29.

¹²¹ *Id.* at 30–31 (“This is not a situation like that in *Sportschannel America* where the court denied the preliminary injunction based upon plaintiff’s laches by waiting until broadcast plans for the hockey season were required to be finalized . . .”).

¹²² The court explained that, in *Sportschannel*, NHL fans would have been deprived of their ability to watch hockey games, “which would be played whether they were aired on plaintiff’s television service or not. Here, fans will not be deprived of viewing the show although it may be on a different airing schedule than that contemplated by TWC and Lifetime.” Trial Order, *supra* note 17, at 32 (internal citation omitted).

¹²³ The court determined that two cycles of *Project Runway* had already aired in the current calendar year and that Bravo had never aired three cycles in one year, thus diminishing the argument of irreparable harm by The Weinstein Company. Additionally, “[t]here was a ten month rest between cycles one and two; a four month rest between cycles two and three; and a twelve month rest between cycles three and four.” *Id.* at 33 & n.18.

¹²⁴ *Id.* at 33–34.

¹²⁵ Weinstein Co., LLC’s Motions, *supra* note 70, at 1.

¹²⁶ Memorandum of Lifetime Entertainment Services in Support of Its Motion to Intervene at 1, *NBC Universal, Inc. v. Weinstein Co., LLC*, 2008 WL 5044007 (S.D.N.Y. July 21, 2008) (No.08-CV-8911) [hereinafter Lifetime Memorandum].

motion in the United States District Court for the Southern District of New York to dissolve and vacate, or alter, the preliminary injunction.¹²⁷ The Weinstein Company argued that *Project Runway* was no longer irreplaceable to the NBC Universal family because, during the preliminary injunction proceedings, NBC Universal continued its past trend of airing shows that capitalized on *Project Runway*'s successful formula,¹²⁸ even creating a new fashion design competition show, *The Fashion Show*.¹²⁹ The Weinstein Company asserted that:

By developing another such *Runway*-knockoff, using the same fashion-design theme as *Project Runway*, Bravo further undermines the argument that *Project Runway* is unique, and that its loss causes the Plaintiffs, and more specifically NBCU, irreparable harm. To the contrary, Plaintiffs development of *Fashion [Show]* admits that *Project Runway* is replaceable. Plaintiffs cannot continually replicate *Project Runway* while at the same time claim that the show is unique and their damages are irreparable.¹³⁰

However, the court did not find the Weinstein Company's argument persuasive, and the controversial preliminary injunction remained in place into 2009.¹³¹ The court did not publish a court order about its ruling, but one can imagine that the court believed that Bravo merely replaced what it expected to lose by creating *The Fashion Show* and did not expect the same

¹²⁷ See Weinstein Co., LLC's Motions, *supra* note 70, at 1.

¹²⁸ The *Project Runway* formula inspired the creation of other hit shows on Bravo such as *Top Chef* (created by the producers of *Project Runway*) and *Top Design*. See Ginia Bellafante, *Trying to Stand the Heat in a Pressure Cooker*, N.Y. TIMES, Nov. 12, 2008, at C1; Ginia Bellafante, *Duck and Decorate: Putting Flair in the Fallout Shelter*, N.Y. TIMES, Sept. 10, 2008, at E3; Frank Bruni, *Cooking Under Pressure, That's Reality*, N.Y. TIMES, Jan. 31, 2007; Virginia Heffernan, *Walking the Runway Walk, Mile After Mile*, N.Y. TIMES, Mar. 8, 2006, at E8 ("Like Bravo's fashion winner 'Project Runway,' the channel's promising 'Top Chef' flaunts terms of art and insiderism to give it authority. Who knew cooking and sewing could be made so telegenic?").

¹²⁹ While *Fashion House* was the title referred to in the court documents, *The Fashion Show* is what eventually aired on Bravo in the spring/summer of 2009. See Stuart Elliott, *Hair Spray's Sponsorship Stays in Place (on Bravo)*, N.Y. TIMES, May 1, 2009, at B3 ("While the court battle continued, Bravo announced that it would buy 'The Fashion Show'—like 'Project Runway,' a competition among 15 fashion designers—from 3 Ball Productions and start showing it on May 7."); Alessandra Stanley, *Contestants are Sewing, but the Hosts Are Cutting*, N.Y. TIMES, May 7, 2009, at C1 (discussing how *The Fashion Show* is Bravo's response to losing *Project Runway* and how "a design competition by any other name is not nearly as sweet").

¹³⁰ Weinstein Co., LLC's Motions, *supra* note 70, at 42. Critics found the show to be a second-rate *Project Runway*: "I realize that this show was thrown together quick and sloppy once Bravo lost Project Runway to Lifetime, but that could have been an opportunity to have some fun with the format, jazz it up a bit—improvise." James Wolcott, *Project Rundown*, JAMES WOLCOTT'S BLOG ON VANITY FAIR (May 15, 2009, 1:53 PM), <http://www.vanityfair.com/online/wolcott/2009/05/early-word-on-bravos-facsimile.html>.

¹³¹ Stelter, *supra* note 98, at C3.

kind of success from it that *Project Runway* had been for the network.

Outside of the direct parties to the lawsuit, the Lifetime Network also had a great deal at stake. Lifetime filed a motion in July 2008, asking to be made a party to the lawsuit, and filed another motion in October 2008 to remove the case to federal court by alleging federal copyright issues, a motion which Lifetime eventually lost in December 2008 when a federal court judge ruled that the dispute should stay in state court.¹³² Lifetime had made its deal with the Weinstein Company for the future seasons of *Project Runway* and *Project Runway* spin-offs without knowledge of any contractual dispute with NBC Universal, and a preliminary injunction halting the airing of the show could have cost the network significantly. Lifetime worried that the dispute could continue the show's hiatus indefinitely, causing audiences to not return once the show was allowed to resume.¹³³ The bad press associated with a lawsuit and the public knowledge that the show had been legally suspended could significantly damage Lifetime's future earning potential. The preliminary injunction prevented the Weinstein Company and Lifetime from promoting, marketing, and airing the future cycles of *Project Runway*, but it did not prevent them from producing the show.¹³⁴ At the time the lawsuit was filed by NBC Universal, the Weinstein Company had already started filming the sixth season of *Project Runway* for Lifetime, the cost of which included compensation for talent and crew.¹³⁵ While the preliminary injunction remained in force throughout the course of the lawsuit, both the Weinstein Company and the Lifetime Network

¹³² Lifetime Memorandum, *supra* note 126, at 1; John Bracchitta, *Lifetime Attempts to Move 'Project Runway' Lawsuit to Federal Court*, REALITYTVWORLD.COM (Oct. 21, 2008), <http://www.realitytvworld.com/news/lifetime-attempts-move-project-runway-lawsuit-federal-court-7891.php>; Matea Gold, *Maybe New Robes for the Judges?*, L.A. TIMES, Feb. 1, 2009 (Image), at 4; Jon Lafayette, *NBCU Wins Round in 'Project Runway' Case*, TVWEEK.COM (Dec. 23, 2008), http://www.tvweek.com/news/2008/12/nbcu_wins_round_in_project_run_1.php.

¹³³ Lifetime Memorandum, *supra* note 132, at 8. Commentators explained:

In the short term the decision means that 'Project Runway' cannot be presented on Lifetime, nor marketed and promoted by that network. Nor can Lifetime offer any spinoffs of the show, as it had planned. 'Runway' had been tentatively scheduled to begin on Lifetime on Jan[uary] 7. Lifetime has built much of its winter schedule around the arrival of 'Runway,' one of the most successful recent shows in cable television.

Carter & Stelter, *supra* note 3, at B9.

¹³⁴ The court ordered the plaintiff's motion for a preliminary injunction be granted to the extent that the Weinstein Company could not perform its agreement with Lifetime through the promotion, marketing, or exhibition of *Project Runway* or any spin-off of *Project Runway* on Lifetime. Trial Order, *supra* note 17, at 41.

¹³⁵ Filming for the sixth season in Los Angeles did not finish until October 2008, with the finale later recorded in February 2009. Stelter, *supra* note 98, at C3.

sank significant production costs into a season of the show that might never air. Furthermore, even if it did air, if it had been delayed too long the season could have been outdated and potentially shunned by audiences.¹³⁶ Bravo, NBC Universal, and Lifetime could have possibly suffered damages to their reputations by engaging in a lawsuit that kept a fan favorite television show off the air over a contractual dispute.¹³⁷ Even after the lawsuit ended, the possible financial repercussions for everyone involved would mean that there was no true winner in the situation.¹³⁸ While the original production team of *Project Runway*, Magical Elves, Inc.,¹³⁹ decided not to produce the show for Lifetime and instead continued business with Bravo,¹⁴⁰ other parties involved with the show, including host Heidi Klum, judges Michael Kors and Nina Garcia, mentor Tim Gunn, and various other production staff, were affected by the preliminary injunction.¹⁴¹

While the celebrity judges and host are a large part of the show, the true talents marketed by *Project Runway* are the contestants competing for the show's prizes. Future designers vie to be a part of *Project Runway*, and when the designers of season six entered to be contestants, they did not know that their season would be fraught with such legal implications.¹⁴² The main goal of a *Project Runway* contestant is to remain on the show long enough to be part of the final three, or sometimes four, designers who are given a chance to put on a fashion show at Bryant Park's Fashion Week in New York City.¹⁴³ Contestants who reach the finale get to show their own personal collections at

¹³⁶ Those involved with the show were worried about the popularity of the show if and when it was allowed to return and air the sixth season. Former winner Christian Siriano was even quoted as saying: "It might be a little bit over by then." *Id.*

¹³⁷ Lawson, *supra* note 1 (speculating that since "*Project Runway* may not be airing on its new network, Lifetime . . . some may be wondering what the hell does this *mean* for the show. . . . NBC and Weinstein Company may be brattily fighting over a toy that's already been broken") (emphasis in original).

¹³⁸ *Id.* ("Bravo may have given up on this one because, heck, they were losing the show anyway, but it makes you wonder then why NBC is fighting so bitterly for it to return. The show isn't exactly fresh or new, it's six seasons old after all, with the sullied brand to show for it.").

¹³⁹ See generally MAGICAL ELVES, <http://www.magicalelves.com/home.html> (last visited Oct. 11, 2010).

¹⁴⁰ Brian Stelter, *'Runway' Producers Run Away*, N.Y. TIMES, May 6, 2008; Heather Havrilesky, *"Project Runway" Trips and Falls*, SALON.COM (Nov. 20, 2009, 5:20 ET), http://www.salon.com/entertainment/project_runway/index.html?story=/ent/tv/review/2009/11/20/project_runway_finale.

¹⁴¹ See Stelter, *supra* note 98, at C3; Lawson, *supra* note 1.

¹⁴² See Stelter, *supra* note 98, at C3.

¹⁴³ *Id.* ("In previous seasons the first episodes of 'Runway' had been broadcast by the time the three finalists presented at Fashion Week, enabling the audience at Bryant Park to root for their favorite contestants and handicap the results of the final competition.").

Fashion Week, and even if they do not win the contest, having a collection under their name at Fashion Week is often enough to launch a young designer's career.¹⁴⁴ The three finalists of season six reached Bryant Park's Fashion Week while the show was still under the state court's preliminary injunction. In order to protect the show from being spoiled for audiences if it eventually aired, the contestants had to show their collections anonymously.¹⁴⁵ Without the name recognition of showing a collection under the designer's future brand name, the young contestant's future earning potential as a designer in the fashion world is significantly diminished. This essentially defeats the main purpose of being a contestant on *Project Runway* in the first place.¹⁴⁶

The list of those affected by the preliminary injunction is quite lengthy, from the sponsors involved in the various episode challenges, to the residual effects on the professional sponsorships of the show including Parsons School of Design,¹⁴⁷ L'Oréal Paris, and TRESemmé, which provided makeup and hairstyling for the designers' models during each episode.¹⁴⁸ In fact, many view *Project Runway* as important to the fashion industry as a whole and believe its disappearance from television would be nothing but detrimental to the health of the industry.¹⁴⁹ In April 2009, the lawsuit was settled when The Weinstein Company agreed to pay a settlement fee to NBC Universal and admitted that it improperly sold *Project Runway* to Lifetime without first giving NBC an opportunity to match the deal.¹⁵⁰ The settlement allowed the show to move to Lifetime without the

¹⁴⁴ See *id.*

¹⁴⁵ Gold, *supra* note 132, at 4. See also Stelter, *supra* note 98, at C3 ("[T]he 'Runway' producers went to great lengths to conceal the identities of the finalists, lest future viewers feel that the show is spoiled by leaks. The finalists weren't allowed to walk onstage and present their fashion collections publicly; instead the collections were shown anonymously.").

¹⁴⁶ Stelter, *supra* note 98, at C3.

¹⁴⁷ See Eric Wilson, *Project Parsons: Fashion School as Star*, N.Y. TIMES, Apr. 20, 2006.

¹⁴⁸ Stephanie Clifford, *Bravo Shows Move Further into Licensing Products*, N.Y. TIMES, Apr. 13, 2009 ("Bravo has never been shy about product placement. 'Project Runway' has had design challenges sponsored by Hershey's, Levi's and Saturn. Models' hair is styled in the Tresemmé hair salon, and their makeup is applied in the L'Oréal Paris makeup room. The show's host, Heidi Klum, cradles a bottle of Moët & Chandon Champagne several times a season . . ."). Tresemmé, for one, chose to stay with Bravo when *Project Runway* left, instead opting to be the sponsor of *The Fashion Show*. Elliott, *supra* note 129, at B3.

¹⁴⁹ Nina Garcia, one of the judges, said that "[t]he show is about supporting young designers . . . [i]t's about supporting the business of fashion." In this current economic climate, Garcia said, *Project Runway* is "very needed right now in the industry." Stelter, *supra* note 98, at C3.

¹⁵⁰ Bill Carter, *Weinstein Strikes a Deal in 'Project Runway' Lawsuit*, N.Y. TIMES, Apr. 2, 2009, at C3.

threat of future litigation, as long as the parties agreed to let Bravo air *The Fashion Show* first, without any competition from *Project Runway*.¹⁵¹ However, although the show was free from litigation, the realistic effects in the ratings for a show that had moved to a new network after a year-long hiatus, had yet to be seen. *Project Runway* debuted on Lifetime with record high ratings for the network.¹⁵² However, since the show's ratings steadily declined throughout the season and the season finale drew fewer viewers than it had on Bravo, the season premiere ratings may have merely indicated the audience's curiosity as to how the show would be different on a new network.¹⁵³ The media did not offer much support to *Project Runway*'s sixth season and blamed it on Lifetime.¹⁵⁴ But, while it is possible to blame the switch of a network for a show's lower ratings, it is more likely the show had fallen from favor due to the bitter legal battle that had placed the show in limbo.

III. WHERE DO WE GO FROM HERE?

As Howard Blumenthal wrote in his book, *This Business of Television*: "[T]elevision is rarely about fine art. Television has always been a commercial endeavor. With few exceptions, television is about the money."¹⁵⁵ Courts should apply this same principle to the legal remedies regarding the television industry. The television industry has a long track record of calculable profits and losses based on ratings and advertising, making damages consistently the most applicable remedy in a legal

¹⁵¹ *Id.*

¹⁵² TV by the numbers reported that the season premiere of *Project Runway* on Lifetime

averaged 4.2 million viewers and a 3.3 household rating and was the highest-rated premiere ever for Lifetime. On a household ratings basis, that's up 32 percent from the show's season five premiere on Bravo, according to Lifetime. Among women 18–49, *Project Runway* averaged a 3.2 rating, that's 28 percent higher than its last season premiere on Bravo.

Robert Seidman, *Project Runway Ratings Take Off for Lifetime*, TVBYTHENUMBERS.COM (Aug. 21, 2009), <http://tvbythenumbers.com/2009/08/21/project-runway-ratings-take-off-for-lifetime/25174>.

¹⁵³ Amy Odell, *Project Runway's Ratings Dipped on Lifetime*, N.Y. MAGAZINE (Nov. 23, 2009, 1:50 PM), http://nymag.com/daily/fashion/2009/11/project_runways_ratings_dipped.html ("Last week, *Project Runway*'s season finale aired on Lifetime instead of Bravo for the first time in the show's six-season history. And the ratings were down. Thursday's episode drew 4.2 million viewers, down from the 4.8 million who watched the season-five finale on Bravo. Despite a strong season premiere, ratings for the show dwindled to an average of 3.2 million each week, while an average of 3.6 million watched the show on Bravo.").

¹⁵⁴ Havrilesky, *supra* note 140 ("The winner of Season 6 is announced, and no one cares. Did Lifetime murder Bravo's favorite pet? . . . Their collections were well-constructed, sure, but like the sixth season itself, not all that exciting."); Odell, *supra* note 153.

¹⁵⁵ BLUMENTHAL & GOODENOUGH, *supra* note 15, at xxiv.

dispute.¹⁵⁶ However, over the last decade, television has changed dramatically, making it harder for shows to get the ratings and advertising rates they once did, which has made hit television shows harder and harder to come by.¹⁵⁷ Television now is no longer just regular network schedules, but also encompasses the use of DVRs, downloadable television content, and full streaming on the Internet.¹⁵⁸ This explosion has caused confusion for networks, production companies, and advertising companies in terms of how to measure the value of a show and what revenue streams can be used with the new technology.

Increasing technology and additional revenue streams for networks and producers has also made it more difficult to calculate the monetary harm involved in a case.¹⁵⁹ Traditional advertising revenue has also given way to more modern forms of advertising, such as product placement¹⁶⁰ and product integration,¹⁶¹ which provide many new avenues for networks to expand television revenue and therefore more streams of potential monetary damages to recover during a legal battle.¹⁶² Reality television, a form of unscripted programming,¹⁶³ has used

¹⁵⁶ See *Metromedia Broad. Corp. v. MGM/UA Entm't Co.*, 611 F. Supp. 415, 427 (C.D. Cal. 1985); *SportsChannel Am. Assocs. v. Nat'l Hockey League*, 589 N.Y.S.2d 2, 3 (App. Div. 1992).

¹⁵⁷ LOTZ, *supra* note 11, at 43 (stating that even the most successful shows today can no longer get the same share of the market as successful shows previously could).

¹⁵⁸ Television is no longer as simple as turning on a television. With the advent of DVRs, TiVO, and Internet streaming, television is more accessible than ever before. Additionally, between iTunes and television on DVD, consumers can purchase and watch television both inside and outside of the home. "As a result of these changing technologies and modes of viewing, the nature of television use has become increasingly complicated, deliberate, and individualized." *Id.* at 2.

¹⁵⁹ LOTZ, *supra* note 11, at 34 (explaining that, with the new technologies of DVR, iTunes downloading and Netflix, "[e]ach of these possible transactions of capital for content created new and distinct relationships between the economic model, programming, and how these forms of television might function as a cultural institution").

¹⁶⁰ *Id.* at 166 (explaining that "[p]roduct' or 'brand placement' refers to situations in which television shows use name brand products or present them on the screen within the context of the show").

¹⁶¹ While product placement is a type of advertising that allows characters or actors to use products on screen in order to promote a brand, product and brand integration provide networks with additional opportunities for advertising revenue, allowing such branding to become a part of the show. Simply stated, product placement is a character drinking a can of Coca-Cola as part of a scene, while product integration is the show itself using Coca-Cola for a marketing challenge, or a sponsorship that allows the show to become an overt promotion of the brand. See *id.* at 166, 169–70.

