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DOLLARS FOR VICTIMS OF A "VICTIMLESS" CRIME: A DEFENSE OF DRUG DEALER LIABILITY ACTS

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INTRODUCTION

Although often perceived as a "victimless crime," drug use perpetuated by the illegal drug market continues to harm many members of society, with casualties including non-users as well as users themselves. Worse yet, criminals continue to experience massive profits as the drug trade within the United States generates revenues in excess of $65 billion per year.[1] In 1992, former United States Attorney Daniel Bent proposed legislation that would provide third party plaintiffs with a civil remedy for injuries caused by the use of illegal drugs.[2] Bent's proposal gained notoriety after the American Legislative Exchange

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[1] EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF NATIONAL DRUG CONTROL POLICY. WHAT AMERICA'S USERS SPEND ON ILLEGAL DRUGS, 3 (2001) *available at* http://www.whitehousedrugpolicy.gov/publications/pdf/american_users_spend_2002.pdf.

[2] Clinton W. Taylor, *The Oklahoma Drug Dealer Liability Act: A Civil Remedy for a "Victimless" Crime*, 52 OKLA. L. REV. 227, 234 (1999) (citing *Ill. Permits Suits Against Drug Dealers*, NAT'L L. J., Aug. 28, 1995, at A8; Arnold Ceballos, *New State Laws Let People Sue Drug Dealers*, WALL ST. J., July 16, 1996, at B1).

Council[3] adopted the model statute.[4] Legislators took notice, and since 1994, fifteen jurisdictions have enacted legislation imposing civil liability on drug dealers.[5] These laws, collectively referred to as Drug Dealer Liability Acts ("DDLAs"), allow third parties to bring a civil action against a drug dealer after suffering harm at the hands of a drug user. For example, under Oklahoma's Drug Dealer Liability Statute, a parent-plaintiff could sue a defendant for damages on grounds that the plaintiff's son committed suicide while under the influence of drugs provided by the defendant.

While embraced by legislators and voters, drug dealer liability statutes have been criticized by some legal scholars for circumventing the due process clause, violating fundamental principles of tort law, and, in some cases, infringing upon defendants' protection against double jeopardy.[6] Specifically, critics of drug dealer liability statutes take issue with the relaxed causation requirements and imposition of a civil sanction after some defendants suffer a criminal penalty.[7]

Despite such criticisms, however, drug dealer liability statutes should be held constitutionally valid. Legislators have

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[3] The American Legislative Exchange Council is a national law reform organization consisting of over 2,500 bipartisan state legislators.

[4] Taylor, *supra* note 2.

[5] ARK. CODE ANN. §§ 16.124.102-112 (2006); CAL. HEALTH & SAFETY CODE § 11700-30 (West 2006); COLO. REV. STAT. § 13-21-801 (1998); FLA. STAT. ANN. § 772.12 (West Supp. 2006); GA. CODE ANN. § 51-1-46 (West 2006); HAW. REV. STAT. ANN. § 663 D-14 (LexisNexis 2006); 740 ILL. COMP. STAT. ANN. 57/1-85 (West Supp. 2006); IND. CODE ANN. § 34-1-70-1-20 (West 2006); LA. REV. STAT. ANN. §§ 9:2800.61-.76 (2006); MICH. COMP. LAWS ANN. §§ 691.1601-19 (West 2006); N.J. STAT. ANN. §§ 1-15 (West 2006); OKLA. STAT. ANN. tit. 2-424-34 (West 2006); S.C. CODE ANN. §§ 44-54-10-140 (2006); S.D. CODIFIED LAWS § 34-20-C1 (2006); UTAH CODE ANN. § 58-37E-1-14 (West 2006); 19 V.I. CODE ANN. tit. 641-58 (2006).

[6] *See, e.g.*, Wendy Stasell, *"Shopping" for Defendants: Market Liability Under the Illinois Drug Dealer Liability Act*, 27 LOY. U. CHI. L.J. 1023 (1996); Joel W. Baar, *Let the Drug Dealer Beware: Market Share Liability in Michigan for the Injuries Caused by the Illegal Drug Market*, 32 VAL. U. L. REV. 139 (1997).

[7] Baar, *supra* note 6.

enacted drug dealer liability statutes primarily in an effort to provide victims of the illegal drug market with a remedy, as well as to deter people from engaging in such harmful criminal activity.[8] Furthermore, traditional tort principles tolerate legislation that provides a statutory remedy designed to repair injustice inherent in the common law.[9] In fact, even before the first drug dealer liability statute was enacted, state courts held that the legislature, rather than the judiciary, was best equipped to address the public policy interest of providing a compensation system for plaintiffs for whom it is difficult to prove causation.[10] Last, in terms of the double jeopardy issue, the Supreme Court has departed from its previous position on civil sanctions that serve deterrent purposes.[11] In *Hudson v. United States*, the Supreme Court abandoned the notion that a sanction acting to deter criminal conduct was a criminal punishment per se, and instead required "the clearest proof" that the legislators intended a civil penalty to act as a criminal punishment before determining a statute to be in violation of the Constitution's Double Jeopardy Clause.[12]

This Note focuses on the constitutionality of DDLAs and how such statutes parallel traditionally accepted principles of tort law. Part I explains why common-law tort principles are unable to provide a satisfactory civil remedy against drug dealers. Part II provides a detailed description of the Model Drug Dealer Liability Act ("MDDLA"), as proposed by former United States Attorney Bent, and the case law that serves as the foundation for

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[8] *See*, *e.g.*, ILL. COMP. STAT. ANN. 740 s 57/5 (West 2006).

[9] *See*, *e.g.*, Borgnis v. Falk Co., 133 N.W. 209 (Wis. 1911) (holding that the legislature may constitutionally abolish certain defenses available at common law as a matter of public policy).

[10] Case v. Fireboard Corp., 743 P.2d 1062 (Okla. 1987) (holding that while there were policy reasons for allowing a victim of asbestos to recover against a number of asbestos companies without proving direct causation, the court should allow the legislature to create a civil remedy for such victims rather than create one on its own).

[11] 522 U.S. 93, 118 S.Ct. 488 (1997) (overturning United States v. Halper, 490 U.S. 435 (1989)).

[12] *Id.* at 100 (citing United States v. Ward, 448 U.S. 242, 249 (1980)).

its risk-oriented approach to market share liability. Part III addresses the constitutional challenges to the MDDLA and explains why the MDDLA is constitutionally valid. Finally, this Note reviews the arguments in support of DDLAs and discusses the appropriateness of such legislation in light of the driving forces behind drug dealers' decisions to participate in the illegal drug market.

I. DIFFICULTIES FOR VICTIMS OF THE ILLICIT DRUG TRADE UNDER COMMON-LAW TORT PRINICPLES

Under the common law, plaintiffs in a negligence action must prove four traditional elements: duty, breach, cause, and harm.[13] Additionally, plaintiffs must also contend with the affirmative defenses of contributory negligence and assumption of risk.[14] Three of the elements of a negligence claim—duty, breach, and harm—are relatively easy for plaintiffs to prove when suing a drug dealer for damages. In terms of duty, state and federal legislators have deemed the distribution of illicit drugs illegal, thereby reflecting each person's obligation not to engage in such behavior.[15] Breach of this duty can easily be demonstrated by either a conviction under the relevant drug distribution statutes or a showing by a preponderance of the evidence that the defendant distributed illicit drugs. Harm may also be shown easily where there is evidence of destruction of property while under the influence of narcotics, the death of a loved one due to an overdose, or other evidentiary bases of damages.

Establishing the requisite causal connections, however, is more difficult. In order to prove causation, tort law requires that there be a reasonable connection between the defendant's act or omission and the harm suffered.[16] Plaintiffs may satisfy this

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[13] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 30, at 164-65 (5th ed. 1984).

[14] *Id.*, § 65, at 451.

[15] *See* 21 U.S.C.A. § 841 (West. 2006); MINN. STAT. ANN. § 152.021 (West 2006).

[16] KEETON ET. AL, *supra* note 13, § 41, at 263.

element by showing that the defendant's actions constituted a substantial factor in causing the plaintiff's harm.[17] In order to meet this burden, it is critical that the plaintiff be able to identify the defendant as the tortfeasor.[18] In other words, because mere speculation as to the defendant's role in causing the harm is insufficient under traditional principles of tort law,[19] the plaintiff must show that the defendant either supplied the drug user with drugs himself or, alternatively, that he played a substantial factor in supplying the specific drug user with illicit drugs.

The nature of the illicit drug industry makes it difficult for plaintiffs to identify a drug user's dealer. Rather than conduct transactions with large-scale dealers who possess considerable assets, drug users often interact with small-level dealers and have little knowledge of the bigger players within the chain of distribution. Consequently, third-party plaintiffs and drug users alike have a difficult time identifying a defendant within the drug chain capable of satisfying an adequate award.[20]

Further problems arise despite a plaintiff's ability to identify a large-scale drug dealer in some instances. For example, if a defendant with considerable assets is convicted of illicit drug distribution, his identity may become known to the potential plaintiff, but the plaintiff will need to demonstrate that the harm was foreseeable and that the doctrine of superseding cause is not applicable.[21] The foreseeability doctrine forces plaintiffs to confront the obstacle of no "negligence in the air" as explained in *Palsgraf v. Long Island Railroad Co.*[22] The *Palsgraf* court

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[17] *Id.* § 41, at 267. *See also* Carney v. Goodman, 270 S.W.2d 572, 575 (Tenn. Ct. App. 1954) (defining legal cause as conduct that is a substantial factor in bringing about the harm providing there is no statute relieving the actor from liability).

[18] KEETON ET. AL, *supra* note 13, § 41, at 269.

[19] *Id.*

[20] Kevin G. Meeks, *From Sindell to Street Pushers: Imposing Market Share Tort Liability on Illegal Drug Dealers*, 33 GA. L. REV. 315, 326 (1998).

[21] *Id.* at 327-28.

[22] 248 N.Y. 339, 341 (1928).

held that a plaintiff must show that the defendant has breached a duty owed to himself rather than a violation of duty owed to someone else.[23] Accordingly, courts follow the general rule that despite a defendant's negligence, there is no duty owed to the unforeseeable plaintiff.[24] Although a defendant convicted of distributing illicit drugs on a large scale may be negligent in a broad sense, it is difficult for plaintiffs to show, under common law tort principles, that the defendant was responsible for the distribution of the specific drugs used by the specific drug user who played a role in causing the harm suffered. Likewise, it is difficult for plaintiffs to demonstrate that a reasonable person in the defendant's position could have foreseen the harm suffered by a particular class of persons of which the plaintiff is a member.