¹⁶² BLUMENTHAL & GOODENOUGH, *supra* note 15, at 85 ("This type of advertising has a lot of buzz behind it, and it is growing rapidly. In the statistics-bound advertising industry, it seems likely that a meaningful measurement system will evolve as product placement becomes a more commonplace buy.").

¹⁶³ Reality television shows can be very lucrative in the short term for networks and producers because they do not use actors, conventional scripts, and are often set on location and therefore are cheaper to produce. Due to the lower production costs, reality shows appeal to networks looking to fill large periods of scheduling with very little

these revenue streams more extensively than its scripted television counterparts, expanding how the industry sees advertising revenue.¹⁶⁴ By 2009, these revenue streams had become relatively commonplace, and because of that there is an established track record of calculable profits that include product integration and production sponsorship that can allow courts a great deal of evidence in order to determine damages for a network that loses unscripted programming.¹⁶⁵

Just because technology is new and presents new challenges does not mean it requires a different way of thinking.¹⁶⁶ The same general legal principles can apply to modern-day and future televisions shows, just as they did in *Metromedia* and *SportsChannel*. While any television program, like a work of art, could be considered financially unique and valuable to a network, this does not necessarily mean the program is irreplaceable. Especially given the time-sensitive nature and fleeting taste of audiences, there is no reason to believe such success could be found again with another show.¹⁶⁷ It is harder than ever to view

upfront cost. By the year 2000, reality television had caught on with most of the major networks. *Id.* at 215.

¹⁶⁴ Reality television is more generic than scripted shows, and because of that, producers can more successfully integrate products into scenes and challenges. Producers use this organic marketing potential to sell advertisers the opportunity to be in more of the show than just the commercials. LOTZ, *supra* note 11, at 170.

¹⁶⁵ *Id.* ("According to conventional industry wisdom, most unscripted shows have little potential to recoup production deficits through syndication and consequently require producers to fully fund production through license fees or placement. Integration and placement revenues enable shows to afford impressive concepts or hire the limited skilled editing and production talent in this area of the industry, despite lower license fees and lack of deficit financing. Notably, each of the main unscripted shows for the Big Four networks in the mid-2000s (NBC, *The Apprentice*; CBS, *Survivor*; ABC, *Extreme Home Makeover*; FOX, *American Idol*) features a format that allows for organic placement or integration.").

¹⁶⁶ The idea of something legal being new but not necessarily different is also seen with the "Law of the Internet." Much like when the Internet was becoming more popular, Judge Frank Easterbrook of the Seventh Circuit argued at a 1996 Cyber-law seminar at the University of Chicago that having a "Law of the Internet" was like having a law of the horse. "That is, we should not focus on Internet issues that could make cyber-law unique, simply to engender publicity. Rather, Judge Easterbrook believes that we should focus on the fundamental history of the common law and the appropriate legal rules to apply in situations that *happen* to involve the Internet." John C. Scheffel, *Blinded by the Light: Common Law and the Dangers of Cyberlawyering*, 19 PACE L. REV. 37, 40 (1998) (citing Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL. F. 207 (1996)); accord David G. Post, *Cyberspace and the Law of the (Electronic) Horse, or Has Cyberspace Law Come of Age?*, PLUGGING IN, Apr. 1998, available at <http://www.temple.edu/lawschool/dpost/horse.html> (explaining that Judge Easterbrook's point was that the laws of cyberspace or the Internet are "much like the 'law of the horse': a specialized endeavor best understood with reference to familiar general principles of contract, intellectual property, privacy, free speech and the like, but which does not need, and does not deserve, its own separate category").

¹⁶⁷ *Metromedia Broad. Corp. v. MGM/UA Entm't Corp.*, 611 F. Supp. 415, 427 (C.D. Cal. 1985).

television, especially unscripted programming, as unique physical property that needs to be protected with a drastic measure like a preliminary injunction. While there are shows that rise to the level of phenomenal television hits like *Seinfeld*, *Friends*, *Sex and the City*, or *The Sopranos*,¹⁶⁸ and therefore become truly unique, the success of such shows can be fleeting, time-sensitive, and temporary, and something like a preliminary injunction could ruin a show's future prospects and success. Damages that are difficult to calculate do not give rise to irreparable harm requiring injunctive relief.¹⁶⁹ A preliminary injunction is *never* an appropriate remedy in television, because there is no reason television property disputes should require a remedy beyond monetary damages as compensation, no matter how unique a show is considered by its producers or network.

At the time NBC Universal filed for the preliminary injunction, *Project Runway* was a long-running show that had helped Bravo's reputation. But that did not make it irreplaceable. The trial court incorrectly enjoined the Weinstein Company from broadcasting the sixth season of the show on Lifetime. Even if the Weinstein Company violated its contract with NBC Universal, there was enough monetary evidence for the court to deny the motion for preliminary injunction and allow for damages instead. NBC Universal had five seasons of Bravo ratings, and even some ratings data from the show occasionally having aired on NBC. While the "halo effect" and product integration profits would be harder to calculate, the court still had a track record of success from which to draw.

Bravo and NBC Universal would not suffer irreparable harm from losing even a hit show like *Project Runway*, because Bravo had already reached high-profile awareness as a culturally significant network. Furthermore, losing a breakout hit show in its sixth season would only have given Bravo more opportunity to build upon its reputation with new and potentially better shows.¹⁷⁰ Reality television is also especially time-sensitive and

¹⁶⁸ These shows were listed in the top 10 shows since 1983 by Entertainment Weekly as numbers 3, 9, 5, and 2 respectively. *The New Classics: TV: The 100 Best Shows from 1983 to 2008*, EW.COM (Jun. 17, 2008), http://www.ew.com/ew/article/0,,20207076_20207387_20207339,00.html.

¹⁶⁹ *SportsChannel Am. Assocs. v. Nat'l Hockey League*, 589 N.Y.S.2d 2, 3 (App. Div. 1992).

¹⁷⁰ Bravo already had a track record of successful hit shows, and NBC Universal was not in danger of losing its advertising stability and reputation. LOTZ, *supra* note 11, at 183 ("[B]y 2005, one break-out-hit series could move a cable network from the tier of relative obscurity to high-profile awareness, as *Trading Spaces* did for TLC, *Queer Eye for the Straight Guy* did for Bravo, and *The Shield* did for FX. And once a cable network achieves substantial cultural awareness, it is much easier to secure the advertising dollars necessary to maximize its niche status through additional programming.").

subject to the whim of a potentially fickle audience, such that what is hot for one season may not succeed during the next. However, while there is no way to know if the success of *Project Runway* had already started to fade before it left Bravo, that does not mean a court could not calculate the damages.

The trial court's ruling in *NBC Universal, Inc. v. The Weinstein Company, LLC* set a dangerous precedent for future courts facing motions to enjoin a television show from changing networks. Advertising strategies are only going to get more complicated as the television industry adjusts to new technology,¹⁷¹ and because of that, every network could argue that any television property, no matter how valuable, is irreplaceable and its movement should therefore be restricted by the courts. Because of this, when courts are faced with a motion for a preliminary injunction involving a television show, the best response is to deny the motion. Even if the damages are difficult to calculate because of new media and advertising complications through product integration, it does not elevate the dispute from the realm of damages into the realm of irreparable harm. Difficulty in damage calculation does not make it impossible to do so, and the harm a court could potentially cause by halting the airing of a television show in the constantly changing realm of television would be much greater in the long term.

CONCLUSION

There are circumstances and legal disputes where a preliminary injunction is not only the most appropriate remedy, but also the only remedy available to adequately give relief to the party seeking it. However, in the television industry, as well as in other areas of media such as literary publishing, music publishing, and motion picture development, that has never really been the case. Damages are easily calculable due to the financially-oriented nature of the media industry. With the television industry changing at a rapid pace, there is a temptation to protect networks from losing potentially valuable show properties by issuing preliminary injunctions, but to do so uses an outdated definition of "unique." Preventing television shows from airing by tying them up with preliminary injunctions can have far-reaching repercussions beyond the lawsuit itself, and because of the temporal nature of modern television programming, a show can be irreparably damaged by any period

171 Indeed, "the proliferation of strategies at the end of the multi-channel transition suggests that a mix of placement, integration, branded entertainment, sponsorship, and the thirty-second spot will continue to exist in a post-network era in which television encompasses a range of conventional, on-demand, and subscription services." *Id.* at 179.

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of time that it is kept from being broadcast. A preliminary injunction is not an appropriate remedy in television because there is no reason that television property disputes should require a remedy beyond monetary damages as compensation, no matter how unique a show is considered to be, or how hard it is to accurately calculate advertising revenue.

Addressing the E-Waste Crisis: The Need for Comprehensive Federal E-Waste Regulation within the United States

Hannah G. Elisha*

INTRODUCTION

In 2007, studies found that children in the village of Guiyu, an electronic waste recycling center in Southern China, had blood lead levels fifty percent higher than the Center for Disease Control and Prevention (CDC) sets for maximum safe exposure in the United States.¹ Sadly and ironically, while the United States has established health, safety, and environmental regulations to prevent this kind of toxic exposure domestically, the regulations, practices, and policies of the United States and other developed countries have caused significant toxic exposure overseas in towns like Guiyu.²

The United States and other industrialized countries are flooding the global waste stream with discarded televisions, computers, cell phones, and other electronics³ that contain lead,

* J.D./M.B.A. candidate 2012 Chapman University. B.A. 2005 Whitman College. I would like to thank my family for their continual love and encouragement, my fiancé for his never ending support and my fellow *Chapman Law Review* members for their countless hours of hard work and ceaseless dedication. I also owe a debt of gratitude to Chapman University School of Law Professor Deepa Badrinarayana, as well as Laurel Adcock and Diane Smith of SmithTrager, LLP for graciously introducing me to the nuances of environmental law.

¹ The journal *Environmental Health Perspectives* conducted the study that found children in Guiyu suffered from lead poisoning. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-1044, ELECTRONIC WASTE: EPA NEEDS TO BETTER CONTROL HARMFUL U.S. EXPORTS THROUGH STRONGER ENFORCEMENT AND MORE COMPREHENSIVE REGULATION 18 (2008) [hereinafter GAO REPORT], available at <http://www.gao.gov/new.items/d081044.pdf>. See also *'E-cycling' Puts New Life in Electronic Junk: Toxic Trash Turned into Everyday Objects by Growing Industry*, MSNBC.COM (Jan. 2, 2006, 9:23 AM), <http://www.msnbc.msn.com/id/10642954/> [hereinafter *E-cycling*] (reporting that water samples from Guiyu showed the village's drinking water had lead levels 2,400 times higher than the limit set by the World Health Organization).

² See *The e-Waste Crisis*, E-STEWARDS, http://www.e-stewards.org/ewaste_crisis.html (last visited Aug. 17, 2010) [hereinafter *The e-Waste Crisis*] (stating that the U.S. and Canada's e-waste policies are inadequate and have resulted in a social injustice against developing nations).

³ See, e.g., *e-Waste Items*, OMNI TECHNICS INC., <http://www.ca-recycle.com/recycle.cfm> (last visited Aug. 17, 2010) [hereinafter *e-Waste Items*] (listing "CRT Monitors, LCD Monitors, Plasma Monitors, TVs, Laptop Computers, Desktop Computers, Printers, Scanners, Computer Components & Parts, Circuit Boards, Cables & Wire, Copy

mercury, and other toxic materials.⁴ While the majority of these electronic goods are produced for and used by consumers in wealthy developed countries, at the end of their lifecycles many of these products are shipped to developing nations for recycling and disposal.⁵ All across Asia and Africa, communities like Guiyu suffer the toxic effects.⁶

The United States contributes approximately four million products to the electronic waste (e-waste) stream each year and is a leading contributor to what has become known as the “e-waste crisis.”⁷ However, the United States has not yet implemented federal e-waste regulations governing the domestic disposal and recycling of e-waste, and it has failed to create comprehensive policies regulating the export of toxic electronics to developing countries.⁸

The United States has the capital, market influence, regulatory ability, and ethical duty to take responsibility for its contribution to the e-waste crisis.⁹ This Comment argues that to address the e-waste issue and its own significant contribution to the e-waste stream, the United States must implement uniform federal e-waste regulations that reduce the volume and toxicity of discarded e-waste and prevent the export of e-waste to developing countries.¹⁰ Legislators seeking to develop effective e-waste policy should first evaluate the extended producer responsibility, advance recovery fee take-back systems, and substance restriction policies implemented by the European

Machines, Fax Machines, PDAs, Cell Phones, Calculators, Telephones, DVDs VCRs, Stereos, Radios, UPSs, Rechargeable Batteries, [and] Most Electronic Products . . . [w]orking or [n]on-[w]orking” as e-waste).

⁴ Electronic goods contain dangerous levels of highly toxic substances including lead, mercury, cadmium, arsenic, beryllium, and brominated flame retardants. See ELECTRONICS TAKEBACK COALITION, E-WASTE: THE EXPLODING GLOBAL ELECTRONIC WASTE CRISIS, AN ISSUE BRIEFING BOOK 2 (2009), <http://www.computertakeback.com/Tools/Ewaste%20Briefing%20Book.pdf> [hereinafter ETBC BRIEFING BOOK]; Nicola J. Templeton, *The Dark Side of Recycling and Reusing Electronics: Is Washington's E-Cycle Program Adequate?*, 7 SEATTLE J. SOC. JUST. 763, 766–68 (2009); *The e-Waste Crisis*, *supra* note 2.

⁵ *The e-Waste Problem*, GREENPEACE INT'L, <http://www.greenpeace.org/international/campaigns/toxics/electronics/the-e-waste-problem> (last visited Aug. 17, 2010) [hereinafter *The e-Waste Problem*]; ETBC BRIEFING BOOK, *supra* note 4, at 4; *The e-Waste Crisis*, *supra* note 2.

⁶ See *The e-Waste Problem*, *supra* note 5; *The e-Waste Crisis*, *supra* note 2.

⁷ See *60 Minutes: Following the Trail of Toxic E-Waste* (CBS television broadcast Aug. 30, 2009) [hereinafter *60 Minutes*], available at <http://www.cbsnews.com/stories/2008/11/06/60minutes/main4579229.shtml?tag=contentMain;contentBody> (reporting that Americans discard 130,000 computers each day and 100 million cell phones each year). See also *The e-Waste Crisis*, *supra* note 2 (stating that Americans threw away four billion pounds of e-waste in 2005).

⁸ See *E-Cycling*, *supra* note 1.

⁹ See GAO REPORT, *supra* note 1, at 15; Templeton, *supra* note 4 at 763, 771–72.

¹⁰ See ETBC BRIEFING BOOK, *supra* note 4, at 9.

Union¹¹ and Japan.¹² Second, legislators should ensure that the United States ratifies existing international treaties regulating the transboundary movement of hazardous waste.¹³

Part I of this Comment provides an introduction to the e-waste crisis. It outlines the health and environmental dangers that discarded electronics pose given the scope and toxicity of the e-waste stream and it documents the United States' exploitative practice of exporting these toxic devices to developing nations for disposal. Part II discusses the United States' failure to implement effective e-waste policy. Part III explores existing e-waste policy developed by the international community. Finally, Part IV outlines a proposal for enacting a comprehensive e-waste policy that: 1) prohibits the use of certain toxic substances, 2) distributes end-of-life responsibility between multiple stakeholders, and 3) utilizes the positive feedback signals that extended producer responsibility and advance recovery fee take-back systems provide. In conclusion, this Comment emphasizes that federal policy must be implemented to stop the export of e-waste to developing countries and must be framed with enough breadth to manage existing and future types of e-waste to effectively address all of the issues presented by e-waste, both domestically and abroad.

I. AN OVERVIEW OF THE E-WASTE CRISIS

E-waste poses a significant environmental threat that requires an immediate national response. Three factors contribute

¹¹ The European Union has taken steps to address the e-waste crisis by implementing the Waste Electrical and Electronic Equipment (WEEE) Directive which requires producers to take back used electronics from consumers, and the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment (RoHS) initiative which prohibits the use of certain toxic substances in the production of new electronic devices. *See* discussion *infra* Part III.B. *See also* Directive 2002/96/EC, of the European Parliament and of the Council of 27 January 2003 on Waste Electrical and Electronic Equipment (WEEE), 2003 O.J. (L 37) 24–25 [hereinafter WEEE Directive], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:037:0024:0038:EN:PDF>; Directive 2002/95/EC, of the European Parliament and of the Council of 27 January on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment, 2003 O.J. (L 37) 19–20 [hereinafter RoHS Directive], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:037:0019:0023:en:PDF>; Templeton, *supra* note 4, at 782, 784–85.

¹² Japan has implemented a national e-waste policy. *See* discussion *infra* Part III.C. *See also* INFORM, INC., ELECTRIC APPLIANCE RECYCLING IN JAPAN 1 (2003) [hereinafter INFORM, APPLIANCE], available at <http://informinc.org/japanapr.pdf> (explaining that Japan has enacted responsibility requirements for the disposal of, among other things, electronic appliances); INFORM INC., PC RECYCLING IN JAPAN 1 (2004) [hereinafter INFORM, PC], available at <http://informinc.org/japanpc.pdf> (providing an overview of Japan's Recycling Promotion Law, amended in 2001 to govern the responsible disposal of personal computers).

¹³ *See* GAO REPORT, *supra* note 1, at 34–36.

to the urgency of the e-waste crisis: 1) e-waste is the fastest growing element in today's waste stream,¹⁴ 2) electronic goods are ubiquitous in today's increasingly technological society and contain dangerous levels of highly toxic substances,¹⁵ and 3) e-waste is commonly exported to foreign countries that lack the capacity to safely manage the lingering toxic effects of discarded devices.¹⁶

A. The Scope of the E-Waste Stream

When the National Safety Council Study estimated in 1998 that twenty million computers were becoming obsolete each year, the number seemed unbelievably high; however, according to the Environmental Protection Agency's (EPA) recent estimates, that number has more than doubled in the past ten years.¹⁷ In 2007, more than 372.7 million units of e-waste, including an estimated 205.5 million units of computer products, 140.3 million cell phones, and 26.9 million televisions, were disposed of in the United States alone.¹⁸

The U.S. Geological Survey warns that these estimates should be viewed as conservative approximations because seventy-five percent of e-waste is currently in storage and has yet to contribute to the flooded waters of the e-waste stream.¹⁹ The EPA estimates that at the end of 2007, Americans had nearly 235 million electronic devices in storage.²⁰

¹⁴ *The e-Waste Problem*, *supra* note 5.

¹⁵ See, e.g., ETBC BRIEFING BOOK, *supra* note 4, at 2.

¹⁶ See *The Problem of Global Electronic Waste Dumping*, ELECTRONICS TAKEBACK COALITION, http://www.computertakeback.com/problem/export_problem.htm (last visited Aug. 17, 2010) [hereinafter ETBC, *Problem: Waste Dumping*].

¹⁷ *Statistics on the Management of Used and End-of-Life Electronics*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/epawaste/conserve/materials/ecycling/manage.htm> (last visited Aug. 17, 2010). As the lifespan of electronics decrease, consumers purchase and discard electronics more often. See *The e-Waste Problem*, *supra* note 5 (reporting that while the average lifespan of a computer was six years in 1997, in 2005 the average computer's lifespan was only two years).

¹⁸ "Computer products" include CPUs, monitors, laptops, keyboards, mice, printers, copiers, and faxes. ELECTRONICS TAKEBACK COALITION, FACTS AND FIGURES ON E-WASTE AND RECYCLING 2 (2009), http://www.computertakeback.com/Tools/Facts_and_Figures.pdf [hereinafter ETBC, FACTS AND FIGURES].

¹⁹ DONALD BLEIWAS & THOMAS KELLY, OBSOLETE COMPUTERS, "GOLD MINE," OR HIGH-TECH TRASH? RESOURCE RECOVERY FROM RECYCLING, U.S. GEOLOGICAL SURVEY FACT SHEET FS-060-01 (2001), <http://pubs.usgs.gov/fs/fs060-01/fs060-01.pdf>.

²⁰ In 2007, the EPA estimated there were 65.7 million desktop PCs, 42.4 million PC monitors, 2.1 million portable PCs, 25.2 million peripherals, and 99.1 million televisions in storage. U.S. ENVTL. PROT. AGENCY, ELECTRONICS WASTE MANAGEMENT IN THE UNITED STATES: APPROACH 25 tbl.3.4 (2008), <http://www.epa.gov/osw/conserve/materials/ecycling/docs/app-1.pdf>.

E-waste is the fastest growing municipal waste stream in the United States and other industrialized nations,²¹ and it is expected to increase as consumers transition to digital televisions and discard old analog devices.²² The Electronics TakeBack Coalition (ETBC)²³ forecasted that the 2009 conversion to digital television would cause an “e-waste tsunami”²⁴ as Americans discarded their old televisions and took stockpiled analog sets out of storage because they could no longer be reused or donated.²⁵ Based on estimates provided by the U.S. Government Accountability Office (GAO),²⁶ the ETBC calculated that forty million televisions that relied on over-the-air television signals would be rendered obsolete by the digital conversion.²⁷

²¹ The United States and the United Kingdom are the leading culprits in the e-waste crisis; however, the e-waste issue is a global one. Greenpeace reports that twenty to fifty million tonnes (metric tons) of e-waste are generated each year worldwide. *The e-Waste Problem*, *supra* note 5 (reporting that e-waste currently comprises five percent of the worldwide municipal waste stream and is the waste stream’s fastest growing component). See also Noah Sachs, *Planning the Funeral at the Birth: Extended Producer Responsibility in the European Union and the United States*, 30 HARV. ENVTL. L. REV. 51, 59–60 (2006) (reporting that the European Commission estimates that the European Union will generate twelve million tons of e-waste in 2010 and that the growth rate of e-waste in the European Union is three-times higher than that of the municipal solid waste stream); *id.* at 60 (stating that in 2006 more than 3,500 tons of e-waste became obsolete each day in the United States); *Our e-Waste Comes Back to Haunt Us*, AMERICAN PUBLIC MEDIA (Nov. 14, 2007), http://marketplace.publicradio.org/display/web/2007/11/14/consumed5_pm_1/ (reporting that Greenpeace estimates that four thousand tons of e-waste are discarded every hour worldwide).

²² See Nathaniel Gronewold & Greenwire, *Electronics: Some See E-Waste Crisis Trailing Switch to Digital TV*, N.Y. TIMES (June 15, 2009), <http://www.nytimes.com/gwire/2009/06/15/15greenwire-some-see-e-waste-crisis-trailing-switch-to-dig-81110.html>.

²³ The Electronics TakeBack Coalition (ETBC) is an organization that promotes responsible recycling and environmentally friendly designs within the electronics industry. See generally *About Us*, ELECTRONICS TAKEBACK COALITION, http://www.computertakeback.com/about/about_coalition.htm (last visited Aug. 17, 2010).

²⁴ Television broadcasters stopped sending out analog television signals on June 12, 2009, rendering televisions that could not receive digital signals obsolete. *Take Back My TV Campaign*, ELECTRONICS TAKEBACK COALITION, http://www.computertakeback.com/corporate/take_back_my_TV.htm (last visited Aug. 17, 2010).

²⁵ Sixty-eight percent of consumers keep their old computer equipment. In 2007, there were 235 million units of used electronics in storage including 99 million televisions. ETBC, FACTS AND FIGURES, *supra* note 18, at 3. See also Gronewold & Greenwire, *supra* note 22 (noting that millions of unused televisions are stockpiled in storage and have not yet been disposed of because people often keep old electronics with the hope they will be able to give them to someone else to use; realistically, these televisions will ultimately be discarded since the 2009 digital conversion rendered them obsolete).

²⁶ Referred to as the “congressional watchdog,” the GAO is a nonpartisan agency employed by Congress to determine how the federal government uses taxpayer money. See generally *About GAO*, U.S. GOV’T ACCOUNTABILITY OFF., <http://www.gao.gov/about/index.html> (last visited Aug. 17, 2010).

²⁷ ETBC, FACTS AND FIGURES, *supra* note 18, at 6. See also Gronewold & Greenwire, *supra* note 22 (reporting that the Basel Action Network (BAN) projected that one-in-four households would discard an obsolete television in 2009, following the digital conversion).

B. E-Waste Described and the Dangers of E-Waste Toxicity

While computers, televisions, and cell phones are at the heart of the e-waste debate, e-waste consists of a wide range of everyday “electronic appliances that are discarded because of malfunction, exhaustion, or obsolescence.”²⁸ Thus, e-waste also includes PDAs, light bulbs, batteries, radios, copiers, fax machines, and other electronic devices.²⁹ The torrent of electronic goods flooding the waste stream poses a unique danger because of its high volume and toxicity.³⁰

Producers’ marketing strategies and consumers’ purchasing habits promote high obsolescence rates in electronic goods, making e-waste the fastest growing element in the modern waste stream and a significant global issue.³¹ The faster electronics become outdated, the sooner consumers purchase more.³² Therefore, in today’s electronics market producers have a disincentive to design durable, repairable, and upgradable appliances and are instead encouraged to design and sell electronic devices with short life spans.³³ The problems presented by this accelerated rate of obsolescence are further compounded by the fact that the e-waste flooding the waste stream is designed in a way that it is difficult and costly to disassemble and recycle.³⁴

²⁸ Jennifer Kutz, Comment, *You’ve Got Waste: The Exponentially Escalating Problem of Hazardous e-Waste*, 17 VILL. ENVTL. L.J. 307, 307 (2006); *About e-Waste*, OMNI TECHNICS INC., <http://www.ca-recycle.com/resources.cfm> (last visited Aug. 17, 2010) [hereinafter OMNI: *About e-Waste*].

²⁹ Kutz, *supra* note 28, at 307; *e-Waste Items*, *supra* note 3.

³⁰ See Kutz, *supra* note 28, at 307.

³¹ See *Problem: Electronics Become Obsolete Quickly*, ELECTRONICS TAKEBACK COALITION, http://www.computertakeback.com/problem/made_to_break.htm (last visited Aug. 20, 2010) [hereinafter ETBC, *Problem: Obsolete*].

³² Betsy M. Billingham, Note, *E-Waste: A Comparative Analysis of Current and Contemplated Management Efforts by the European Union and the United States*, 16 COLO. J. INT’L ENVTL. L. & POL’Y 399, 404 (2005).

³³ The electronics industry actively spurs the obsolescence rate of electronics for their financial gain. Cell phone companies, for example, offer free cell phone upgrades every two years, although most mobile phones are still fully functional at the time of the upgrade. Likewise, software companies, like Microsoft, release new operating systems that are incompatible with older computer models so consumers will buy new hardware. Apple, the producer of the iPod, exemplifies this kind of manufactured obsolescence marketing. It encourages consumers to regularly replace their MP3 devices by continually releasing slightly different models of the iPod and by designing the iPod with batteries that are extremely difficult and costly to replace. See ETBC, *Problem: Obsolete*, *supra* note 31.

³⁴ Manufacturers do not consider the end-of-life cycle when designing most electronics. Therefore, a majority of devices are built with materials that are hard to recycle and are constructed in a way that it is difficult to take them apart. See *The Problem with Electronics: Not Designed for Recycling*, ELECTRONICS TAKEBACK COALITION, http://www.computertakeback.com/problem/not_designed_for_recycling.htm (last visited Aug. 17, 2010) [hereinafter ETBC, *Problem: Recycling*]. See also *The e-Waste Crisis*, *supra* note 2 (noting that electronics are often designed with multiple components

Electronic goods contain dangerous levels of highly toxic substances, including lead, mercury, cadmium, beryllium, and brominated flame retardants, which can cause serious health conditions such as cancer and other neurological, circulatory, and reproductive diseases.³⁵ Furthermore, electronics contain other components that can form hazardous dioxins and polycyclic aromatic hydrocarbons when burned.³⁶

Lead is a particularly toxic element of e-waste and is a common component in most electronic appliances, including television and computer cathode ray tubes (CRTs) and computer circuit boards.³⁷ Lead exposure can damage the nervous, circulatory, and reproductive systems.³⁸ It is well-documented that developing brains of children are especially vulnerable to lead toxicity.³⁹

Like lead, mercury is used in electronic devices including cell phones, flat panel monitors, and batteries, and is particularly dangerous to children and fetuses, causing damage to the brain and kidneys.⁴⁰ Cadmium, a carcinogenic heavy metal that causes respiratory, liver, and kidney problems when ingested or inhaled, is found in cathode ray tubes, batteries, circuit boards, and semiconductor chips.⁴¹ Beryllium and beryllium alloys are also commonly found in electronic devices.⁴² Once used to make fluorescent lights, beryllium has since been identified as a potential carcinogen, and inhalation of beryllium particles is

and are bolted, glued, and screwed together with little regard for the cost of disassembling or recycling the devices at the end of their lifecycles).

³⁵ Roughly forty percent of the heavy metals in landfills originate from e-waste. *See, e.g.,* ETBC, BRIEFING BOOK, *supra* note 4, at 2 (reporting that electronics manufacturers use more than one thousand materials, including many heavy metals, plastics, and toxins, to produce electronic goods); *The e-Waste Crisis*, *supra* note 2.

³⁶ *See, e.g.,* Templeton, *supra* note 4, at 768; *The e-Waste Crisis*, *supra* note 2.

³⁷ Computer and television CRTs contain between four and eight pounds of lead. *See, e.g.,* *What's in Electronic Devices?*, GREENPEACE INTERNATIONAL, <http://www.greenpeace.org/international/campaigns/toxics/electronics/what-s-in-electronic-devices> (last visited Aug. 27, 2010) [hereinafter *What's in Electronic Devices?*] (reporting that in 2002, approximately ten thousand tonnes of lead were sold in the form of CRT monitors); Sachs, *supra* note 21, at 59; Templeton, *supra* note 4, at 766–67.

³⁸ Manasvini Krishna & Pratiksha Kulshrestha, *The Toxic Belt: Perspectives on E-Waste Dumping in Developing Nations*, 15 U.C. DAVIS J. INT'L L. & POL'Y 71, 72–73 (2008).

³⁹ *See, e.g.,* Krishna & Kulshrestha, *supra* note 38, at 72–73; *What's in Electronic Devices?*, *supra* note 37.

⁴⁰ Krishna & Kulshrestha, *supra* note 38, at 73; Templeton, *supra* note 4, at 767. *See also* Sachs, *supra* note 21, at 59 (reporting that twenty-two percent of the mercury the world consumes annually is used to make electronic equipment); *id.* at 60 (stating the National Safety Council estimates that the 500 million computers discarded in the United States between 1997 and 2007 contained more than 632,000 pounds of mercury).

⁴¹ Templeton, *supra* note 4, at 767; *What's in Electronic Devices?*, *supra* note 37.

⁴² Templeton, *supra* note 4, at 767–68.

associated with scarring of lung tissue.⁴³ Additionally, circuit boards and plastic casings often contain brominated flame retardants which can cause brain impairment and can interfere with hormone functions.⁴⁴

While the toxic components in electronic devices do not generally threaten the health of those who use them in developed countries, these hazardous substances have adverse health and environmental effects when electronics are incinerated,⁴⁵ dismantled, or dumped in landfills.⁴⁶ Ironically, although they do not generally benefit from electronic devices during the products' useful life, developing nations bear the majority of e-waste's toxic effects.⁴⁷

C. The Export of E-Waste to Developing Countries

Recycling electronic products, which include intricate meshes of plastics, hazardous materials, and precious metals,⁴⁸ is a laborious and costly undertaking.⁴⁹ This is in part because manufacturers of electronic goods have traditionally designed products without considering the costs associated with disassembling and recycling discarded devices.⁵⁰ The high cost of recycling electronic goods, combined with the negligible value of devices that are obsolete in the American market,⁵¹ means that

⁴³ See OMNI: *About e-Waste*, *supra* note 28 (describing chronic berylliosis, a lung condition caused by exposure to beryllium fumes and dust).

⁴⁴ See, e.g., *What's in Electronic Devices?*, *supra* note 37 (reporting that electronic manufacturers used 1,000 tonnes of TBBPA, a brominated flame retardant to produce almost 700 million cellular phones in 2004).

⁴⁵ Lead, mercury, cadmium and other heavy metals are released into the air when electronics are incinerated. See *Where Does e-Waste End Up?*, GREENPEACE INTERNATIONAL, <http://www.greenpeace.org/international/campaigns/toxics/electronics/where-does-e-waste-end-up> (last visited Aug. 17, 2010) [hereinafter *Where Does e-Waste End Up?*].

⁴⁶ Toxic elements can ooze out of discarded electronics that are left in landfills, and eventually can contaminate the groundwater. See *'E-Cycling'*, *supra* note 1.

⁴⁷ See Jennifer L. Fordyce, *Review of Selected Legislation: Health and Safety Chapter 526: Out with the Old, In with the New—California Addresses the Growing Problem of E-Waste*, 35 MCGEORGE L. REV. 529, 531 (2004).

⁴⁸ In addition to containing numerous toxic elements, electronic equipment also contains varying amounts of precious metals which make e-waste a commodity in developing nations. These precious metals include platinum, gold, and silver. Krishna & Kulshrestha, *supra* note 38, at 72.

⁴⁹ See GAO REPORT, *supra* note 1, at 9.

⁵⁰ See ETBC, *Problem: Recycling*, *supra* note 34.

⁵¹ Flat screen LCD TVs, for example, are designed in a way that makes it extremely difficult and costly to disassemble and recycle their components. LCD TVs typically contain twenty-plus mercury lamps that run the length of the display screen. These lamps are extremely fragile and release toxins when they are broken. Therefore, these lamps need to be removed before the device is shredded or otherwise processed for recycling. The entire TV, however, must be fully disassembled in order to remove the lamps. Because it is time consuming and costly to disassemble the entire device, recyclers instead put these devices in the shredder whole, exposing their workers to mercury, or

obsolete devices are commonly exported to foreign countries where low-wage labor and weak environmental regulations make it cost effective to reuse the devices or reclaim their precious metals.⁵² Poverty and lenient environmental regulations in developing countries⁵³ make China, Nigeria, and India recipients of a majority of the developed world's e-waste.⁵⁴

Exporters have another incentive to export e-waste. Waste management agencies that export used electronics abroad stand to make a profit by selling used televisions, computers, cell phones, and other electronics to purchasers who either resell the electronics or harvest their precious metals and recyclable materials.⁵⁵ These practices present problems for the countries receiving vast quantities of e-waste.

Developing countries do not have the infrastructure, technology, or regulatory incentives to safely dispose of e-waste.⁵⁶ In its 2008 report on the harmful effects the e-waste trade, the GAO found that e-waste that is exported from the United States is "often recycled in developing countries by crude and inefficient means and with virtually no human health or environmental protection."⁵⁷ Low wage workers, including many child laborers, disassemble and extract precious metals from electronic devices by hand in unsafe conditions.⁵⁸ Unaware of or with disregard for the extreme toxicity, these laborers burn the plastic coating off of

they dump these TVs in landfills instead of properly disposing of them. ETBC, *Problem: Recycling*, *supra* note 34; *The e-Waste Crisis*, *supra* note 2.

⁵² See ETBC, *Problem: Waste Dumping*, *supra* note 16. See also *The Problem with Electronics: Discarded Electronics are Badly Managed in the U.S.*, ELECTRONICS TAKEBACK COALITION, http://www.computertakeback.com/problem/discards_badly_managed.htm (last visited Sept. 1, 2010) [hereinafter ETBC, *Problem: Badly Managed*] (reporting that fifty to eighty percent of the e-waste collected in the United States under the guise of recycling is exported to developing countries for processing and disposal). It is ten times less expensive to recycle computer monitors in China than it is to do so in the United States. *Where Does e-Waste End Up?*, *supra* note 45 (noting that e-waste from the United States, Japan, and the European Union is likely to be exported to China because it is cheaper to dump e-waste in China than to properly dispose of it in developed nations).

⁵³ For the purposes of this article, "developing countries" refers to foreign nations whose infrastructure, technology, and regulatory framework are less developed than those of wealthy industrialized countries like the United States and the United Kingdom.

⁵⁴ See Krishna & Kulshrestha, *supra* note 38, at 73–74. While it may cost twenty dollars to recycle a computer in the United States, it only costs two dollars in India. Krishna & Kulshrestha, *supra* note 38, at 74; accord *Where Does e-Waste End Up?*, *supra* note 45.

⁵⁵ GAO REPORT, *supra* note 1, at 21 (stating that computers that have little to no value in the United States are commonly exported and sold for one hundred dollars in West African countries); ETBC, *Problem: Waste Dumping*, *supra* note 16.

⁵⁶ See GAO REPORT, *supra* note 1, at 5; *60 Minutes*, *supra* note 7.

⁵⁷ GAO REPORT, *supra* note 1, at 1.

⁵⁸ *The e-Waste Problem*, *supra* note 5.

wires to recover copper and submerge circuit boards in open acid baths to separate other precious metals.⁵⁹

1. Recycling in China and Other Asian Countries

The environmental impact of exporting e-waste to developing countries is best documented in the town of Guiyu in southern China.⁶⁰ Dubbed the “Chernobyl of electronic waste,” Guiyu holds what has been called the “dirty little secret of the electronic age.”⁶¹ Guiyu, once a rural rice-growing community, was devastated by the effects of the e-waste trade within five years of becoming an e-waste processing center.⁶² With over three hundred disposal sites in the village using open burning and acid baths to recover electronics’ precious metals, Guiyu residents suffer from some of the highest incidents of dioxin and lead poisoning in the world.⁶³ In 2007, the journal *Environmental Health Perspectives* found that lead levels in the blood of children in Guiyu were fifty percent higher than the CDC sets for exposure in the United States, and were fifty percent higher than those of children in neighboring towns where used electronics were not dismantled.⁶⁴ Guiyu is just one of many global locations for e-waste recycling.⁶⁵ Towns and cities throughout China, Indonesia, Cambodia, and India are home to “rudimentary” recycling” operations where impoverished workers, including children, toil in scrap yards dismantling the toxic throwaways of developed nations for as little as one dollar per day.⁶⁶

⁵⁹ See ETBC, *Problem: Waste Dumping*, *supra* note 16 (stating that low wage workers in e-waste recycling centers break CRT tubes with hammers, heat circuit boards over open flames, burn wires and plastic casings in the open air, and dump acids and heavy metals into nearby rivers, regularly exposing themselves and their communities to dangerous toxins and health hazards); *Where Does e-Waste End Up?*, *supra* note 45 (reporting that children often dismantle and recycle e-waste in developing countries by hand with no safeguards despite the fact that lead, mercury, cadmium, and other toxins are released into the environment when electronics are incarcerated and dismantled).