Furthermore, even if plaintiffs are able to overcome problems of foreseeability, they often fail to recover damages from a drug dealer on the grounds that the drug user's conduct constituted a superseding cause[25]—the event which produces the resulting harm after the negligence of the defendant, thereby preventing the defendant from being held liable for his negligent conduct.[26]

Under the common law, a drug dealer can be absolved of liability despite his negligence in the same way a bartender may be insulated from liability for the negligent acts of a tavern's patrons: even where a bartender has been found negligent for serving alcohol to a patron, courts have traditionally denied recovery from the bartender or the tavern owner on the grounds

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[23] *Id.* at 343. *But see*, KEETON ET AL, *supra* note 13, § 36, at 224 (stating that "the class of persons to be protected [by some statutes] may of course be a very broad one, extending to all those likely to be injured by the violation" and therefore, "a statute requiring druggists to label poisons, a pure food act, a law prohibiting the sale of firearms to minors, or an ordinance governing the servicing of gas lines, must clearly be intended for the benefit of any member of the public who may be injured by the act or thing prohibited.").

[24] KEETON ET AL., *supra* note 13, § 43 at 285.

[25] *See* Meeks, *supra* note 20, at 327.

[26] KEETON ET AL., *supra* note 13, §44 at 301.

that the damages were too remote. Rather than the sale of alcohol, its consumption is typically viewed as the sole proximate cause of the plaintiff's harm.[27]

During the last quarter century however, many state legislatures have enacted Dram Shop Acts, thereby providing a civil remedy for plaintiffs seeking to recover damages from negligent alcohol vendors.[28] Before Dram Shop legislation became prevalent, courts were unwilling to subject defendants to liability for negligently distributing alcohol because of insufficient statutory authority.[29] It was not until the 1980s, when drinking and driving started to receive attention as a social issue, that legislatures began enacting expansive legislation providing courts with statutory authority for imposing tort liability for the negligent sale of alcohol.[30] Today, forty-one states and the District of Columbia have Dram Shop legislation.[31] Such legislation abrogates the common law's proximate cause requirement and allows a third-party plaintiff to recover damages from parties who sell alcohol. Much like plaintiffs seeking to recover damages from drug dealers under common law principles of negligence, plaintiffs under Dram Shop Acts are barred from recovering damages against alcohol vendors if the legislatures did not provide such a statutory

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[27] Meeks, *supra* note 20, at 328 (citing Belding v. Johnson, 12 S.E. 304, 305 (Ga. 1890)).

[28] *See generally*, Richard Smith, *A Comparative Analysis of Dramshop Liability and a Proposal for Uniform Legislation*, 25 J. CORP. L. 553 (2000).

[29] *Id.* at 555 (citing Felder v. Butler, 438 A.2d 494, 499 (Md. 1981); Holmes v. Circo, 244 N.W.2d 65, 67 (Neb. 1976); Williamson v. Old Brogue, Inc., 350 S.E.2d 621, 624 (Va. 1986)).

[30] *Id.* at 556 (citing McIsaac v. Monte Carlo Club, Inc., 587 So. 2d 320, 324 (Ala. 1991)).

[31] Sean A. O'Connor, *Last Call: The South Carolina Supreme Court Turns Out the Lights on First-Party Plaintiffs' Causes of Action Against Tavern Owners*, 50 S.C. L. REV. 1095, 1100, 1999 (commenting on South Carolina's reluctance to allow intoxicated persons who have played a role in causing a third-party plaintiff's harm from recovering under the State's Dram Shop Act) (citing El Chico Corp. v. Poole, 732 S.W.2d 306, 310 (Tex. 1987)).

remedy.[32] Dram Shop liability has been accepted as a legislative solution for the dilemma faced by third parties who have suffered harm at the hands of intoxicated parties and negligent alcohol vendors—a remedy that is consistent with the judiciary's notion that such questions are better addressed by the legislature.[33]

While Dram Shop Acts serve as a good example of how and why the legislature may help resolve inequity resulting from common law tort principles, a drug dealer liability statute written to mirror Dram Shop Acts would fail to provide a solution to the causation problems that plaintiffs face under common law tort principles. The critical shortfall of such a legislative scheme would be that it would require plaintiffs to prove by a preponderance of the evidence that the defendant's drugs were the same drugs used by the party who injured the plaintiff. Despite this shortcoming, some legal scholars have suggested that DDLAs should parallel Dram Shop Acts.[34] Under this legislative proposal, dubbed "Gram Shop Liability," a third party could recover from a drug dealer if she proved "1) that the drug dealer's illegal drugs were used by the party who injured her, and 2) that these drugs contributed to the party's action that resulted in her injury."[35] Admittedly, these requirements would help plaintiffs overcome the prohibition on recovery for "negligence in the air" handed down by *Palsgraf*,[36] but as discussed earlier, the nature of the illicit drug market makes it difficult, and in some cases nearly impossible, for plaintiffs to

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[32] Meeks, *supra* note 20, at 328.

[33] *See* Case v. Fireboard Corp., 743 P.2d 1062 (Okla. 1987); *see also*, Collins v. Eli Lilly Co., 116 Wis.2d 166, 181 (1984), discussion *infra* notes 98-114 (holding that departing from common law principles to provide a method of recovery for an injured plaintiff was more acceptable than permitting a negligent defendant to escape liability).

[34] *See, e.g.* Michael E. Bronfin, *"Gram Shop" Liability: Holding Drug Dealers Civilly Liable for Injuries to Third Parties and Underage Purchasers*, 1994 U. CHI. LEGAL F. 345 (1994).

[35] *Id.* at 353.