⁶⁰ *60 Minutes*, *supra* note 7.

⁶¹ *Id.*

⁶² Templeton, *supra* note 4, at 773–74. See also *60 Minutes*, *supra* note 7 (reporting that all of the village’s drinking water has to be trucked in because of the pollution).

⁶³ Gronewold & Greenwire, *supra* note 22; accord *60 Minutes*, *supra* note 7 (reporting that “pregnancies are six times more likely to end in miscarriage [in Guiyu], and that seven out of ten kids have too much lead in their blood”).

⁶⁴ GAO REPORT, *supra* note 1, at 18.

⁶⁵ See *id.* at 17.

⁶⁶ See GAO REPORT, *supra* note 1, at 19 (reporting that e-waste recycling centers can be found in many of Indonesia’s hundreds of sea ports including east Java and Batam Island). Greenpeace has documented e-waste operations in Delhi, Meerut, Ferozabad, Chennai, Bangalore and Mumbai, India. Delhi’s scrap yards employ 25,000 laborers and process ten to twenty tonnes of e-waste each year. *Where Does e-Waste End Up?*, *supra* note 45.

2. The Ruse of “Reuse” in Africa

While the trade of electronics for recycling and disposal has its focal point in China and other Asian countries, the environmental impact of e-waste is not limited to Asia.⁶⁷ Western Africa also receives large quantities of the developed world’s discarded electronics.⁶⁸ Recycling operations are less common in West Africa than in Asia because it costs more to ship used electronic goods to Africa⁶⁹ and because Africa lacks a market for salvaged materials.⁷⁰ Therefore, discarded electronics are shipped to Africa under the guise of being reusable and resellable goods.⁷¹ Reuse can extend the product life of some electronic appliances that would otherwise be dumped and can help bridge the “digital divide,” making technology available to African countries that would otherwise not have access.⁷² However, because it is costly and time-consuming to test each electronic device before shipping it abroad, it is common practice to ship broken and unusable units along with those that have potential for reuse.⁷³ Every month, 400,000 computers arrive in Nigeria, a hub for the import of reusable electronic goods in Western Africa.⁷⁴ Approximately seventy-five percent of this imported equipment is broken “junk” that is dumped or burned with little to no environmental safeguards.⁷⁵

⁶⁷ See ETBC, *Problem: Waste Dumping*, *supra* note 16.

⁶⁸ GAO REPORT, *supra* note 1, at 21; BASEL ACTION NETWORK, BRIEFING PAPER 10, PREVENTING THE DIGITAL DUMP: ENDING “RE-USE ABUSE” (2007), http://www.ban.org/Library/BP10_09_07.pdf [hereinafter THE DIGITAL DUMP].

⁶⁹ GAO REPORT, *supra* note 1, at 21 (noting it costs \$750 to ship a forty-foot container from the United States to Hong Kong but it costs between \$4,000 to \$7,000 to ship a twenty-foot container from the United States to West Africa).

⁷⁰ Salvageable metals, plastics, and glass taken from e-waste in Asian recycle operations are melted down and reused in manufacturing. *Where Does e-Waste End Up?*, *supra* note 45 (reporting that the demand for e-waste in Asia grew when waste managers discovered they could extract copper, gold, iron, nickel, and silicon from recycled e-waste).

⁷¹ See *The e-Waste Crisis*, *supra* note 2 (noting electronic scrap can easily be relabeled as “refurbishable”).

⁷² Templeton, *supra* note 4, at 770–71 (describing the “digital divide” as a disparity in access to technology which hinders economic and infrastructure development in countries that lack access to computers, phones, and other electronic equipment).

⁷³ GAO REPORT, *supra* note 1, at 21; *Where Does e-Waste End Up?*, *supra* note 45 (noting that although there are benefits associated with reusing electronics in developing countries, exporting electronics for reuse is problematic because the devices will likely have short life spans and the recipient country is unlikely to have adequate waste treatment facilities).

⁷⁴ Templeton, *supra* note 4, at 775 (reporting five hundred containers containing eight hundred computers arrive in Nigeria each month); *E-Cycling*, *supra* note 1 (reporting thirteen thousand discarded computers are smuggled from America to Nigeria each day).

⁷⁵ GAO REPORT, *supra* note 1, at 21; Templeton, *supra* note 4, at 775; ETBC BRIEFING BOOK, *supra* note 4, at 5 (reporting that the scrap that Nigeria receives under the banner of reuse often ends up being tossed in unregulated landfills where it exposes impoverished communities to toxins).

Fifty to eighty percent of the e-waste collected in the United States under the guise of recycling is exported to developing countries for processing and disposal.⁷⁶ Countries in Asia and Africa receive the majority of the industrialized world's e-waste and suffer from its toxic effects.⁷⁷ As the next section will discuss, the United States, a leading culprit in the e-waste crisis, has done little to moderate or remedy this unethical poisoning.⁷⁸

II. THE FAILURE OF THE UNITED STATES TO IMPLEMENT EFFECTIVE E-WASTE REGULATIONS

The United States has failed to adequately address the e-waste issue. First, at a federal level, the primary environmental regulation governing hazardous waste is outdated and spotted with loopholes, and the EPA has failed to aggressively pursue regulatory controls.⁷⁹ Second, while states have attempted to independently address the e-waste issue by experimenting with varying waste regulation schemes,⁸⁰ these localized attempts have produced a "patchwork" of inconsistent and sometimes counterproductive policies.⁸¹

A. Federal Regulations Within the United States that Pertain to E-Waste are Inadequate

Despite its contributory role in the e-waste crisis, the United States has not yet adopted a federal e-waste policy, and there are no federal regulations specifically dealing with the domestic management or export of used electronic products.⁸² Existing environmental regulations focus on limiting the pollution created during the manufacturing process and ignore the externalities presented by the products and their end-of-life cycle.⁸³ In the

⁷⁶ ETBC, *Problem: Badly Managed*, *supra* note 52.

⁷⁷ *Id.*

⁷⁸ See GAO REPORT, *supra* note 1, at 21.

⁷⁹ See Heather L. Drayton, Note, *Economics of Electronic Waste Disposal Regulations*, 36 HOFSTRA L. REV. 149, 162–63 (2007); *The e-Waste Crisis*, *supra* note 2.

⁸⁰ See generally *State by State E-Waste Law Summary: E-Waste Laws Passed and Legislation Being Considered In 2010*, ELECTRONICS TAKEBACK COALITION, http://www.computertakeback.com/legislation/States_Summary_2010.pdf (last updated Feb. 17, 2010) [hereinafter ETBC, *State by State E-Waste Law Summary*]; *State Legislation*, ELECTRONICS TAKEBACK COALITION, http://www.computertakeback.com/legislation/state_legislation.htm (last visited Aug. 19, 2010) [hereinafter ETBC, *State Legislation*].

⁸¹ Drayton, *supra* note 79, at 166.

⁸² See *Regulations/Standards*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/waste/conserve/materials/ecycling/rules.htm> (last visited Aug. 17, 2010); GAO REPORT, *supra* note 1, at 21–23 (noting "U.S. Exports of Potentially Harmful Used Electronics Flow Virtually Unrestricted"); Drayton, *supra* note 79, at 162–63.

⁸³ See Sachs, *supra* note 21, at 53, 57–58 (noting that U.S. regulations strictly monitor the release of Volatile Organic Compounds (VOCs) during the manufacturing

absence of federal regulation dealing with used electronic products, the Resource Conservation Recovery Act (RCRA)⁸⁴ and the EPA's voluntary product stewardship program⁸⁵ currently act as inadequate substitutes.⁸⁶ Both the RCRA and the EPA are generally unable to address the e-waste crisis because they are intended to serve a wider purpose and do not have the ability to focus on narrower issues, like e-waste.⁸⁷

The RCRA governs the generation and disposal of hazardous waste within the United States.⁸⁸ However, the RCRA was originally enacted in 1976—long before today's overwhelming e-waste stream could be envisioned—and is thus ill-equipped to deal with the issue of discarded electronic goods.⁸⁹ To be governed by the RCRA, a material must be deemed a hazardous waste.⁹⁰ Because the RCRA provides that equipment that has the “potential for reuse” is not waste, many electronic products at the end of their life cycle are not classified as “waste” and are therefore excluded from the RCRA regulation.⁹¹ The field of used electronic products governed by the RCRA is further limited by the EPA's narrow definition of what is “hazardous.”⁹² Under the RCRA, a solid material is considered hazardous only if it leaches chemicals in dangerous concentrations during their functional lives.⁹³ Electronics do not generally do so.⁹⁴ So while they contain brews of toxins that pose serious health and environmental risks when they are disassembled or burned—as they often are after being exported to developing countries—most

process, but fail to regulate finished products that contain VOCs, thus allowing the eventual release of the VOC toxins during use or upon disposal).

⁸⁴ 42 U.S.C. §§ 6901–6992k (2006).

⁸⁵ See generally *Product Stewardship: Basic Information*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/waste/partnerships/stewardship/basic.htm> (last visited Aug. 17, 2010) [hereinafter EPA, *Product Stewardship*].

⁸⁶ See, e.g., *The e-Waste Crisis*, *supra* note 2; Drayton, *supra* note 79, at 162–63.

⁸⁷ See Drayton, *supra* note 79, at 162–64.

⁸⁸ See §§ 6901–6992k.

⁸⁹ See 42 U.S.C. §§ 6901–6992k; OFFICE OF TECH. POL'Y, U.S. DEPT. COMMERCE, RECYCLING TECHNOLOGY PRODUCTS: AN OVERVIEW OF E-WASTE POLICY ISSUES 4 (2006) [hereinafter RECYCLING TECHNOLOGY], available at <http://www.bvsde.paho.org/bvsacd/cd57/recycling/intro.pdf>; Templeton, *supra* note 4, at 786–87.

⁹⁰ ROBERT TONETTI, EPA OFFICE OF SOLID WASTE: EPA'S REGULATORY PROGRAM FOR “E-WASTE” (2007), <http://www.epa.gov/waste/conservation/materials/ecycling/docs/e-wasteregs.pdf> [hereinafter EPA'S REGULATORY PROGRAM FOR “E-WASTE”].

⁹¹ See *id.*

⁹² See GAO REPORT, *supra* note 1, at 6.

⁹³ Rob Courtney, Note, *Evolving Hazardous Waste Policy for the Digital Era*, 25 STAN. ENVTL. L. J. 199, 205–06 (2006) (describing limitations of the Toxicity Characteristic Leachate Procedure (TCLP) test and noting that, although the EPA now considers them to be hazardous, for several years CRT computer monitors failed to register on TCLP lead toxicity tests).

⁹⁴ *Id.* at 205–07.

kinds of e-waste are not considered hazardous and are exempt from the RCRA.⁹⁵

Additionally, even if waste is deemed hazardous and should properly fall under the Act's governance, the RCRA contains a number of loopholes that decrease the regulation's effectiveness against e-waste.⁹⁶ The RCRA narrowly focuses on waste generated by large businesses, and it provides exclusions for households and small quantity generators while overlooking the significant contribution of e-waste from the aggregation of sources such as households and small companies.⁹⁷

By providing exemptions for donated equipment, the RCRA encourages "disguised dumping" in which owners of used electronics pass their obsolete appliances on to others, such as non-profit organizations, who ultimately bear the responsibility of managing the product's disposal.⁹⁸ A substantial portion of electronic goods that are donated under the guise of "reuse" either have obsolete technology or short life expectancies, or are broken and unusable.⁹⁹ Within the United States, many charities and non-profit organizations have started to refuse donations of used electronics because the cost of disposal often outweighs the short life expectancy of these goods.¹⁰⁰ Because the majority of donated electronics are nearing the end of their life, donating shifts the externalities associated with those goods away from the parties who are best able to manage and internalize the cost of disposal and removes the feedback loop that might otherwise encourage the consumer to seek more environmentally conscious electronics in the future.¹⁰¹

⁹⁵ GAO REPORT, *supra* note 1, at 6 (noting that CRT computer monitors are unique in that they are recognized as hazardous and are governed by RCRA).

⁹⁶ See 40 C.F.R. § 261.4(b)(1) (2007) (exclusion for household waste, such as garbage and trash); 40 C.F.R. § 261.5(f)(3) (2007) (conditional exemption for companies that generate less than 220 pounds of hazardous waste per month); JAMES E. MCCARTHY, CONG. RESEARCH SERV., RL31505, RECYCLING COMPUTERS AND ELECTRONIC EQUIPMENT: LEGISLATIVE AND REGULATORY APPROACHES FOR "E-WASTE" 2 (2005), available at <http://wikileaks.org/leak/crs/RL31505.pdf>.

⁹⁷ Courtney, *supra* note 93, at 208–09. See also Sachs, *supra* note 21, at 58 (reporting that American households generate 1.6 million tons of hazardous waste each year).

⁹⁸ See Krishna & Kulshrestha, *supra* note 38, at 88.

⁹⁹ Drayton, *supra* note 79, at 159 (reporting that donated units are often so old they are not compatible with current technology and have no value to potential users). See also THE DIGITAL DUMP, *supra* note 68 (stating that reuse "is a less preferable waste management option for a technology that undergoes rapid obsolescence").

¹⁰⁰ Drayton, *supra* note 79, at 159 (noting that organizations that take public donations such as Goodwill and the Salvation Army no longer accept old computers or televisions because the cost to dispose of these items is so high).

¹⁰¹ See BASEL ACTION NETWORK & SILICON VALLEY TOXICS COALITION, EXPORTING HARM: THE HIGH-TECH TRASHING OF ASIA 7 (2002), <http://www.ban.org/E-waste/>

By providing an exemption for recyclable material, the RCRA widens the e-waste loophole in which any party can easily evade the RCRA's disposal requirements by simply claiming their waste is "destined for recycling."¹⁰² This presents a significant environmental danger because the EPA loses its authority to determine whether the goods will actually be recycled once the exemption has been claimed.¹⁰³ Accordingly, electronic goods are shipped to other countries, who ultimately suffer from eventual toxic releases when the goods are dismantled or dumped.¹⁰⁴

B. The EPA Has Failed to Pursue Adequate E-Waste Policies

While the majority of domestic e-waste slips through the RCRA's regulatory loopholes, the small portion of e-waste that is subject to EPA control—cathode-ray tubes (CRTs)—is still widely exported.¹⁰⁵ In 2006, the EPA introduced the CRT rule, which recognized CRTs as hazardous waste and placed regulations on their export.¹⁰⁶ Operating under a notice-and-consent requirement, the CRT rule requires exporters to notify the EPA of their intent to export CRTs for reuse or repair and to obtain the consent of importing countries if CRTs are intended to be recycled abroad.¹⁰⁷ However, because the majority of electronic products are not considered hazardous—despite their dangerous toxicity levels—the CRT rule's scope is too narrow because it only applies to CRTs.¹⁰⁸

The effectiveness of the CRT rule is further limited both because the CRT regulations are easily circumvented by exporters who ship without submitting the proper paperwork or who intentionally mislabel their shipments of CRTs in order to avoid the regulation, and because the EPA's enforcement of the CRT rule has been inconsistent.¹⁰⁹ Although e-waste operators have reported that the EPA stepped up its enforcement of the

technotrashfinalcomp.pdf [hereinafter EXPORTING HARM]; MCCARTHY, *supra* note 96, at 2; Templeton, *supra* note 4, at 785–87.

¹⁰² EXPORTING HARM, *supra* note 101, at 28.

¹⁰³ *Id.*

¹⁰⁴ See Templeton, *supra* note 4, at 787; EXPORTING HARM, *supra* note 101, at 1.

¹⁰⁵ GAO REPORT, *supra* note 1, at 6–7.

¹⁰⁶ *Final Rules on Cathode Ray Tubes and Discarded Mercury-Containing Equipment*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/osw/hazard/recycling/electron/index.htm> (last visited Aug. 19, 2010); *Export Requirements for Cathode Ray Tubes*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/osw/hazard/international/crts/index.htm> (last visited Aug. 19, 2010) [hereinafter EPA, *Export Requirements for CRTs*].

¹⁰⁷ EPA, *Export Requirements for CRTs*, *supra* note 106.

¹⁰⁸ See GAO REPORT, *supra* note 1, at 6.

¹⁰⁹ See *id.* at 6–7, 23–31; *The e-Waste Crisis*, *supra* note 2.

CRT rule in 2009,¹¹⁰ in its August 2008 evaluation of the EPA's management of harmful U.S. exports, the GAO found that violations of the CRT rule were "widespread" following the regulation's adoption.¹¹¹ Despite numerous documented violations, the EPA failed to issue its first administrative penalty for illegal CRT shipments until July 2008, a year and a half after the rule took effect.¹¹² Criticizing the EPA for its failure to enforce the CRT rule, the GAO reported that the EPA had neglected to investigate noncompliance with the CRT rule and had not developed the basic elements of an enforcement strategy.¹¹³ The EPA had instead decided to focus on public awareness programs that have also been unable to prevent the export of e-waste.¹¹⁴

In place of federal legislation regulating the end-of-life of electronic goods, the EPA endorses a voluntary producer-centered approach based on extended producer responsibility (EPR) known as product stewardship.¹¹⁵ A diluted version of the pure EPR initiatives,¹¹⁶ product stewardship encourages manufacturers, retailers, consumers, waste operators, and state and local governments to voluntarily share the responsibility for e-waste management.¹¹⁷ In an attempt to use its purchasing power as the nation's single largest consumer as leverage to encourage producers to join the product stewardship program and voluntarily design clean electronics, the federal government

¹¹⁰ Email from Mike Easterbrook, Certifications Consultant, Cyclelution, to author (Jan. 5, 2010, 08:32 MST) (on file with author) (reporting that the EPA began "rigorously enforcing the CRT rule" following the GAO's scathing 2008 report).

¹¹¹ GAO REPORT, *supra* note 1, at 6–7 (noting that forty-three American-based electronic recyclers, including many firms that actively cultivated environmentally friendly public images, failed to comply with the CRT rule when negotiating with undercover GAO agents posing as fictitious buyers from Asia).

¹¹² *Id.* at 7 (noting that although the EPA can seek criminal penalties of up to \$50,000 per day of violation and up to two years imprisonment against parties who knowingly violate the CRT rule, the EPA failed to issue a single penalty against an illegal exporter until July 2008).

¹¹³ *Id.* (reporting that the EPA does not have a plan or timetable to begin monitoring, investigating, or prosecuting exporters who violate the CRT rule, and noting numerous instances where the EPA failed to detain containers destined for export although the containers had already been denied entry by foreign countries and the EPA knew the containers contained broken CRTs in direct violation of the CRT rule).

¹¹⁴ *Id.* at 8.

¹¹⁵ EPR is a product take-back methodology, which holds the producer responsible as the primary polluter in the e-waste chain. See *infra* Part II.C.1 & Part IV.A. See also generally EPA, *Product Stewardship*, *supra* note 85.