[36] Palsgraf v. Long Island R. Co., 162 N.E. 99, 248 N.Y. 339, 341 (1928).

identify high-level drug dealers as the persons who constituted a substantial factor in the resulting injury.[37] Therefore, while "Gram Shop Liability" is appealing because DDLAs would more closely adhere to traditional common law tort principles, thereby minimizing constitutional scrutiny, such legislation would do little, if anything, to provide plaintiffs with a solution to the causation problems faced under the common law's negligence doctrine.

To summarize, plaintiffs seeking to recover damages as a result of a drug dealer's negligence are barred from recovery under common law tort principles. Despite the duty not to engage in the distribution of illicit drugs, the obvious breach of this duty upon conviction of a crime or other evidentiary grounds, and the significant harm that the illegal drug trade regularly inflicts upon third parties, the illegality of drug dealing requires drug dealers to maintain anonymity and, as a result, precludes many potential plaintiffs from demonstrating causation. As the popularity of Dram Shop Acts indicates, our legal system has embraced legislative efforts to remedy injustices resulting from instances in which the common law's tort principles prevent plaintiffs from recovering damages from negligent defendants. However, this does not necessarily imply that "Gram Shop Liability" is an appropriate solution. Rather, in the vast majority of cases, "Gram Shop Liability" would fail to provide any assistance to plaintiffs seeking to recover from drug dealers as the proposal requires plaintiffs to prove that the drug dealer supplied drugs to the party whose conduct formed the basis for the plaintiff's suit.[38]

Although this approach would limit the constitutional arguments against DDLAs, it is an inadequate measure for achieving the original goal of such a statute—helping plaintiffs overcome the causation obstacles under the common law's tort doctrine. Accordingly, fifteen jurisdictions have enacted legislation based upon the MDDLA in an effort to provide plaintiffs who have suffered harm as a result of the illicit drug

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[37] Meeks, *supra* note 20.

[38] *See* Bronfin, *supra* note 34, at 353.

trade with a remedy while ensuring that such legislation adheres to constitutional principals.[39]

II. THE MODEL DRUG DEALER LIABILITY STATUTE

Although fifteen different jurisdictions have enacted drug dealer liability statutes,[40] each jurisdiction closely follows the provisions set forth in the Model Drug Dealer Liability Act ("MDDLA"), which has been adopted by the American Legislative Exchange Council.[41] For this reason and for purposes of efficiency, this Note focuses primarily on the MDDLA's language, while intermittently referring to statutes enacted by Illinois, Michigan, South Dakota, and Oklahoma as representative samples of current legislation based upon the MDDLA.[42]

A. Who May Recover Under the MDDLA

Potential plaintiffs under the MDDLA include relatives of drug users, injured members of the public, and others that have incurred a financial loss as a result of the person's drug use.[43] Although drug users may bring suit themselves, unless the user is a minor, a drug-user's voluntary decision to use drugs limits his recoverable damages.[44] Admittedly, the notion that drug users should be able to recover any damages from drug dealers initially provokes a negative reaction. However, there are several policy reasons for including drug users among potential

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[39] *Supra* note 5.

[40] *Id.*

[41] MODEL DRUG DEALER LIABILITY ACT (Daniel Bent 1996), a*vailable at* http://www.modelddla.com /Model_ Act. htm.

[42] It should be noted that the first judgment rendered under a drug dealer liability statute, and the first state to enact such legislation, was in Michigan in the case of Ficano v. Clemens, No. 95-512918 (Mich. Cir. Ct. Wayne C'ty. 1995), discussed *infra* notes 121-30.

[43] MODEL DRUG DEALER LIABILITY ACT, *supra* note 41, § 6(c).

[44] *Id.* § 7.

plaintiffs.[45]

First and foremost, allowing users to bring suit under the MDDLA furthers the deterrent goal of the statute because such plaintiffs are in a particularly good position to identify drug dealers whose actions led to harm.[46] Allowing such recovery provides an incentive for users to identify drug dealers and seek treatment for their addiction.[47] Furthermore, only drug users who have never dealt drugs would likely bring a suit under the MDDLA because, if the plaintiff were a dealer, the defendant could file a counter-claim thereby making the suit even more incriminatory for the user.[48] By creating severe penalties for drug distribution offenses and relatively minor criminal penalties for drug users who have no intent to distribute, legislators throughout the country have, appropriately, identified drug distribution as a more serious offense than using or possessing drugs.[49] Accordingly, the idea that drug users may recover damages, albeit limited damages, from drug dealers is consistent with the criminal law's distinction between these two classes of offenses.

Notwithstanding these different criminal classifications, the MDDLA also recognizes that there is a significant distinction between drug users who have suffered injury at the hands of drug dealers, and third-party plaintiffs who are not themselves drug users and have suffered harm as a result of a drug dealer's

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[45] Daniel Bent and Sharon Burnham, *Imposing Products Liability for Illegal Drugs*, http://www.modelddla.com/Imposing_Products_Liability_for_Illegal_Drugs.htm (last visited April 10, 2007).

[46] *Id*.

[47] Meeks, *supra* note 20 at 351, n.104.

[48] Bent et al, *supra* note 45.

[49] *See* 21 U.S.C.A. § 841(b) (West. 2006) (establishing minimum prison sentences of 10 years for a defendant's first drug distribution offense, 20 years if death or serious bodily injury occurs as a result of a defendant's first drug distribution offense, 20 years if the defendant has prior drug distribution convictions, and life imprisonment if death or serious bodily injury occurs and the defendant has prior drug distribution convictions); *but see,* 21 U.S.C.A. § 844(a) (West 2006) (establishing a maximum sentence of 1 year in prison for simple possession and up to two years if the defendant has prior possession convictions).

actions.[50] As a result, the MDDLA limits the extent of damages user-plaintiffs may recover, and requires that several deterrence-focused provisions be satisfied before the user may recover damages.[51] For example, under the MDDLA a user-plaintiff must: 1) personally disclose to law enforcement, more than six months before filing the suit, all information he has regarding the source of illegal drugs; 2) refrain from using illegal drugs during the six months before filing the action; and 3) remain drug-free for the duration of the suit.[52] Most significantly, user-plaintiffs are barred from recovering non-economic damages.[53] Therefore, users are limited to recovery for pecuniary losses, including "the cost of treatment, rehabilitation, medical expenses, loss of economic or educational potential, loss of productivity, absenteeism, accidents or injury, and any other pecuniary loss proximately caused by the person's illegal drug use."[54] Users may also seek award for the cost of the suit, including reasonable attorney fees and expenses for expert witnesses.[55] Thus, although all plaintiffs are permitted to recover economic damages, public policy dictates that only plaintiffs who did not knowingly use drugs may recover non-economic damages.[56]

Plaintiffs who do not knowingly use drugs are distinguished from voluntary drug users, however, and like third-party plaintiffs, may seek punitive and exemplary damages in addition to economic damages.[57] For example, the drug user who knowingly sells crack to a pregnant mother, thereby injuring the mother and her unborn child, would likely be held liable for punitive or exemplary damages, but the child's guardian would have to file suit on his behalf; the mother would not be eligible for punitive, exemplary, and other non-economic damages

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[50] *See* MODEL DRUG DEALER LIABILITY ACT, *supra* note 41, § 7.

[51] *Id.* § 7(a).

[52] *Id.*

[53] *Id.* § 7(c).

[54] *Id.*

[55] *Id.*

[56] MODEL DRUG DEALER LIABILITY ACT, *supra* note 41, § 6(c)(2).

[57] *Id.* § 6(c)(3).

because she knowingly used drugs.[58]

Put plainly, the MDDLA focuses upon harm to third parties and drug users stemming from drug dealers' negligence.[59] While the full range of recoverable damages is available for parties who incur injury at the hands of a drug user and for involuntary drug users, public policy argues against allowing voluntary drug users to recover non-economic damages.[60]

B. Expanding the Class of Defendants to Help Solve Causation Issues

The MDDLA establishes two different classes of defendants from which plaintiffs may recover damages.[61] Plaintiffs may bring suit against a party who knowingly distributed or participated in the distribution of an illegal drug that was used by the user.[62] Alternatively, in an effort to expand the class of defendants, plaintiffs may file suit against a party who knowingly participated in the illegal drug market but who may have not necessarily distributed the drug used by the user.[63] Plaintiffs filing suit against the second class of defendants must demonstrate the following: that the defendant distributed illegal drugs in the same target community as that in which the drug user used drugs, that the defendant distributed the same type of illegal drug as was used by the drug user, and that the defendant was engaged in the distribution of drugs during the same time period in which the user used drugs.[64] In terms of causation

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[58] Bent et al., *supra* note 45.

[59] *Id*.

[60] *Id*.

[61] MODEL DRUG DEALER LIABILITY ACT, *supra* note 41, § 6(b).

[62] *Id*.

[63] Bent et. al., *supra* note 45.

[64] *Id*. "Target community" is defined, at a minimum, as the state house legislative district in which the defendant's conduct was located. However, this geographic area may expand in relation to the severity of the drug distribution activity. For example, a defendant whose participation in the illicit drug market constitutes a level 1 offense would be considered to have a target community of the state house legislative district in which his negligence

principles, there is little controversy, over the first class of defendants because the defendants in these cases knowingly distributed illegal drugs, the use of which forms the basis of recovery. However, legal scholars take issue with the second set of potential defendants because the causal connection is relaxed in an effort to overcome the obstacles plaintiffs face when attempting to identify members of the illicit drug trade community.[65]

While it must be conceded that the MDDLA permits a plaintiff to impose liability upon a defendant who may not have actually provided drugs to the individual whose use forms the basis of recovery, critics of the MDDLA lose sight of the fact that the legislation serves as a statutory solution toward the difficult task of providing victims of the illegal drug trade with a remedy.[66] It is the legislature's responsibility to assist plaintiffs who have suffered a distinct harm but who have difficulty either identifying the correct defendant against whom to bring an action, or demonstrating that the defendant, while having clearly committed a tortious act, committed the specific act leading to the particular plaintiff's harm.[67]

Throughout our legal system, legislatures have helped plaintiffs overcome obstacles particular to the common law's principles of negligence.[68] The wide-spread enactment of workers' compensation statutes serves as a clear example of how legislatures help plaintiffs who have suffered harm to recover damages despite clear hindrances presented by the common

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occurred, whereas a defendant whose conduct constituted a level 2 offense would be considered to have a target community of the state house legislative district in which his negligence occurred plus all legislative districts with borders adjacent to the district in which his negligence took place. Defendants meeting the criteria for a level 3 offense would be considered to have a target community of the districts included for level 2 defendants, plus all districts with borders adjacent to the level 2 borders. Finally, level 4 defendants are considered to have a target community of the entire state. MODEL DRUG DEALER LIABILITY ACT, *supra* note 41, § 9.

[65] *See* Stasell, *supra* note 6.

[66] MODEL DRUG DEALER LIABILITY ACT, *supra* note 41 § 2.

[67] Case v. Fireboard Corp., 743 P.2d 1062 (Okla. 1987).