¹¹⁶ Pure EPR places the full burden of end-of-life recycling and disposal on electronic producers. Product stewardship is viewed as a diluted version of EPR because it divides the responsibilities between manufacturers, retailers, consumers, waste operators, and the government. See *infra* Part II.C.1 & Part IV.A; Courtney, *supra* note 93, at 216 & n.72.

¹¹⁷ See generally EPA, *Product Stewardship*, *supra* note 85. See also Courtney, *supra* note 93, at 216.

has begun to incorporate e-waste management provisions into its procurement contracts and has taken steps to identify and purchase environmentally friendly products.¹¹⁸ Hoping to stimulate similar market-based initiatives in the private sector, the EPA has also launched the Electronic Product Environment Assessment Tool (EPEAT) to help private consumers identify environmentally friendly products.¹¹⁹

Some progressive producers including Sony, Apple, Dell, and IBM, and retailers such as Best Buy have voluntarily initiated programs to “take back” electronic waste for recycling.¹²⁰ However, some of these companies charge a fee to take back used electronic units,¹²¹ and current industry take-back programs remain an anomaly rather than the norm.¹²² Because these programs are limited in scope and are often under-publicized, they are not sufficient to curb the U.S. e-waste stream.¹²³

In 2006, the EPA introduced a voluntary program targeted at recyclers known as the Responsible Recycling (R2) Practices for Use in Accredited Certification Programs.¹²⁴ R2 sets guidelines for assessing e-waste recyclers’ environmental, health,

¹¹⁸ See EPA, *Product Stewardship*, *supra* note 85. See also Courtney, *supra* note 93, at 216–17 (stating that the federal government spent sixty billion dollars on information technology in 2005 and has since implemented product stewardship into its purchasing practices).

¹¹⁹ The EPEAT provides information on electronic product’s environmental attributes so that consumers can make informed purchases. See generally ELECTRONIC PRODUCT ENVIRONMENT ASSESSMENT TOOL, <http://www.epeat.net> (last visited Aug. 19, 2010). See also *The Ultimate Solution: Green Design*, COMPUTER TAKEBACK COALITION, http://www.computertakeback.com/green_design/green_design.htm (last visited Aug. 19, 2010) (describing the TV Company Recycling Report Card and Greenpeace’s Electronics Scoreboard, programs similar to the EPEAT which direct consumers to clean electronics).

¹²⁰ See *Which Manufacturers Take Back Their Products?*, ELECTRONICS TAKEBACK COALITION, http://www.computertakeback.com/corporate/who_takes_back.htm (last visited Jan. 10, 2010); Sachs, *supra* note 21, at 90. See also *How the Companies Line Up*, GREENPEACE INT’L, <http://www.greenpeace.org/international/campaigns/toxics/electronics/how-the-companies-line-up> (last visited Aug. 19, 2010) (providing a “Guide to Greener Electronics” which ranks the top eighteen producers of personal electronic goods based on their environmental policies).

¹²¹ Best Buy only allows households in most states to recycle three items per day and charges ten dollars for televisions up to twenty inches, CRTs, monitors, and laptops. *Frequently Asked Questions for Electronics Recycling Program*, BESTBUY.COM, <http://www.bestbuy.com/site/null/Recycling-Electronics/pcmcat149900050025.c?id=pcmcat149900050025&DCMP=rdr0001422> (last visited Aug. 19, 2010).

¹²² See Sachs, *supra* note 21, at 90–91.

¹²³ *Id.* (noting that a similar voluntary recycling campaign launched by the Rechargeable Battery Recycling Corporation in the late 1990’s failed because most consumers were largely unaware of the need to recycle used batteries, and those that knew of the requirement did not know where to bring their used batteries and therefore regularly discarded them in the trash because it was more convenient).

¹²⁴ See *Responsible Recycling Practices*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/waste/conservation/materials/recycling/r2practices.htm> (last visited Aug. 19, 2010) [hereinafter *Responsible Recycling Practices*].

and safety practices.¹²⁵ The EPA's guidelines, however, are largely ineffective because they do not impart any legal obligations on R2 certified e-waste recyclers and contain numerous loopholes that allow recyclers to export, incinerate, and dump e-waste.¹²⁶

While the EPA hopes that rallying federal and private purchasing power around the product stewardship initiative and the EPEAT, as well as motivating recyclers to obtain voluntary e-waste recycling certificates under R2, will solve the e-waste problem, these voluntary programs ultimately are ineffective and inadequate solutions.¹²⁷ The initiatives lack enforcement mechanisms, and the American public remains unaware of the e-waste issue.¹²⁸

C. State E-Waste Regulations: An Inconsistent Patchwork of E-Waste Policy

Many states, and a few municipalities, have begun to experiment with varying e-waste schemes based on advance recovery fee and extended producer responsibility methodology.¹²⁹ While these local initiatives should be applauded for their attempts to address the e-waste issue, they have failed to address the underlying dangers of e-waste and have instead created an inconsistent "patchwork" of e-waste policies, thus perpetuating the continued export of e-waste to vulnerable countries.¹³⁰

¹²⁵ *Id.*

¹²⁶ The two environmental groups that participated in R2 discussions, the Basel Action Network and Electronics Takeback Coalition, were so disappointed with R2's standards and found the guidelines so "weak" that they both withdrew from the R2 discussion in its final stages. BASEL ACTION NETWORK & ELECTRONICS TAKEBACK COALITION, WHAT'S WRONG WITH THE EPA'S NEW R2 ELECTRONICS RECYCLING STANDARD? 1-4 (2008), http://www.ban.org/Library/Whats_Wrong_With_R2.pdf [hereinafter WHAT'S WRONG WITH R2] (reporting that R2 "fails to adequately address the four biggest problems in the electronics recycling industry": export, incineration/landfilling, prison recycling and worker health and safety).

¹²⁷ See Drayton, *supra* note 79, at 164; Courtney, *supra* note 93, at 218; WHAT'S WRONG WITH R2, *supra* note 126, at 1-4.

¹²⁸ See TACHI KIUCHI ET AL., GLOBAL FUTURES FOUNDATION, COMPUTERS, E-WASTE, AND PRODUCT STEWARDSHIP: IS CALIFORNIA READY FOR THE CHALLENGE? (2001) [hereinafter GLOBAL FUTURES FOUNDATION, COMPUTERS], available at <http://future500.org/documents/e-waste.pdf> (reporting that the EPA has concluded that "the awareness among most computer and electronic buyers as to the scope of the e-waste problem is low to none"). See also Courtney, *supra* note 93, at 218 (pointing out that, because product stewardship lacks enforcement mechanisms, "manufacturers, distributors, and waste generators who simply elect to ignore product stewardship remain free to do so").

¹²⁹ ETBC, *State Legislation*, *supra* note 80.

¹³⁰ Drayton, *supra* note 79, at 166.

1. A Brief Overview of E-Waste Methodology: Advance Recovery Fee Systems and Extended Producer Responsibility Policies

Two primary methodologies dominate the governance of e-waste.¹³¹ The first is the advance recovery fee (ARF) system. The second is extended producer responsibility (EPR) approach.¹³²

ARF systems place the financial burden of e-waste disposal on consumers and put the physical burden of disposing of and recycling used electronic goods on the government.¹³³ Under ARF systems, consumers pay an advance collection deposit fee between eight and twenty-five dollars when they purchase electronic products.¹³⁴ Retailers collect these fees for the government, and the government then redistributes the funds to public and private entities that manage disposal and recycling.¹³⁵

In contrast to the ARF approach, EPR¹³⁶ assigns environmental responsibility¹³⁷ to the manufacturers that produce electronic goods and requires that, at the end of the appliance's lifecycle, producers take back the products they made.¹³⁸ Known as "cradle to cradle" management, EPR places the burden of safely disposing of and recycling electronic products on the

¹³¹ Kutz, *supra* note 28, at 323.

¹³² *Id.* at 323–24; *Extended Producer Responsibility*, ELECTRONIC TAKEBACK COALITION, http://www.computertakeback.com/legislation/about_epr.htm (last visited Aug. 19, 2010) [hereinafter ETBC, *Extended Producer Responsibility*].

¹³³ See *infra* Part II.C.2 for a discussion of ARF's introduction and role in U.S. e-waste policy; see *infra* Part IV.A for an evaluation of ARF's ability to control the e-waste crisis. See also Kutz, *supra* note 28, at 323 (weighing the benefits and problems of ARF systems).

¹³⁴ As of January 1, 2009, consumers pay eight dollars when purchasing a four to fifteen inch screen, sixteen dollars when purchasing a fifteen to thirty-five inch screen, and twenty-five dollars when purchasing a thirty-five inch or larger screen in California. See *Electronic Product Management: Electronic Waste Recycling Fee*, CALRECYCLE, <http://www.calrecycle.ca.gov/electronics/act2003/retailer/fee/> (last visited Aug. 19, 2010) [hereinafter CALRECYCLE]; Sachs, *supra* note 21, at 62.

¹³⁵ See Kutz, *supra* note 28, at 323–24 (noting that bottle recycling deposits are the most common example of the ARF system).

¹³⁶ EPR is also known as "producer takeback," "product liability," and the "polluters pay principle." Kutz, *supra* note 28, at 324; ETBC, *Extended Producer Responsibility*, *supra* note 132.

¹³⁷ The EPR places physical responsibility (burden of physically collecting and managing the disposal of used electronic goods), economic responsibility (the cost of managing the end-of-life cycle), informational responsibility (the duty to label products and notify the public of the need and availability of take-back programs), and financial responsibility (financial liability for environmental damage that products cause) on manufacturers. Sachs, *supra* note 21, at 62–63. See also Kutz, *supra* note 28, at 334.

¹³⁸ *Producer Responsibility for Electronic Waste*, ELECTRONIC TAKEBACK COALITION, http://www.computertakeback.com/corporate/corporate_main.htm (last visited Aug. 19, 2010) [hereinafter ETBC, *Producer Responsibility for Electronic Waste*].

companies that produce these goods and relieves the public and the government of this responsibility.¹³⁹

2. States Across the Country Have Implemented an Array of Different E-Waste Policies

Many states have begun to address e-waste issues individually by enacting their own regulations.¹⁴⁰ At the time of this writing,¹⁴¹ twenty-three states had passed statewide e-waste recycling legislation.¹⁴² In 2003, California became the first state to implement e-waste regulations, and it is the only state thus far to have passed regulations based on the ARF system.¹⁴³ In

¹³⁹ ETBC, *Producer Responsibility for Electronic Waste*, *supra* note 138. See *infra* Part II.C.2 for a discussion of EPR's introduction and role in American e-waste policy; see *infra* Part IV.A for an evaluation of EPR's ability to control the e-waste crisis. See also ETBC, *Extended Producer Responsibility*, *supra* note 132.

¹⁴⁰ See generally ETBC, *State Legislation*, *supra* note 80.

¹⁴¹ The writing of this Comment was finalized in August–September 2010.

¹⁴² California, Connecticut, Hawaii, Illinois, Indiana, Maine, Maryland, Michigan, Minnesota, Missouri, New Jersey, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Texas, Vermont, Virginia, Washington State, West Virginia and Wisconsin have passed e-waste regulations. CAL. PUB. RES. CODE § 42460 (West 2007); CONN. GEN. STAT. ANN. § 22a-630 (West 2009); HAW. REV. STAT. ANN. § 339D1–27 (LexisNexis 2009); 415 ILL. COMP. STAT. ANN. 150/1 (West 2009); IND. CODE ANN. § 13-20.5-1-1 (West 2009); ME. REV. STAT. ANN. tit. 38, § 1610 (2008); MD. CODE ANN., ENVIR. § 9-1727 (LexisNexis 2009); MICH. COMP. LAWS ANN. § 324.17301 (West 2009); MINN. STAT. ANN. § 115A.1310 (West 2008); MO. ANN. STAT. § 260.1050 (West 2009); N.J. STAT. ANN. § 13:1E-99.94 (West 2009); 2010 N.Y. Sess. Laws 163 (McKinney); N.C. GEN. STAT. § 130A-309.90 (2009); OKLA. STAT. ANN. tit. 27A § 2-11-601 (West 2008); OR. REV. STAT. ANN. § 459A.300 (West 2010); R.I. GEN. LAWS § 23-24.10-1 (2008); S.C. CODE ANN. § 48-60-05 (2010); TEX. HEALTH & SAFETY CODE ANN. § 361.951 (West 2010); VT. STAT. ANN. tit. 10, § 7551 (2010); VA. CODE ANN. § 10.1-1425.27 (2010); WASH. REV. CODE ANN. § 70.95N.010 (West 2010); W. VA. CODE ANN. § 22-15A-2 (LexisNexis 2009); WIS. STAT. ANN. § 287.17 (West 2010). See generally ETBC, *State Legislation*, *supra* note 80 (providing information on which states have passed e-waste legislation, the date the regulations were signed into law, the start date for recycling, links to the law or bill, and the state program websites).

¹⁴³ California operates under an ARF based system implemented under the Electronic Waste Recycling Act of 2003: Covered Electronic Waste Payment System (SB 20/SB 50). CAL. PUB. RES. CODE § 42460 (2007); *Electronic Waste Recycling Act of 2003: Covered Electronic Waste Payment System (SB 20/SB 50)*, CALRECYCLE, <http://www.ciwmb.ca.gov/electronics/act2003/> (last visited Aug. 27, 2010). Connecticut, Hawaii, Illinois, Indiana, Maine, Maryland, Michigan, Minnesota, Missouri, New Jersey, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Texas, Vermont, Virginia, Washington State, West Virginia and Wisconsin have passed EPR laws. CONN. GEN. STAT. ANN. § 22a-630; HAW. REV. STAT. ANN. § 339D1–27; 415 ILL. COMP. STAT. ANN. 150/1; IND. CODE ANN. § 13-20.5-1-1; ME. REV. STAT. ANN. tit. 38, § 1610; MD. CODE ANN., ENVIR. § 9-1727; MICH. COMP. LAWS ANN. § 324.173; MINN. STAT. ANN. § 115A.1310; MO. ANN. STAT. § 260.1050; N.J. STAT. ANN. § 13:1E-99.94; 2010 N.Y. Sess. Laws 163; N.C. GEN. STAT. § 130A-309.90; OKLA. ST. ANN. tit. 27A, § 2-11-601; OR. REV. STAT. ANN. § 459A.300; R.I. GEN. LAWS § 23-24.10-1; S.C. CODE ANN. § 48-60-05; TEX. HEALTH & SAFETY CODE ANN. § 361.951; VT. STAT. ANN. tit. 10, § 7551; VA. CODE ANN. § 10.1-1425.27; WASH. REV. CODE ANN. § 70.95N.010; W. VA. CODE ANN. § 22-15A-2; WIS. STAT. ANN. § 287.17. See generally *E-waste Laws in Other States*, CALIFORNIANS AGAINST WASTE, http://www.cawrecycles.org/issues/ca_e-waste/other_states (last visited Aug. 1, 2010).

addition to promoting an advance consumer fee, California's E-waste Recycling Act (EWRA)¹⁴⁴ also requires manufacturers to report on their efforts to design more environmentally friendly products and reduce the use of hazardous substances in electronic goods sold within the state.¹⁴⁵ These requirements compel manufacturers who sell electronic goods within the state of California to conform to the European Union's Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment (RoHS) Directive,¹⁴⁶ which requires manufacturers to discontinue the use of certain toxic materials including lead, mercury, and cadmium, in the production of electronic goods.¹⁴⁷

While California pioneered statewide e-waste regulations using the ARF model, each of the twenty-three states that subsequently enacted legislation have implemented EPR systems.¹⁴⁸ In fact, four years after California's consumer fee based EWRA was implemented, California itself adopted a resolution advocating for an EPR approach for future policy.¹⁴⁹

In the absence of federal e-waste policy, the United States is now covered by varied and inconsistent state e-waste regulations.¹⁵⁰ EPR laws vary from state to state and lack uniformity, often distributing costs in different ways¹⁵¹ and

¹⁴⁴ The EWRA requires consumers purchasing new electronics after January 1, 2005 to pay an advance recycling fee. The retailers collect and transfer these fees to the E-waste Recovery and Recycling Account, which is administered by the California Waste Management Board under the EPA. See CAL. PUB. RES. CODE §§ 42460–42486. Today, the EWRA fee ranges from eight to twenty-five dollars. See *supra* note 134. See generally *Electronic Waste: More Information*, CAL. DEP'T TOXIC SUBSTANCE CONTROL, <http://www.dtsc.ca.gov/HazardousWaste/EWaste/MoreInfo.cfm> (last visited Jan. 11, 2010).

¹⁴⁵ See *Electronic Waste Recycling Act of 2003: Covered Electronic Waste Payment System (SB 20/SB 50)*, CALRECYCLE, <http://www.ciwm.ca.gov/electronics/act2003/> (last visited Aug. 27, 2010); *Product Manufacturer Information*, CALRECYCLE, <http://www.calrecycle.ca.gov/Electronics/Act2003/Manufacturer/> (last visited Aug. 27, 2010).

¹⁴⁶ See RoHS Directive, *supra* note 11. See *infra* Part III.B. for a discussion of the European Union's e-waste policy and the RoHS Directive.

¹⁴⁷ See CAL. HEALTH & SAFETY CODE § 25214.10 (West 2006) (banning the sale of electronic goods that the European Union RoHS Directive prohibits). See also Phoenix Pak, Note, *Haste Makes E-Waste: A Comparative Analysis of How the United States Should Approach the Growing E-Waste Threat*, 16 CARDOZO J. INT'L & COMP. L. 241, 271 (2008); Fordyce, *supra* note 47, at 531–32.

¹⁴⁸ ETBC, *State Legislation*, *supra* note 80.

¹⁴⁹ *Id.* (noting that while California is the only state with consumer fee regulations, in 2007 the State Agency adopted a resolution advocating for an EPR approach in future state policy).

¹⁵⁰ See Drayton, *supra* note 79, at 166. See generally ETBC, *State by State E-Waste Law Summary*, *supra* note 80.

¹⁵¹ For example, Maine and Maryland require producers and local governments to share the financial cost of recycling e-waste, while Washington State mandates that the entire financial burden is born by the producer alone. Compare ME. REV. STAT. ANN. tit. 38, § 1610 (2008) and MD. CODE ANN., ENVIR. § 9-1727 (2009) with WASH. REV. CODE

placing varying responsibilities and requirements on manufacturers.¹⁵² Regulatory variations place an arduous and costly burden on producers and consumers as they attempt to decipher which products are regulated in each state.¹⁵³ The lack of uniformity among state e-waste policies is further complicated by emerging county and municipal e-waste regulations.¹⁵⁴

Many manufacturers and states have begun to recognize the high transaction costs of operating within the “patchwork” of state regulations and have begun to advocate for the implementation of a national e-waste policy.¹⁵⁵ Even states with existing e-waste regulations such as Maine and California have joined the call for federal e-waste regulation.¹⁵⁶

E-waste legislation must be implemented at a federal level for yet another critical reason—states lack the ability to regulate international trade and are thus unable to address the export of e-waste to developing countries, one of the e-waste crisis’ largest issues.¹⁵⁷ Under the Commerce Clause, states do not have

ANN. § 70.95N.010 (West 2010). *See also* Pak, *supra* note 147, at 270 (explaining the differences between the Maine, Maryland, and Washington State approaches).

¹⁵² For example, while Virginia, Washington State, and Minnesota all operate under EPR, each state places different requirements on producers. Virginia’s EPR e-waste law covers desktops, laptops, monitors, and CRTs but does not include televisions. VA. CODE ANN. § 10.1-1425.27 (2010). Washington State’s EPR regulations govern the same devices as Virginia (desktops, laptops, monitors, and CRTs), but Washington State’s regulation includes televisions. WASH. REV. CODE ANN. § 70.95N.010 (West 2010). Minnesota, which also has EPR e-waste regulations, specifically regulates the disposal of a wide range of devices including computers, peripherals, fax machines, scanners, DVD players, VCRs, and video display devices. MINN. STAT. ANN. § 115A.1310 (West 2009). *See also generally* *Scope of Products in E-Waste Laws*, COMPUTER TAKEBACK COALITION, (last updated June 23, 2010) http://www.computertakeback.com/legislation/Scope_of_Product_in_Ewaste_Laws.pdf; ETBC, *State by State E-Waste Law Summary*, *supra* note 80 (providing a breakdown of which products each state regulates and showing that even the states that use EPR place different requirements on manufacturers).

¹⁵³ Drayton, *supra* note 79, at 166. Arizona, Kentucky, Massachusetts, Nebraska, Pennsylvania and Utah are all scheduled to review proposals regarding e-waste regulation in 2010. ETBC, *State by State E-Waste Law Summary*, *supra* note 80. With California operating under the ARF system, twenty-three states with different variations of EPR, and six states considering e-waste legislation in 2010, manufacturers and consumers must navigate a web of inconsistent policies. *Id.*

¹⁵⁴ In 2008 New York City passed an e-waste recycle bill which banned e-waste from the municipal solid waste stream and required manufactures to implement take-back programs. N.Y.C., N.Y. ADMIN. CODE § 16-420 (2008). *See also* ETBC, *State by State E-Waste Law Summary*, *supra* note 80 (describing the EPR e-waste regulation New York City passed in 2008).

¹⁵⁵ *See* Drayton, *supra* note 79, at 166, 168. *See also* *E-Cycling*, *supra* note 1 (reporting that “manufacturers and environmentalists complain about a lack of federal regulations addressing the proper disposal and recycling of high-tech components”).

¹⁵⁶ *See* Drayton, *supra* note 79, at 168 (quoting representatives from Maine and California, two states with e-waste regulations, saying “they could benefit from national leadership” in the area of e-waste regulation).

¹⁵⁷ *The e-Waste Crisis*, *supra* note 2.

jurisdiction over trade and cannot regulate foreign commerce.¹⁵⁸ Given this constitutional limitation, federal e-waste legislation is necessary in order to prevent the export of hazardous e-waste abroad.¹⁵⁹ In order to implement effective national policy, the United States should first review international e-waste strategies.

III. LESSONS FROM THE INTERNATIONAL COMMUNITY

A comprehensive evaluation of potential e-waste strategies in the United States must include an analysis of existing policies within the international community. Three prominent sets of initiatives merit individual attention: 1) the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention)¹⁶⁰ and its Ban Amendment,¹⁶¹ 2) the European Union's Waste Electrical and Electronic Equipment (WEEE)¹⁶² and Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment directives (RoHS),¹⁶³ and 3) Japan's Home Appliance Recycling Law (SHAR)¹⁶⁴ and Revised Law for Promotion of Effective Utilization of Resources (Recycling Promotion Law).¹⁶⁵

A. International Collaboration Against the E-Waste Issue: The Basel Convention and Ban Amendment

While the United States has failed to address the issue of hazardous waste exports, the international community has been

¹⁵⁸ See U.S. CONST. art. I, § 8, cl. 3; Templeton, *supra* note 4, at 792 (noting that by banning the export of goods to countries whose laws prohibit the import of those goods, California's e-waste regulations do limit the export of e-waste). See also Lisa Stiffler, *State's Recycling Plan Could be Poisonous*, SEATTLE POST INTELLIGENCER, Sept. 13, 2007, at B1, available at http://www.seattlepi.com/local/331364_computer12.html (noting that Washington State Governor Chris Gregoire vetoed part of Washington State's e-waste bill that prohibited the export of e-waste to certain countries because the state did not have the authority to restrict exports).

¹⁵⁹ See Templeton, *supra* note 4, at 792. See generally *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB/97/1 (Aug. 30, 2000), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=Main&actionVal=OnlineAward> (setting aside an award from a NAFTA Tribunal because the tribunal exceeded the scope of its jurisdiction when it adjudicated a dispute regarding the operation of a hazardous waste landfill located abroad).

¹⁶⁰ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, art. 4(2), Mar. 22, 1989, 1673 U.N.T.S. 126 [hereinafter *Basel Convention*].

¹⁶¹ See *The Basel Convention Ban Amendment*, BASEL CONVENTION, <http://www.basel.int/pub/baselban.html> (last visited Aug. 24, 2010) [hereinafter *The Basel Convention Ban Amendment*].

¹⁶² WEEE Directive, *supra* note 11.

¹⁶³ RoHS Directive, *supra* note 11.

¹⁶⁴ INFORM, APPLIANCE, *supra* note 12.

¹⁶⁵ INFORM, PC, *supra* note 12.

navigating this problem for over two decades.¹⁶⁶ In 1989, 118 nations created the Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal (Basel Convention)¹⁶⁷ after discovering that the development of stricter environmental regulations in industrialized nations encouraged “toxic traders” to ship hazardous waste to developing countries.¹⁶⁸ Designed in part to prevent wealthy industrialized countries from exploiting developing nations, the Basel Convention promotes “environmentally sound management” (ESM)¹⁶⁹ of hazardous waste within the borders of the country that generated it.¹⁷⁰ The treaty has three primary objectives: 1) to reduce the generation of hazardous waste, 2) to dispose of hazardous waste as close to its source of origin as possible, and 3) to reduce the transboundary movement and transportation of hazardous wastes.¹⁷¹ The Basel Convention requires prior written consent from both the exporting and importing countries before hazardous waste can be moved internationally by Convention parties, and it completely prohibits the export of hazardous wastes to member states that have banned the import of hazardous wastes under their domestic laws.¹⁷²

As of July 2010, 174 nations had adopted the Basel Convention.¹⁷³ The United States is the only developed country in the world that has not done so.¹⁷⁴ Furthermore, the United States is one of three nations worldwide to have signed but not

¹⁶⁶ See Kutz, *supra* note 28, at 315.

¹⁶⁷ While it was implemented to deal with larger hazardous waste issues, the Convention regulates waste containing lead, mercury, cadmium, and beryllium, and therefore applies to e-waste, specifically classifying CRTs as hazardous. See Basel Convention, *supra* note 160, art. I, Annex I; BASEL ACTION NETWORK, BRIEFING PAPER 1, THE BASEL BAN: A TRIUMPH FOR GLOBAL ENVIRONMENTAL JUSTICE (2007), http://www.ban.org/Library/BP1_09_07.pdf [hereinafter BAN, BRIEFING PAPER 1].

¹⁶⁸ *About the Convention*, BASEL CONVENTION, <http://www.basel.int/convention/basics.html> (last visited Aug. 24, 2010) [hereinafter *Basel Convention Basics*].

¹⁶⁹ *Id.* (“ESM means addressing the issue through an ‘integrated life-cycle approach,’ which involves strong controls from the generation of a hazardous waste to its storage, transport, treatment, reuse, recycling, recovery and final disposal.”).

¹⁷⁰ Templeton, *supra* note 4, at 793–94.

¹⁷¹ *Basel Convention Basics*, *supra* note 168 (stating the goal to reduce the generation of hazardous wastes includes decreasing both the quantity of existing hazardous waste and the degree of such waste’s hazardousness).

¹⁷² In order to ensure hazardous waste is dealt with in an environmentally sound manner, the Convention strictly prohibits the export of hazardous wastes to certain countries. It does however allow the transboundary movement of hazardous waste if the state of origin does not have the ability to safely dispose of or manage it. *Basel Convention Basics*, *supra* note 168.

¹⁷³ *Parties to the Basel Convention*, BASEL CONVENTION, <http://www.basel.int/ratiff/convention.htm> (last visited Aug. 24, 2010).

¹⁷⁴ EXPORTING HARM, *supra* note 101, at 3; *The e-Waste Crisis*, *supra* note 2.

ratified the Convention.¹⁷⁵ This is a particular point of contention because although a majority of participating nations wanted the Convention to implement stricter controls, the United States used its leverage as a signing member to weaken the treaty and prevent an outright ban on all hazardous waste exports to developing nations.¹⁷⁶ Many countries were disappointed with the resulting treaty and some refused to endorse it.¹⁷⁷ As a result, less than a decade later, the international community increased the Convention's regulatory control on hazardous waste by adopting the 1995 Ban Amendment, which places a complete prohibition on the export of hazardous wastes from wealthy "Organisation for Economic Co-operation and Development" (OECD) countries¹⁷⁸ to poor non-OECD countries.¹⁷⁹ Questions remain over how many countries need to ratify the Ban Amendment in order for it to take effect.¹⁸⁰ The treaty's status has been further undermined by the fact the United States has failed to ratify it and has even taken steps to reverse it.¹⁸¹ Despite the United States' resistance, however, many Convention members have adopted the amendment, including many European countries that have simultaneously

¹⁷⁵ Templeton, *supra* note 4, at 795 (pointing out that the United States is not only one of three countries worldwide (the remaining two countries are Haiti and Afghanistan) that signed but never ratified the Convention, but that the United States is currently the world's most wasteful country and therefore potentially the Convention's largest violator).

¹⁷⁶ See Templeton, *supra* note 4, at 794–95; BAN, BRIEFING PAPER 1, *supra* note 167.

¹⁷⁷ Greenpeace denounced the treaty, claiming it sanctioned what should be considered criminal activity. BAN, BRIEFING PAPER 1, *supra* note 167 (noting that a group of African nations refused to sign the watered down treaty preferring to create their own treaty banning the import of hazardous waste to Africa).

¹⁷⁸ See *The Basel Convention Ban Amendment*, *supra* note 161. The OECD is an international partnership of thirty-two countries committed to democracy and the free market. OECD members include Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States. See generally ORG. FOR ECON. CO-OPERATION & DEV., <http://www.oecd.org/home/> (last visited Aug. 25, 2010).

¹⁷⁹ Unlike the Basel Convention, which makes exceptions in certain circumstances, the Ban Amendment strictly forbids the transboundary movement of hazardous waste without exception. See *What is the Basel Ban?*, BASEL ACTION NETWORK, http://www.ban.org/about_basel_ban/what_is_basel_ban.html (last visited Aug. 21, 2010); Kutz, *supra* note 28, at 315.

¹⁸⁰ See Templeton, *supra* note 4, at 795 (reporting that the Ban Amendment has not yet become part of the Basel Convention and that it is unclear when this will officially happen because there are multiple perspectives on how many countries must ratify the amendment before it becomes part of the convention).

¹⁸¹ Templeton, *supra* note 4, at 796. See also BASEL ACTION NETWORK, BRIEFING PAPER 4, THE BASEL BAN AMENDMENT: ENTRY INTO FORCE = NOW! (2008), available at http://www.ban.org/Library/BP04_June_2008.pdf (discussing how many countries need to ratify the Ban Amendment for it to take effect); *The e-Waste Crisis*, *supra* note 2 (reporting that the United States and Canada actively oppose the Ban Amendment).

united under independent European Union initiatives aimed at addressing hazardous waste exports and e-waste issues.¹⁸²

B. The European Union's Attempt to Control E-Waste: The WEEE Directive and RoHS Initiative

In 2003, the European Union enacted groundbreaking EPR legislation requiring its Member States to implement producer take-back programs.¹⁸³ The European Union's Waste Electrical and Electronic Equipment (WEEE) Directive requires producers to finance and coordinate collection facilities where consumers can bring their used electronic goods to be properly disposed of or recycled at no charge to the consumer.¹⁸⁴ Recognized as an example of "wholesale EPR," today the WEEE Directive is one of the most progressive EPR programs in effect.¹⁸⁵ It covers all e-waste¹⁸⁶ and requires producers to take back e-waste regardless of the device's source or quantity.¹⁸⁷

Advocates of the WEEE Directive argue that it successfully closes the "cradle to cradle" loop of polluter responsibility and captures most of the benefits of the EPR approach to e-waste.¹⁸⁸ However, because the WEEE Directive allows Member States to

¹⁸² Templeton, *supra* note 4, at 795 (noting that France, Germany, and the United Kingdom have adopted the Ban Amendment).

¹⁸³ Prior to 2003, Europe mirrored the United States' present e-waste "patchwork." While some European countries had enacted product take-back laws, Europe lacked a comprehensive e-waste policy. Belgium, Denmark, Germany, Italy, the Netherlands, Norway, and Sweden implemented product take-back policies prior to the introduction of the WEEE Directive. Sachs, *supra* note 21, at 53, 68–70 (describing Germany's 1991 Packaging Ordinance as the "first practical application of EPR in Europe").

¹⁸⁴ The WEEE also sets minimum requirements for the quantity of e-waste recovered by each Member State and specifies that Member States erect environmentally-sound treatment facilities. See WEEE Directive *supra*, note 11, at art. 6–7; Kutz, *supra* note 28, at 321; Pak, *supra* note 147, at 258.

¹⁸⁵ The WEEE is based on full cost internalization EPR methodology. Courtney, *supra* note 93, at 212, 221 (describing the WEEE "responsibility transfer" as an example of "full cost internalization" EPR policy and the "most aggressive approach toward helping producers internalize the cost of e-waste"); cf. Sachs, *supra* note 21, at 71 (arguing that while the EU's WEEE initiative places primary end-of-life responsibility on producers, municipalities and consumers are required to sort and collect products and are therefore active and necessary participants). See *supra* note 116 for a description of pure EPR.

¹⁸⁶ See Sachs, *supra* note 21, at 77 (noting that WEEE requires producers to take back small and large household appliances, telecommunications equipment, medical devices, electric tools, toys, and sports equipment).

¹⁸⁷ Courtney, *supra* note 93, at 212.

¹⁸⁸ First, WEEE supporters maintain that by forcing producers to internalize the costs associated with electronic products' end-of-life, the directive provides an economic incentive for manufacturers to design products with less hazardous materials and appliances which can be more easily recycled. Second, supporters claim it relieves the government and the taxpayers of the financial burden of dealing with e-waste disposal. Pak, *supra* note 147, at 258–59 (noting that while producers could ultimately pass the costs associated with end-of-life management on to consumers by raising the price at which they sell their products, manufacturers will have an incentive to minimize these costs so that they can retain competitive prices in the market).

assign “collective responsibility” rather than “individual responsibility,” manufacturers are not forced to manage the end-of-life costs of their own products and the WEEE Directive does not achieve true EPR.¹⁸⁹ As an alternative to assigning individual responsibility for every good each manufacturer produces, Article Eight of the WEEE Directive allows producers to pool financial resources and create collective e-waste management systems.¹⁹⁰ Generally, under these collective systems, participating manufacturers contribute to a common fund that is used to pay a third-party to manage the disposal and recycling of used electronics turned in by the public.¹⁹¹ Producers who cooperate in collective recycling generally pay a flat fee per the number of units they place on the market, rather than paying for the number of their goods that are actually recycled.¹⁹² This collective approach is favored by some because the costs associated with sorting returned electronics by type and estimating the exact costs of recycling each electronic good are expensive and complex.¹⁹³ However, this system is ultimately ineffective because it allows producers to pay a flat fee to recycle, regardless of the life span or toxicity of their products.¹⁹⁴ Under collective systems, manufacturers lose all incentives to redesign their products to contain fewer toxins, to last longer, or to be more easily disposed of.¹⁹⁵

Furthermore, because the WEEE Directive merely sets minimum requirements¹⁹⁶ and grants all twenty-five Member

¹⁸⁹ Pak, *supra* note 147, at 260; WEEE Directive, *supra* note 11, at art. 8. “Individual responsibility” means that firms are held responsible for products they actually produce, and “collective responsibility” indicates that all producers within the industry are collectively held responsible and are required to take back electronic goods, regardless of whether they manufactured that item or not. Pak, *supra* note 147, at 260.

¹⁹⁰ See *id.*; WEEE Directive, *supra* note 11, at art. 8. Several European Union Member States, such as France and Germany, have implemented forms of collective-responsibility systems. Sachs, *supra* note 21, at 78–79.

¹⁹¹ See Pak, *supra* note 147, at 260 (noting that it is far more efficient to delegate recycling to designated third-parties rather than to have each manufacture develop their own recycling plant and program).

¹⁹² *Id.* at 261–62.

¹⁹³ *Id.* at 261 (arguing that because estimating the cost of recycling individual devices and tracking how many of each manufacturer’s goods are returned is nearly impossible, tracking issues are the WEEE’s primary weakness). See also Sachs, *supra* note 21, at 76–77 (describing the high transaction costs of the EPR system by noting producer fees would have to be tailored to product types and to each firm’s individual product model).

¹⁹⁴ See Pak, *supra* note 147, at 261–62.

¹⁹⁵ *Id.* at 262; Sachs, *supra* note 21, at 76.

¹⁹⁶ See Consolidated Version of the Treaty Establishing the European Community art. 176, Dec. 24, 2002, 2002 O.J. (C 325) 33. See also Sachs, *supra* note 21, at 84–85 (noting that because the EU’s EPR Directives were established pursuant to the Treaty Establishing the European Community, which states that European Union Directives establish minimum requirements that Member States are able to exceed, Member States

States leeway in implementing additional mandates, the initiative has resulted in “complete chaos” that mirrors the United States’ current regulatory patchwork.¹⁹⁷ Inconsistencies between Member State regulations add additional transactional costs and may encourage producers to join a collective recycling initiative rather than manage their own e-waste.¹⁹⁸ Even worse, it may encourage producers and recyclers to export e-waste abroad in order to escape the EU’s spider web of environmental responsibility.¹⁹⁹

While the European Union designed the WEEE Directive to provide incentives to develop cleaner electronics, it also took aggressive steps to ensure that hazardous materials were removed from electronic devices by enacting the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment (RoHS) Directive.²⁰⁰ The RoHS Directive required that producers discontinue the use of six substances in electronic goods sold within the European Union by 2006: lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls (PBBs), and polybrominated diphenyl ethers (PBDEs).²⁰¹

The RoHS Directive provides exemptions for the use of banned substances when it is “technically or scientifically impracticable” to use a substitute or when use of a substitute will result in “negative environmental, health and/or consumer safety impacts” likely to outweigh any benefits derived from the ban.²⁰²

have the ability to establish “higher recycling targets, stricter timetables, or more reporting requirements”).

¹⁹⁷ Despite the overarching guidelines provided by the WEEE Directive, the European Union retains some inconsistent e-waste policies. JACO HUISMAN ET AL., WHERE DID WEEE GO WRONG IN EUROPE?, in PROCEEDINGS OF THE INTERNATIONAL SYMPOSIUM ON ELECTRONICS AND THE ENVIRONMENT 83 (2006), available at http://ewasteguide.info/system/files/Huisman_2006_IEEE.pdf (stating that the WEEE Directive has failed to coordinate all twenty-five Member States and has resulted in “complete chaos . . . with having 25 completely different transpositions . . . [and] inaccessible rules and agreements due to language problems”).

¹⁹⁸ See Pak, *supra* note 147, at 262.