[68] *See supra* notes 9-11, and accompanying text.

law.[69]

Workers' compensation acts were created to combat the very limited tort liability of employers to their employees under the common law.[70] Traditional common law provided a relatively low level of liability for employers because labor opportunities were in high supply, and therefore, employees could seek work under a different employer if their current working conditions were not safe or adequate.[71] Before workers' compensation acts became common, employees were often limited by the "unholy trinity" of common law defenses—contributory negligence, assumption of risk, and the fellow servant rule.[72] This trio of common law defenses often meant that a "momentary lapse of caution on the part of the worker was penalized by casting the entire burden of his injury upon him, in the face of continued and greater negligence of the employer."[73] Courts were unwilling to change the common law rules by themselves, and instead awaited reform from the legislatures.[74] Recognizing the injustices faced by injured employees under the common law, legislatures rapidly began passing workers' compensation acts.[75] Today, all fifty states have workers' compensation acts and "it has been said that no subject of labor legislation ever has made such progress or received such general acceptance of its principles in so brief a period."[76]

State legislatures that have enacted the MDDLA in response to the needs of victims of the illegal drug trade have acted in accord with the legislative rationale behind the passage of workers' compensation acts. In both instances, the legislatures identified a negligent defendant who inappropriately escapes

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[69] Discussed *infra* notes 189-98.

[70] KEETON ET AL., *supra* note 13, §80, at 568.

[71] *Id.*

[72] *Id.*, §80 at 569.

[73] *Id.*, §80 at 570.

[74] *Id.*, §80 at 573.

[75] *Id.*

[76] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 80, at 573 (5th ed. 1984) (citing U.S. Bureau of Labor Statisitcs, Bull. No. 126, 1913, p. 9).

liability under common law principles. Legislators have taken notice that traditional common law principles of negligence fail to consider the nuances of the illegal drug trade and have found a solution in a statute with less stringent causation requirements. Therefore, while critics of the MDDLA contend that the statute is a departure from traditional tort law and compromises fundamental principles of justice,[77] the notion that the legislature may, and should, create a remedy for plaintiffs who have been injured but who are barred from recovery under the common law is an established principle of legislative behavior.

C. Standard of Proof

The MDDLA requires that the plaintiff prove the defendant's participation in the illegal drug market by "clear and convincing evidence."[78] All other elements of the cause of action require proof by a preponderance of the evidence.[79] However, if a defendant has a conviction under either state drug laws or the Comprehensive Drug Abuse Prevention and Control Act of 1970, he or she is collaterally estopped from denying participation in the illegal drug market.[80]

Nonetheless, the plaintiff must still demonstrate that the defendant was engaged in the distribution of drugs during the same time period in which the user used drugs.[81] Under the MDDLA, a drug distribution-offense conviction serves as prima facie evidence of participation in the illegal drug market for the two years preceding the date of the conduct that leads to the suit.[82] This provision allows plaintiffs to determine how long a defendant has been involved in the market.[83] Although defendants who have previously been convicted of drug distribution offenses are estopped from denying participation in

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[77] Stasell, *supra* note 6, at 1024.

[78] MODEL DRUG DEALER LIABILITY ACT, *supra* note 41, § 13(a).

[79] *Id.*

[80] *Id.* § 13(b).

[81] *Id.* § 6(b).

[82] *Id.*

[83] Bent et al., *supra* note 45, n.45.

the illegal drug market, they may nonetheless offer evidence to show that they did not engage in the distribution of illicit drugs during the time period in question, thereby avoiding liability under the MDDLA. Additionally, the absence of a criminal drug conviction does not preclude a plaintiff from bringing suit against a defendant.[84]

D. Imposing Liability under the MDDLA: Market Share Liability

Market share liability theory serves as one of the central methods for imposing liability on defendants brought into court under the MDDLA.[85] The following subsections describe the circumstances leading to the creation of market share liability, the public policy arguments in favor of implementing market share liability, and the recent developments in market share liability theory utilized by the MDDLA. Most significantly, just as it is used for plaintiffs under the MDDLA, market share liability was created to help injured plaintiffs overcome the causation difficulties present when bringing suit against negligent defendants.[86]

1. The Origins of Market Share Liability

Market share liability originated primarily with plaintiffs who suffered harm at the hands of pharmaceutical companies. In *Sindell v. Abbot Laboratories*, the California Supreme Court created market share liability to provide a remedy for a plaintiff who suffered prenatal injuries as a result of her mother ingesting the drug diethylstilbestrol ("DES").[87] Although the plaintiff in *Sindell* suffered a distinct and easily demonstrable harm, it was

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[84] MODEL DRUG DEALER LIABILITY ACT, *supra* note 41, § 13(a).

[85] Daniel Bent, *Market Share Liability Further Explained*, *available at* http://www.modelddla.com/Market_Liability_Further_Explained.htm (last visited April 25, 2007).

[86] *See* Sindell v. Abbot Laboratories, 26 Cal. 3d 588, 611 (1980); Collins v. Eli Lilly Co., 166 Wis. 2d 166, 181 (1984).