¹⁹⁹ Critics contend Article Six of the WEEE creates another loophole in the Directive’s effectiveness. It allows parties to export e-waste outside of the European Union as long as the exporter can show the receiving facility will process the goods in accordance with the environmental standards set by the directive. See Pak, *supra* note 147, at 262 (noting the inconsistencies between Member States’ implementation of the WEEE Directive incentivizes exporting e-waste either through the WEEE’s legal channels under Article Six or through illegal channels).

²⁰⁰ See RoHS Directive, *supra* note 11, at art. 1; Kutz, *supra* note 28, at 320; Pak, *supra* note 147, at 263–64.

²⁰¹ RoHS Directive, *supra* note 11, at art. 4. RoHS prohibited the use of these substances both by manufacturers within the European Union, and also producers who imported electronic goods into the EU. See RoHS Directive, *supra* note 11, at art. 3, 4; Kutz, *supra* note 28, at 321; Templeton, *supra* note 4, at 784–85.

²⁰² RoHS Directive, *supra* note 11, at art. 5. For example, the RoHS allows producers to use lead in the glass of CRTs because there is no suitable alternative. RoHS Directive,

Given the ubiquity of the substances that the RoHS Directive bans, electronic producers argue that RoHS-type restrictions impede technological progress and force the industry to produce inferior products.²⁰³ Critics argue that the RoHS Directive poses a threat to the public by forcing manufacturers to rely on unproven technologies and materials, which may be unreliable or may have a more deleterious impact on the environment and public health than the substances that were used before the ban.²⁰⁴ Generally, however, electronics manufacturers have been able to modify their products to meet the regulation and the RoHS Directive has been successful overall.²⁰⁵ In addition to cleaning up electronics sold in the European Union, the regulation has forced producers to invest time, research, and money in new, cleaner designs and manufacturing techniques, and has encouraged international manufacturers to clean up the devices they sell throughout the world.²⁰⁶

C. Shared E-Waste Responsibility Legislation in Japan

Like the EU, Japan has also enacted legislation based on EPR principals.²⁰⁷ However, rather than placing full end-of-life management responsibility on producers as the WEEE Directive does, Japan's system distributes e-waste recycling responsibility between four different stakeholders: producers, consumers,

supra note 11, at art. 4, Annex. See also RoHS Directive, *supra* note 11, at art. 2 (outlining the scope of products affected by the directive, which does not include devices with medical or military applications). See also Pak, *supra* note 147, at 265–66 & n.149 (stating that the directive “excludes from its scope most high-reliability applications, such as medical and military devices”).

²⁰³ See Pak, *supra* note 147, at 264–65 (arguing the banned substances originally used by manufacturers were initially chosen because they were optimally suited for that particular purpose, and that substitute materials may not have provided the same characteristics).

²⁰⁴ See Commission Decision 2005 O.J. (L 214) 65, para. (1), available at <http://www.rohs.eu/english/legislation/docs/launchers/launch-2005-618-EC.html> (amending Directive 2002/95/EC to tolerate “certain concentration values” of banned substances). The electronics industry, which faced significant challenges and costs when redesigning their products and reconfiguring their factories and supply chains to accommodate substance bans, has been critical of the RoHS Initiative. Pak, *supra* note 147, at 264–66 (stating restrictions placed on the use of lead, a common component in soldering applications, caused the formation of “tin whiskers,” a phenomenon which led to the shutdown of a nuclear power plant in 2005). See generally HENNING LEIDECKER ET AL., NASA, TIN WHISKERS: A HISTORY OF DOCUMENTED ELECTRICAL SYSTEM FAILURES (2006), available at http://nepp.nasa.gov/WHISKER/reference/tech_papers/2006-Leidecker-Tin-Whisker-Failures.pdf; cf. Pak, *supra* note 147, at 266 (reporting that although some opponents argue RoHS places too narrow a restriction on the electronics industry, RoHS also faces criticism from those who feel both the exceptions for banned substances without substitutes and high-reliability applications and the RoHS compliance standards are too broad).

²⁰⁵ See Kutz, *supra* note 28, at 328.

²⁰⁶ See Sachs, *supra* note 21, at 93–94.

²⁰⁷ See ETBC, *Extended Producer Responsibility*, *supra* note 132.

retailers, and the government.²⁰⁸ In 2001, Japan implemented the Home Appliance Recycling Act (SHAR), legislation mandating that consumers discard bulky electronic items at specified collection locations maintained by large appliance retailers and local government agencies.²⁰⁹ Producers are responsible for the end-of-life processing after collection and are charged with developing the infrastructure and facilities needed to transport and recycle discarded electronic products in an environmentally-sound manner.²¹⁰ Japanese consumers fund SHAR collection and recycling by paying disposal fees when they drop their used electronic goods off at the collection centers.²¹¹

While SHAR initially applied only to large appliances, in 2001, the Revised Law for Promotion of Effective Utilization of Resources (Recycling Promotion Law) extended recycling requirements to used PCs and other electronic accessories such as mice and keyboards.²¹² Like SHAR, the Recycling Promotion Law divides end-of-life responsibility between consumers, retailers, the government, and manufacturers.²¹³ However, while consumers still finance the recycling system under the Recycling Promotion Law, they do so primarily through ARF fees at the time of purchase and are only charged end-of-life disposal fees if they purchased the electronic device before the law's effective date.²¹⁴

By requiring consumers to both physically deliver their used electronic goods to specified collection centers and to pay end-of-life fees, Japan's e-waste policies may encourage some to illegally

²⁰⁸ Pak, *supra* note 147, at 271–72.

²⁰⁹ See Catherine K. Lin et al., *Globalization, Extended Producer Responsibility and the Problem of Discarded Computers in China: An Exploratory Proposal for Environmental Protection*, 14 GEO. INT'L ENVTL. L. REV. 525, 541–42 (2002). The Home Appliance Recycling Act is known as SHAR because it was originally named the “Specified Home Appliance Recycling Law.” Bulkier electrical and electronic products covered by SHAR include televisions, refrigerators, washing machines, and air conditioners. INFORM, APPLIANCE, *supra* note 12. See also ETBC, *Extended Producer Responsibility*, *supra* note 132 (stating that large appliance retail stores, local post offices, and municipalities serve as collection points in Japan).

²¹⁰ Under SHAR, the largest electronics manufacturers bear the weight of the responsibility for building the infrastructure and facilities needed to appropriately process e-waste. In turn, smaller producers are required to negotiate agreements to access these networks. See INFORM, APPLIANCE, *supra* note 12.

²¹¹ Pak, *supra* note 147, at 272 & n.196 (noting that manufacturers determine the recycling fees for their own products and these fees typically range from 2,400 to 4,600 yen—or \$21 to \$41). Japanese consumers pay two fees when they discard e-waste at collection centers: a collection fee which covers the cost of collection, and a recycling fee based on the cost of recycling that particular item. INFORM, APPLIANCE, *supra* note 12.

²¹² Copy machines are also regulated under the disposal guidelines. See Kutz, *supra* note 28, at 322; INFORM, PC, *supra* note 12.

²¹³ ETBC, *Extended Producer Responsibility*, *supra* note 132.

²¹⁴ Pak, *supra* note 147, at 272–73; INFORM, APPLIANCE, *supra* note 12.

dump unwanted electronics rather than following the policy.²¹⁵ However, by offering a hybrid of EPR and ARF policies, Japan's e-waste initiatives offer an innovative approach to the e-waste issue.²¹⁶

Japan's allocation of responsibility between producers, consumers, retailers, and the government ensures that the parties who contribute to the e-waste stream and those with the means to resolve the e-waste issue have an incentive to do so.²¹⁷ Consumers are large contributors to the e-waste stream.²¹⁸ By making consumers responsible for delivery and the cost of safely disposing of obsolete electronics, Japan's policies educate and alert the public to the e-waste issue, a problem that goes widely unnoticed in most other developed nations.²¹⁹ Because the amounts of disposal fees vary depending on the cost of recycling individual brands and items, Japan's system not only encourages consumers to modify their purchasing habits and buy less often, but it also provides incentives to buy environmentally sound products.²²⁰

By allocating collection responsibilities between retailers and the government, Japan's policies efficiently utilize existing networks that have the ability to coordinate collection centers, and, by assigning the cost to consumers, these policies ensure taxpayers do not bear the financial burden of the system.²²¹ By holding manufacturers individually responsible for their goods, SHAR and the Recycling Promotion Law create economic incentives for producers to design environmentally sound electronics with longer product lives.²²² Although it allows producers to work within a collaborative network, Japan's policy enforces individual EPR by requiring manufacturers to take physical responsibility for the disposal and recycling of their waste and allowing them to determine disposal costs for their

²¹⁵ One month after SHAR came into effect, illegal e-waste dumping in Japan increased by twenty-five percent. Lin et al., *supra* note 209, at 542.

²¹⁶ *Producer Takeback: Japan—Electronics*, CLEAN PRODUCTION ACTION, <http://www.cleanproduction.org/Producer.International.Japan.Electronics.php> (last visited Aug. 21, 2010) (reporting that Japan's take-back system has "stronger feedback between upstream and downstream actors" than the WEEE).

²¹⁷ See Pak, *supra* note 147, at 275–78.

²¹⁸ Pak, *supra* note 147, at 278. See also Fordyce, *supra* note 47, at 539 (noting the California legislature intended that consumers bear some of the financial responsibility for e-waste recycling when designing Health and Safety: Chapter 526).

²¹⁹ Pak, *supra* note 147, at 275–78. The EPA has stated that most computer users are unaware of the e-waste problem. GLOBAL FUTURES FOUNDATION, *COMPUTERS*, *supra* note 128.

²²⁰ See Pak, *supra* note 147, at 275–78.

²²¹ INFORM, PC, *supra* note 12, at 1–2 (arguing that Japan's postal service offers "widespread and easily recognizable collection infrastructure").

²²² See Pak, *supra* note 147, at 272–73.

own products.²²³ These provisions retain the cost-based feedback loop that some critics argue is lost under the WEEE Directive's collective responsibility opt-out.²²⁴

The successes and failures of international e-waste schemes provide valuable guidance for the United States. As the following section will discuss, the United States should look to international approaches for direction and implement comprehensive e-waste policy at a national level.

IV. SOLUTIONS TO THE E-WASTE CRISIS

While each system has inherent flaws when implemented independently, taken together, EPR and ARF methodologies offer a possible solution to the e-waste crisis. Therefore, this section proposes that the United States decrease the detrimental impact of e-waste by pursuing a hybrid e-waste policy founded upon EPR methodology that 1) reduces e-waste's volume and toxicity through EPR and ARF incentive-based regulations, and 2) prevents the continued export of hazardous waste abroad through the ratification of the Basel Convention and Ban Amendment.

A. The Potential of EPR and ARF as E-Waste Solutions

As discussed above, ARF systems require the government to coordinate the disposal and recycling of used appliances while consumers cover the cost by paying an advance fee when they purchase new electronics.²²⁵ Supporters of the ARF method²²⁶ claim it is preferable because it places the burden on the parties who use and benefit from the electronic goods,²²⁷ and because fees collected from consumers pool to provide funding for the disposal and recycling of all waste, whether it is orphan waste,²²⁸ the producer of which cannot be readily identified, or historic

²²³ Pak, *supra* note 147, at 273.

²²⁴ See *id.*

²²⁵ See *supra* Part II.C.1.

²²⁶ Although future policies may change, California has been a leading advocate of the ARF system and has implemented an advance disposal fee system under the E-waste Recycling Act of 2003 (EWRA). See *supra* Part II.C.2 for a discussion of California's e-waste regulation. See also Courtney, *supra* note 93, at 218–19.

²²⁷ Consumers who purchase electronic goods are partially responsible for the e-waste cycle, and therefore “should bear some of the burden of the environmental consequences of these decisions.” Pak, *supra* note 147, at 278.

²²⁸ “Orphan e-waste” is waste for which the manufacturer cannot be identified or where the manufacturer is no longer in business and has no successor-in-interest. NYC's *Electronic Equipment Recycling and Reuse Act*, NYC.GOV, http://www.nyc.gov/html/nycwasteless/html/in_business/electroniclaw_reqs.shtml (last visited Aug. 19, 2010).

waste²²⁹ that was manufactured prior to the regulation's effective date.²³⁰

However, because ARF recycling funds are limited to the fees collected from consumer purchases, funds available for recycling may be insufficient to cover the cost of managing orphan and historic waste, which means the costs will ultimately be passed on to taxpayers.²³¹ Critics also claim that the ARF system will place a visible tax on electronic goods that will encourage consumers to purchase electronics in states without ARFs in order to avoid the fee.²³² This could potentially lead to decreased revenue generation within the ARF jurisdiction and a depletion of available ARF funds.²³³ Additionally, because ARF systems place the financial and physical burden of end-of-life management on consumers and the government, rather than on the manufacturers, pure ARF systems weaken producers' incentives to minimize the environmental impact and costs associated with their goods.²³⁴

Taken independently, EPR is a superior system because it not only lifts the burden off of consumers and taxpayers,²³⁵ but it encourages manufacturers to evaluate and internalize the end-of-life costs of their products.²³⁶ Accordingly, manufacturers who know they will ultimately be responsible for disassembling and recycling the electronic goods they produce are more likely to use

²²⁹ The term "historic e-waste" applies to electronic goods produced prior to the implementation of applicable e-waste regulations. Courtney, *supra* note 93, at 221.

²³⁰ Electronic manufacturers generally prefer ARF systems because they do not personally bear physical or economic responsibility for old electronic goods. Kutz, *supra* note 28, at 323–24. *See also* Sachs, *supra* note 21, at 95–96 (noting that producers generally favor ARF systems because they leave the manufacturer free from collection and recycling responsibilities but that some producers, such as Dell and Hewlett-Packard, favor EPR take-back regulations because they want to profit from their own efforts to go green and produce more recyclable products).

²³¹ *See* Kutz, *supra* note 28, at 324.

²³² *See* NATURAL RESOURCES DEFENSE COUNCIL, STATEMENT OF THE NATURAL RESOURCES DEFENSE COUNCIL BEFORE THE NEW YORK CITY COUNCIL'S COMMITTEE ON SANITATION AND SOLID WASTE MANAGEMENT REGARDING INTRO. 643 THE ELECTRONIC EQUIPMENT RECYCLING AND REUSE ACT OF 2005 5 (Oct. 24, 2005), http://www.computertakeback.com/legislation/lawsuit_vs_nyc/NRDC_filings/B.1--Testimony%20on%20Intro%20643.pdf.

²³³ *See id.* at 5.

²³⁴ Under ARF programs, producers do not have financial incentives to design their equipment with less toxic materials or in a way that the products could be more easily recycled and dismantled. *See id.*

²³⁵ *See* Kutz, *supra* note 28, at 324–35 (noting that in the absence of comprehensive federal regulation dealing with e-waste, local government entities bear the physical and financial burden of managing e-waste).

²³⁶ *Id.* at 325. *See also* Key Elements of EPR Plan, CLEAN PRODUCTION ACTION, <http://www.cleanproduction.org/Producer.Key.Examples.php> (last visited Jan. 10, 2010) [hereinafter CPA, *Key Elements of an EPR Plan*]; ETBC, *Extended Producer Responsibility*, *supra* note 132.

less toxic materials in the production process and design products with longer life spans that are easier to disassemble and recycle.²³⁷ Some producers, such as Dell and Hewlett-Packard, favor individual EPR take-back regulations because they enable them to capitalize on their current efforts to produce environmentally sound products.²³⁸

B. Proposed E-Waste Policy for the United States

Although it has not yet garnered the full attention of Congress, e-waste is the fastest growing waste stream within the United States.²³⁹ With Americans discarding 133,000 electronic units each day²⁴⁰ and shipping 5,126 containers worth of e-waste to developing countries each year, e-waste presents a formidable challenge.²⁴¹ In order to adequately address this crisis, the United States should implement EPR based federal e-waste policy that: 1) minimizes the extent and toxicity of the e-waste stream, and 2) stops the export of hazardous waste abroad.²⁴²

1. The United States Should Decrease the Impact of the E-Waste Stream by Decreasing its Volume and Toxicity

Successful e-waste policy must decrease the flow and impact of discarded electronics.²⁴³ The first step in this process is slowing the rate at which electronic goods become obsolete. While manufacturers have long capitalized on continual revenue streams generated by short-lived electronic appliances, e-waste policy must incentivize producers to design products that are durable and can be repaired and upgraded.²⁴⁴ The second step is to implement regulatory controls and economic-based incentives that persuade producers to design electronic goods that can be easily disassembled and recycled.²⁴⁵

As the third and final step, the United States should phase out hazardous materials by adopting legislation that mirrors the

²³⁷ See ETBC, *Extended Producer Responsibility*, *supra* note 132.

²³⁸ See Sachs, *supra* note 21, at 95–96.

²³⁹ *The e-Waste Problem*, *supra* note 5.

²⁴⁰ See Drayton, *supra* note 79, at 149.

²⁴¹ See ETBC, *Problem: Waste Dumping*, *supra* note 16 (reporting that if all the e-waste America exports each year were placed in shipping containers and stacked on top of one another, they would reach eight miles high).

²⁴² See *Federal Legislation on E-Waste*, ELECTRONICS TAKEBACK COALITION, http://www.computertakeback.com/legislation/federal_legislation.htm (last visited Aug. 19, 2010); ETBC, *BRIEFING BOOK*, *supra* note 4, at 7, 9.

²⁴³ Kutz, *supra* note 28, at 317.

²⁴⁴ *Id.* at 320.

²⁴⁵ Manufacturers should be encouraged to use common designs, interchangeable parts, and materials which can be easily recycled and are non-toxic. Kutz, *supra* note 28, at 318–19.

EU's RoHS Directive.²⁴⁶ While prescriptive systems like the EPR and ARF have the potential to encourage green design changes, the ubiquity of toxic substances in electronic products and the deleterious environmental impact of these materials require that the United States pursue a prohibitory approach that specifies a date for the discontinuance of certain hazardous materials.²⁴⁷ Decisive prohibitory regulations should ban the same six substances that RoHS Directive has targeted.²⁴⁸ These substances have already been identified as harmful toxins, and the success of the RoHS Directive and California's EWRA demonstrate that, contrary to critics' claims, it is possible to replace these substances with non-toxic substitutes without crippling the electronics industry or seriously undermining the technological advances upon which today's society depends.²⁴⁹ The campaigns of the European Union and California have been so successful that some international electronic producers that sell within the United States, China, and Japan have already begun to take steps to remove these substances from their factory lines.²⁵⁰ Like the EU's initiative, U.S. regulations should provide

²⁴⁶ See Pak, *supra* note 147, at 276; Sachs, *supra* note 21, at 93.

²⁴⁷ Krishna & Kulshrestha, *supra* note 38, at 79 (distinguishing prohibitory approaches which specify the outer limits of restrictions, like the RoHS initiative, from prescriptive approaches, like the WEEE, which outline minimum standards that must be followed). See also Sachs, *supra* note 21, at 68 (arguing that existing "command-and-control chemical ban[s]" have been more influential in bringing about product design changes).

²⁴⁸ RoHS required the following materials be discontinued by 2006: lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls (PBBs) and polybrominated diphenyl ethers (PBDEs). RoHS Directive, *supra* note 11. See also Pak, *supra* note 147, at 276 (advocating that regulations banning the use of hazardous materials in electronic goods in the United States should be consistent with existing restrictions in the international community).