[87] *Sindell*, 26 Cal. 3d. at 588.

unclear as to which drug manufacturing company had produced the DES that led to the plaintiff's injuries. Because of the intricacies of the drug manufacturing business, it was impossible for the plaintiff to prove with any certainty which drug manufacturer produced the DES that her mother ingested.[88] The *Sindell* court's decision was of particular importance to the MDDLA because it created market share liability to enable a plaintiff to recover from defendants who had clearly committed tortious acts despite being unable to demonstrate that those acts were the proximate causes of her injuries.[89] *Sindell* shifted the burden of proof to the defendant to show that it did not produce the DES that injured the plaintiff, thereby allowing the defendants to exculpate themselves.[90]

The central tenet of the market share liability theory developed in *Sindell* is that defendants were to be held liable in proportion to the percentage of DES that each had sold in relation to the entire amount sold by all defendants.[91] Accordingly, any defendant found liable in *Sindell* was responsible for paying its market share portion of the total damage award.[92] This theory of assigning liability was developed in part to provide a remedy for a plaintiff who had suffered harm at the hands of negligent defendants, and was in lieu of a more precise and accurate method for determining defendants' liability.[93] Critics of market share liability contend that under the *Sindell* rationale, defendants may be held liable for harm they did not cause,[94] but the California Supreme Court, in defense of its decision, explained that "as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury."[95]

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[88] *Id*. at 596.

[89] *Id*. at 610.

[90] *Id*. at 611.

[91] *See Id*. at 611-13.

[92] *See Id*.

[93] Sindell v. Abbot Laboratories, 26 Cal. 3d. 588, 615-16 (Cal. 1980).

[94] Andrew B. Nace, *Market Share Liability: A Current Assessment of a Decade-Old Doctrine*, 44 VAND. L. REV. 395, 434 (1991).

[95] *Sindell*, 26 Cal. 3d at 610-11.

Sindell was not the first time the California Supreme Court relaxed a plaintiff's evidentiary burden, however.[96] The plaintiff in *Summers v. Tice* filed a negligence claim against two defendants after being shot in the eye during a hunting trip.[97] After conceding that contributory negligence was not an issue, and determining that one of the two defendants must have been the one responsible for the plaintiff's injury, the *Summers* court held that the defendants, rather than the plaintiff, were obligated to offer affirmative proof of lack of causation in order to avoid liability.[98] The court implemented a theory of alternative liability and explained: "when we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest."[99]

2. Public Policy Supports the Implementation of Market Share Liability

As in *Summers*, the plaintiff in *Sindell* was not penalized for the lack of evidence of causation and, "although the absence of such evidence is not attributable to the defendants either, their conduct in marketing a drug, the effects of which are delayed for many years, played a significant role in creating the unavailability of proof."[100] The *Sindell* court articulated three policy reasons supporting the adoption of market share liability, all of which are fully applicable to the MDDLA: 1) the negligent defendant should bear the burden of an injury rather than the innocent plaintiff; 2) manufacturers have an incentive to improve product safety if subject to increased liability; and 3) drug manufacturers are in a better position to absorb the cost of the harm than the plaintiff.[101] The court looked to Justice

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[96] *See* Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948).

[97] *Id.* at 82, 199 P. 2d at 2.

[98] *Id.* at 86, 199 P. 2d at 2.

[99] *Id.*

[100] Sindell v. Abbot Laboratories, 26 Cal. 3d 588, 611 (1980).

[101] *Id.*

Traynor's opinion in *Escola v. Coca-Cola Bottling Co.*,[102] and recognized that "in an era of mass production and complex marketing methods the traditional standard of negligence [is] insufficient to govern the obligations of manufacturer to consumer, so we should acknowledge that some adaptation of the rules of causation and liability may be appropriate in these recurring circumstances."[103]

The *Sindell* court's reasons for embracing market share liability are even stronger in the context of the MDDLA. As with plaintiffs who have suffered harm at the hands of pharmaceutical companies, plaintiffs bringing suit under the MDDLA have a difficult time identifying the specific dealer-defendant who was responsible for providing the drug user with the drugs that formed the basis for recovery. More importantly, however, the criticisms of market share liability, as articulated with regard to litigation against pharmaceutical companies, are much weaker when applied to litigation against drug dealers. For example, several state courts have rejected market share liability theory in cases involving suits against drug manufacturers because of the detrimental effects such a system of liability would have upon the industry.[104] This concern becomes irrelevant when courts or legislatures consider market share liability in the context of the illicit drug trade. As applied under the MDDLA, market share liability has the potential to aid in the ferrying out of crime since it will, at least theoretically, increase the cost of production for large scale illegal drug distributors. From an economic standpoint, an increase in the cost of production will decrease profits and eventually increase prices of narcotics, thereby serving as a deterrent to both individual dealers and to users who seek to

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[102] 24 Cal. 2d 453 (1944).

[103] *Sindell*, 26 Cal. 3d at 610.

[104] *See, e.g.,* Smith v. Eli Lilly & Co., 137 Ill. 2d 222, 261 (1990) (explaining that market share liability will increase the cost of production and therefore decrease research and development of advancements in pharmaceutical field); Shackil v. Lederle Laboratories, 116 N.J. 155 (1989) (holding that market share liability would cripple the pharmaceutical industry).

participate in drug distribution-related activity.