²⁴⁹ Innovative manufacturers have already started designing environmentally sound appliances and have begun using biodegradable "bioplastics" in the production of electronics. See e.g., Kutz, *supra* note 28, at 318–19, 328 (reporting that Motorola has begun experimenting with a biodegradable cell phone cover that decomposes into a sunflower seed and Swedex has created timber-encased computer screens, and accessories; and also noting that toxin reduction regulations have been successful in Europe and Japan).

²⁵⁰ Joel Boon, Note: *Stemming the Tide of Patchwork Policies: The Case of E-Waste*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 731, 753–54 (2006) (noting that many countries and producers were influenced by the EU's RoHS initiative and describing the substance ban's impact on China, Japan and the United States as an intentional and designed "contagion"). While any substance ban should provide a transition period to allow producers to modify their production systems, given the success and global market pressure the RoHS and California's EWRA have already exerted on the electronics' industry, I disagree with other scholars' assertions that the U.S. hazardous substances bans should be implemented in phases in contrast to the EU's RoHS Directive, which went into full force in 2006. Compare Sachs, *supra* note 21, at 93 (noting that given the size of California's market, California's adoption of the RoHS Directive has the potential to "elevate the RoHS into a kind of global electronics standard" with the strength to indirectly modify electronic components worldwide), with Pak, *supra* note 147, at 276

exceptions that allow producers to use banned substances when it is necessary to do so for technical, scientific, or environmental reasons.²⁵¹

2. EPR Should Form the Foundation of a Hybrid E-Waste Policy in the United States

United States e-waste policy should be founded on a hybrid EPR take-back system.²⁵² EPR provides the framework to manage existing and future e-waste, and it appropriately places responsibility on the producer—which is both the primary polluter²⁵³ and also the party most able to address the design issues that form the root of the e-waste problem.²⁵⁴ However, while having a system founded on EPR take-back methodology is central to creating a policy that provides influential feedback incentives for manufacturers to design more environmentally sound electronics, EPR alone will not address all facets of the e-waste crisis.²⁵⁵

The United States, therefore, should pursue a hybrid approach, similar to Japan's, that distributes financial, physical, economic, and informational responsibility between multiple parties and incorporates ARF policies into a primarily EPR framework. Federal e-waste policy should distribute end-of-life responsibilities and costs between producers, consumers, retailers, and the government. Producers should assume primary physical and economic responsibility for recycling and disposal.²⁵⁶ In order to maintain the effectiveness of the EPR feedback loop, U.S. policy should promote individualized EPR systems and encourage manufacturers to take back and recycle

("[U]nlike the EU RoHS Directive, the U.S. RoHS should be gradually phased in to give manufacturers time to adapt.").

²⁵¹ See Pak, *supra* note 147, at 276 (recommending that an immediate exception be granted where the use of banned substances is needed for technical or scientific advancement, but that in order to maintain the integrity of the system, these exceptions should be determined on an individual basis).

²⁵² See Kutz, *supra* note 28, at 326–28. See also Pak, *supra* note 147, at 275 (advocating for a "moderate" EPR system with equitable distribution between the industry, manufacturers, consumers and the public); Boon, *supra* note 250, at 756 (arguing the United States should implement a take-back system but not specifying it should be EPR).

²⁵³ By designing, creating, and distributing toxic electronic goods, manufacturers are easily identifiable as a primary polluter. See Krishna & Kulshrestha, *supra* note 38, at 91.

²⁵⁴ With the dual technical and financial ability to address the e-waste issue both during the upstream design process and the downstream disposal stage, manufacturers have an unparalleled opportunity to mitigate the e-waste crisis' contributing factors. See Kutz, *supra* note 28, at 325.

²⁵⁵ See Courtney, *supra* note 93, at 227 (describing EPR as "the most robust and flexible of the options currently on the table").

²⁵⁶ See CPA, *Key Elements of an EPR Plan*, *supra* note 236.

their own products.²⁵⁷ Given the significant physical and financial burden of developing environmentally sound disposal and recycling systems, however, federal regulations should allow collective EPR schemes.

Producers should be allowed to collectively create and manage shared disposal and recycling facilities or coordinate the development of such infrastructure through third party recyclers.²⁵⁸ By ensuring that producers that choose to work within a collective disposal infrastructure pay the costs directly associated with their products, the U.S. system would avoid the disconnect in the feedback loop that the WEEE Directive has experienced with its collective opt-out provision.²⁵⁹ In addition to paying disposal and recycling fees based on the actual end-of-life processing of their products, manufacturers should also pay charges based on whether their devices are durable, repairable, upgradable, and can be easily disassembled.²⁶⁰

While some critics maintain that the expense of coordinating collective systems and determining individual producers' costs is overly burdensome, Japan's success demonstrates that a collective EPR option that assigns individual costs is possible. If the collective system proves too arduous for certain manufacturers, these groups have the option to implement their own individual take-back programs. Furthermore, funding for the transactional expenses associated with determining and assigning individual product costs can be provided by consumers.

Although EPR policies are the primary vehicle with which to influence producers' design behavior, consumer fees should also be incorporated into federal policy.²⁶¹ Buyer fees provide a

²⁵⁷ See Sachs, *supra* note 21, at 77–80 (criticizing the WEEE's collective responsibility provisions and arguing individual responsibility is necessary to incentivize clean design changes). See also CPA, *Key Elements of an EPR Plan*, *supra* note 236 (advocating for individual responsibility).

²⁵⁸ Japan has achieved success by allowing smaller manufacturers to contract their recycling out to larger recyclers. See generally INFORM, APPLIANCE, *supra* note 12; ETBC, *Extended Producer Responsibility*, *supra* note 132.

²⁵⁹ See Pak, *supra* note 147, at 276–77.

²⁶⁰ Fees that provide producers incentives to design durable goods that can be repaired and upgraded will decrease the volume of obsolete electronics entering the waste stream. Likewise, charges that encourage manufacturers to design electronics that can be easily disassembled or recycled decrease the likelihood these devices will be shipped abroad in order to avoid the costs domestic disposal. See Kutz, *supra* note 28, at 320 (suggesting that producers can slow how quickly their electronics become obsolete by specifically designing products for “durability, upgradability and disassembly” and which can be “easily repairable and upgradable”).

²⁶¹ I disagree with scholars who suggest that consumer based fees should be used as a temporary remedy that should be phased out after EPR systems gain strength or as an alternative which manufacturers can opt out of. Consumers' purchasing habits spur the e-waste cycle. It is important therefore that e-waste polices continually utilize consumer

continual source of revenue to aid the management of orphan and historic waste, the transactional costs associated with collecting and transporting e-waste to recycling facilities, and the costs of maintaining a system capable of determining and assigning individual disposal costs to producers operating within collective EPR systems.²⁶²

Consumers perpetuate the continual growth of the e-waste stream and should shoulder partial responsibility for the negative externalities associated with their purchasing habits.²⁶³ Publicized consumer fee-based systems present an ideal platform from which to alert the public to the e-waste crisis and to encourage better buying decisions.²⁶⁴ The United States should implement ARFs rather than end-of-life disposal charges because drop-off fees may encourage illegal “midnight” dumping, as evidenced by Japan’s SHAR regulation.²⁶⁵

Opponents of California’s ARF system argue that ARF regulations will merely encourage consumers to purchase their electronics outside of ARF jurisdictions, but a federal system would eliminate this concern.²⁶⁶ If EPR were to form the foundation of the federal e-waste policy, consumer fees could be smaller than those currently imposed in California, where ARFs fund the entire take-back system, and consumers would have little incentive to purchase from abroad because they would have to pay high international shipping costs.²⁶⁷ Even if a consumer were to purchase electronics from international retailers, those goods would still be subject to EPR at the end of their life cycles, thus minimizing the impact of the lost ARF revenue.

based fees in order to ensure consumers are aware of the e-waste issue and have ongoing financial incentives to modify their purchasing habits. *Compare* Sachs, *supra* note 21, at 73–75 (advocating a consumer based fee and noting that “[f]ocusing attention on producer responsibility . . . may constitute a license for consumers to continue their unsustainable, high consumption lifestyles”), and Pak, *supra* note 147, at 277–78 (suggesting consumer based fees raise “consumer awareness . . . [and create] market demand for ecological design”), with Sachs, *supra* note 21, at 96 (proposing an ARF “opt-out” that would allow manufacturers to impose or eliminate ARF fees on their products).

²⁶² See Kutz, *supra* note 28, at 323–24; Sachs, *supra* note 21, at 96.

²⁶³ See Pak, *supra* note 147, at 277–78; Sachs, *supra* note 21, at 65, 73–74, 95–96.

²⁶⁴ See Sachs, *supra* note 21, at 96.

²⁶⁵ Following SHAR’s implementation, 9,692 units of e-waste were illegally dumped between April and June 2000 in Japan. See Lin et al., *supra* note 209, at 542.

²⁶⁶ See Courtney, *supra* note 93, at 219–20 (reporting that ARF critics claim consumers will purchase their electronics out of state to avoid paying fees).

²⁶⁷ See Pak *supra* note 147, at 278. See also Courtney, *supra* note 93, at 219–20 (noting it is unlikely consumers would purchase electronics that usually cost one thousand dollars or more out of state in order to avoid paying ten dollar ARF fees). As of January 1, 2009, California’s fees ranged from eight to twenty-five dollars. CALRECYCLE, *supra* note 134. Because California’s ARF fees have been implemented without notable consumer backlash and have by enlarge proven to be sustainable, I propose a federal fee between five to fifteen dollars, only slightly less than that of California’s.

Finally, government and electronics retailers should take primary responsibility for the physical collection of used electronics, as has been required in Japan. Both entities have visible and familiar collection locations that are easily accessible to the public, and they have existing infrastructures with which to efficiently coordinate large-scale collection initiatives.²⁶⁸ Because producers and consumers will share the economic burden of the national take-back system, taxpayers and retailers will remain free of the financial costs of the system.

3. U.S. Policy Should Stop the Export of E-Waste

To fully address the e-waste issue, U.S. e-waste policy must regulate the export of toxic electronics to developing countries.²⁶⁹ By influencing producers' objectives and consumers' buying habits, EPR and ARF systems have the potential to clean up electronics and reduce the volume of the e-waste stream in the future.²⁷⁰ However, these policies cannot fully address the dangers that existing and historic e-waste pose to developing countries.²⁷¹ The United States, therefore, should ratify both the Basel Convention and the Ban Amendment.²⁷² By doing so, the United States would assume responsibility for its contribution to the e-waste stream, take affirmative steps to discontinue its toxic exploitation of developing nations, and spur the momentum necessary to make the Ban Amendment officially part of the Basel Convention.²⁷³

Opponents to the Ban Amendment claim that the treaty will harm the fragile economies of developing countries that currently trade in e-waste and will widen the digital divide by diminishing

²⁶⁸ The United States should follow Japan's example and utilize post offices as collection centers. See Pak, *supra* note 147, at 275 ("Local municipalities would be in the best position to handle the e-waste collection responsibilities because the [municipal solid waste] collection infrastructure already exists."). See also INFORM, PC, *supra* note 12 (describing the collection process at Japan post offices).

²⁶⁹ See Kutz, *supra* note 28, at 319, 328. See also Sachs, *supra* note 21, at 92–93 (arguing that when the United States creates e-waste policy it should be founded on the theory that e-waste should be managed within its own borders); Templeton, *supra* note 4, at 796.

²⁷⁰ See Courtney, *supra* note 93, at 225; Sachs, *supra* note 21, at 96.

²⁷¹ See BLEIWAS & KELLY, *supra* note 19 (reporting that seventy-five percent of e-waste is stored by its owners); GAO REPORT, *supra* note 1, at. 40–41 (recommending the EPA submit a legislative package ratifying the Basel Convention to Congress).

²⁷² Templeton, *supra* note 4, at 796. See also GAO REPORT, *supra* note 1, at 34–37 (revealing that ratifying the Basel Convention would help fill some of RCRA's gaps because the Convention has a broader definition of what constitutes hazardous waste that ought to be controlled than RCRA).

²⁷³ See Templeton, *supra* note 4, at 796 (noting that by ratifying the Basel Convention and the Ban Amendment the United States could encourage countries such as Canada and Australia to follow suit).

these countries' access to affordable electronics.²⁷⁴ The Ban Amendment, however, only prohibits the export of hazardous waste to non-OECD countries and does not prevent the export of clean electronics.²⁷⁵ Therefore, by implementing the Ban Amendment while simultaneously introducing EPR, ARF, and substance ban initiatives—policies designed to clean up the e-waste stream—the United States will prevent the export of electronics containing hazardous materials and will create a source of clean electronics that can be shipped abroad.²⁷⁶

4. Proposed Legislation

In order to successfully decrease the toxicity and volume of the e-waste stream and stop the flow of toxic discarded electronics to developing countries, Congress must implement uniform, nationwide regulations with effective enforcement mechanisms and sufficient breadth to govern all harmful electronics.²⁷⁷ As has been discussed, many of the United States' current environmental regulations fail to govern e-waste because they focus the environmental effects of the manufacturing process.²⁷⁸ Future legislation must take a more holistic approach and address the environmental impact of electronics at every stage of their lifecycle.²⁷⁹

Existing environmental regulations, such as the RCRA, are also ineffective because many electronics fall outside their governance.²⁸⁰ Lawmakers should modify the RCRA so that it governs existing e-waste and future generations of electronics.²⁸¹ The RCRA's narrow definition of "hazardous" should be expanded to include potentially hazardous items, taking into account that, while items may not release toxins in their natural state, they

²⁷⁴ See *id.*

²⁷⁵ See *Basel Convention Basics*, *supra* note 168; BAN BRIEFING PAPER 1, *supra* note 167.

²⁷⁶ See Templeton, *supra* note 4, at 796 (arguing that critics who claim the Ban Amendment would be harmful to the economies of developing nations who capitalize on the e-waste trade undervalue the significant health and environmental dangers this trade presents). See also *60 Minutes*, *supra* note 7 (reporting Basel Action Network's argument that impoverished workers should never have to choose between "poverty and poison").

²⁷⁷ See Kutz, *supra* note 28, at 329.

²⁷⁸ See Sachs, *supra* note 21, at 53, 57–58.

²⁷⁹ See *id.* at 53, 98.

²⁸⁰ Implemented long before today's current e-waste crisis could be foreseen, these regulations categorize the substances they govern too narrowly and provide too many exemptions to be effective. See GAO REPORT, *supra* note 1, at 31–32 (stating that even when fully enforced, the EPA's current e-waste regulation, the CRT rule, only reaches a small percentage of e-waste).

²⁸¹ See Kutz, *supra* note 28, at 328 (arguing that, given how quickly technology changes the items available in the electronics market, legislation must define and govern current and future electronic equipment in order to be effective); Templeton, *supra* note 4, at 787 (reporting that RCRA is currently inadequate).

may do so when disassembled or incinerated.²⁸² In order to better govern potentially hazardous goods, the EPA should remove the provision in the RCRA that exempts CRTs labeled for reuse or repair from the notice and consent requirements to which other hazardous substances are held.²⁸³

Finally, federal e-waste policy must set a uniform national standard and include adequate enforcement mechanisms.²⁸⁴ To avoid the inconsistent “patchwork” the European Union has experienced, Congress should establish firm, nationwide requirements and give the EPA the authority to enforce e-waste regulations and prosecute violators.²⁸⁵ When creating e-waste legislation, Congress should simultaneously implement a fine-based system to encourage compliance from producers, retailers, and consumers.²⁸⁶ Additionally, producers and retailers that fail to meet the requirements imposed by the hybrid EPR and ARF system should be forbidden from selling within the United States.²⁸⁷ Lawmakers could minimize the burden that enforcement imposes upon the government and the EPA by requiring stakeholders to regularly issue public reports on their compliance with e-waste regulations.²⁸⁸

²⁸² The GAO has recommended that the EPA revise RCRA’s definition of “hazardous” to include “products that can pose risks upon disassembly or reclamation.” GAO REPORT, *supra* note 1, at 32, 40 (noting that RCRA’s narrow definition of “hazardous” stands in “stark contrast” to the ideology of Basel Convention members who seek to regulate *potentially* hazardous items).

²⁸³ See GAO REPORT, *supra* note 1, at 22 (stating that parties seeking to export CRTs for recycling are required to contact the EPA and obtain the consent of the importing country but that parties seeking to export CRTs for reuse are only required to notify the EPA of their intention).

²⁸⁴ See Krishna & Kulshrestha, *supra* note 38, at 90; Kutz, *supra* note 28, at 329.

²⁸⁵ See HUISMAN ET AL., *supra* note 197 (arguing that the WEEE has resulted in regulatory chaos because European Member States are allowed to independently implement the Directive). The GAO reports that the EPA currently lacks the legal authority and enforcement power to take back waste after it has been shipped abroad. Between 1998 and 2001, a chemical company called Pyramid Chemicals illegally shipped twenty-nine containers of hazardous waste abroad. GAO REPORT, *supra* note 1, at 35. However, when officials in the Netherlands found leakage coming from the containers and discovered the illegal substances, the EPA lacked the legal ability to have the shipment returned to the United States for proper processing. *Id.* (reporting that should the United States ratify the Basel Convention, Congress would need to give the EPA or another appropriate agency legal authority before the convention’s could be enforced domestically).

²⁸⁶ See Krishna & Kulshrestha, *supra* note 38, at 90 (advocating for a fine-based system, but also arguing for criminal prosecution of those who violate environmental laws).

²⁸⁷ See Kutz, *supra* note 28, at 329.

²⁸⁸ *Id.* (suggesting e-waste legislation requires that producers publish periodic public reports in order to ensure compliance).

CONCLUSION

Technological advances in the last quarter-century have accelerated the standard of living in most industrialized nations and introduced electronics that the world had never before imagined. This technology continues to bound forward as producers introduce new gadgets and improved models every few months. The benefits associated with these new electronics, however, do not outweigh the detrimental impact these toxic devices have on human health and the environment as they flood the waste stream.

By not implementing regulations that adequately address the e-waste issue domestically or abroad, the United States has failed to successfully manage this crisis. Instead, it has been content to reap the benefits of technology and shift the harmful effects of the electronics industry onto impoverished developing nations that lack the infrastructure and ability to manage e-waste with adequate health and environmental protections.

The United States is a leading contributor to the e-waste stream. It has the wealth, regulatory ability, market power, and moral responsibility to address the e-waste crisis by decreasing the volume and toxicity of the e-waste stream and to ensure that poor nations are not saddled with the burden of disposing the industrialized world's toxic throwaways.

In order to address the e-waste issue, regulations must be broadly implemented at a federal level, and should include both prescriptive initiatives that encourage producer and consumer support and prohibitory regulations that ban the use of specified toxic substances and prevent the export of hazardous wastes to developing nations. The United States should implement EPR and ARF take-back systems that assign end-of-life responsibility to multiple stakeholders in a way that encourages the development of more environmentally friendly electronics and decreases the toxicity and volume of the waste stream. For the children of Guiyu and the other low-wage laborers who toil over open acid baths in impoverished communities around the world, it is imperative that the United States take decisive action to address the e-waste crisis and its own contribution to the toxic waste stream.