3. Recent Developments to Market Share Liability

Market share liability is not a stagnant concept. After its creation in *Sindell*, a number of courts involved in DES litigation adopted the principle that market share liability should serve as a method for imposing liability upon negligent defendants.[105] In *Collins v. Eli Lilly Co.*, the Wisconsin Supreme Court modified the *Sindell* court's theory of market share liability by focusing more upon the risk of harm created by the defendant.[106] As in *Sindell*, the plaintiff in *Collins* suffered harm as a result of her mother's ingestion of DES.[107] The *Collins* court determined that the plaintiff had suffered an apparent harm at the hands of a tortfeasor, but recognized that Collins was unable to identify the manufacturer of the DES ingested by her mother for three reasons: the drug's generic form, the large number of producers and marketers of the drug, and the scarcity of records indicating specific DES production by individual manufacturers.[108] When faced with the "choice of either fashioning a method of recovery for the DES case which [would] deviate from traditional notions of tort law, or permitting possibly negligent defendants to escape liability to an innocent, injured plaintiff,"[109] the *Collins* court chose to depart from the common law principles of negligence in order to permit recovery on behalf of the plaintiff.[110]

In defense of its choice to provide Collins with a remedy, the court explained:

> the common law is a dynamic principle which allows

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[105] *See, e.g.,* McElhaney v. Eli Lilly & Co., 564 F. Supp. 265 (S.D. 1983); Abel v. Eli Lilly & Co., 94 Mich. App. 59 (Mich. Ct. App. 1979); Bichler v. Eli Lilly & Co., 55 N.Y.2d 571 (1982); Collins v. Eli Lilly Co, 116 Wis. 2d 166 (1984).

[106] *Collins*, 116 Wis. 2d at 166.

[107] *Id.* at 174.

[108] *Id.* at 180.

[109] *Id.* at 181.

[110] *Id.*

> it to grow and to tailor itself to meet the changing needs within the doctrine of *stare decisis*, which, if correctly understood, was not static and did not forever prevent the courts from reversing themselves or from applying principles of common law to new situations as the need arose.[111]

Nonetheless, the *Collins* court determined that the theories of alternative and market share liability developed in *Summers* and *Sindell* should not apply to Collins' cause of action.[112] With regard to alternative liability, the court reasoned that Collins, unlike the plaintiff in *Summers*, could never join all of the negligent defendants.[113] To do so would require Collins to join every DES manufacturer who produced DES during the time period and within the geographic area in which Collins's mother ingested the DES that led to Collins's injuries. Further, after considering and ultimately rejecting *Sindell*'s version of market share liability, the *Collins* court explained that defining and proving a defendant's market share is too difficult a task to require of plaintiffs given the lack of available records held by drug companies.[114]

As a result, the *Collins* court developed its own version of market share liability based on the principle that "each defendant contributed to the *risk* of injury to the public and, consequently, the risk of injury to individual plaintiffs such as Therese Collins."[115] This theory of liability rests upon the idea that each defendant is responsible to a certain degree for producing or marketing a drug that has been determined to be dangerous.[116] The *Collins* court noted that manufacturers of harmful drugs

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[111] *Id.* at 182 (quoting Bielski v. Schulze, 16 Wis. 2d 1, 11 (1962)).

[112] Collins v. Eli Lilly Co., 116 Wis. 2d 166, 184, 189 (1984)

[113] *Id.* at 184.

[114] *Id.* at 189.

[115] *Id.* at 191 (emphasis added).

[116] *Id. See also,* Glen O. Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713 (1982). The *Collins* court did not agree with Robinson's theory, however, that contributing to the risk of harm by acting as a DES manufacturer was sufficient to subject a defendant to liability.

were in a better position to absorb the cost of liability because consumers and physicians normally base their decisions to use a drug on the information provided by the manufacturers, thereby leaving the consumers "virtually helpless to protect themselves from serious injuries caused by deleterious drugs."[117] Consequently, the Wisconsin Supreme Court remanded the case and required the plaintiff to demonstrate that her injuries were caused by her mother's ingestion of DES, that the defendant produced the same type of drug as her mother ingested, and that the defendant breached a legally recognized duty to the plaintiff by producing or marketing DES.[118]

The *Collins* court's formulation of a risk-oriented version of market share liability may also be imposed on defendants in MDDLA litigation. First, like the problems faced by the plaintiff in *Collins*, plaintiffs who suffer harm as a result of drug use have difficulty identifying negligent defendants capable of satisfying an adequate award. Because illicit drugs are often manufactured in generic form, there exists an indeterminable number of drug producers and dealers. Moreover, due in large part to the illegality of their trade, drug dealers keep few, if any, records of their business.[119]

Second, the required elements for demonstrating liability under *Collins* parallel those of the MDDLA. Although plaintiffs under *Collins* and the MDDLA are not required to show that the defendant produced and/or distributed the exact drugs ingested by the drug user whose drug use formed the basis for recovery,[120] plaintiffs in both contexts must demonstrate that the drug user used the same type of drug produced or marketed by the defendant. Third, much like the court's reasoning in *Collins*, the MDDLA seeks to impose liability upon otherwise negligent defendants in an effort to provide a remedy for plaintiffs who have suffered a demonstrable harm.

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[117] Collins v. Eli Lilly Co., 116 Wis. 2d 166, 192-93 (Wis. 1984).

[118] *Id.* at 193.

[119] Steven D. Levitt & Sudhir Alladi Venkatesh, *An Economic Analysis of a Drug-Selling Gang's Finances* 12-45 (American Bar Foundation, Working Paper No. 9814, 1999).

[120] *Collins*, 116 Wis. 2d at 194.

Last, *Collins* and the MDDLA help further similar policy interests. The *Collins* court explained that a defendant may implead as many third-party defendants as possible in order to fairly distribute liability, so long as the original defendant can show that the additional defendants produced the same type of drug taken by the plaintiff's mother which formed the basis for the plaintiff's recovery.[121] The MDDLA addresses similar policy concerns by permitting the joinder of additional defendants who may share liability, and creating an incentive for drug dealers who have been brought into court to disclose information that might be used to implicate additional defendants.

To summarize, like plaintiffs in market share liability cases, plaintiffs under the MDDLA are not tortfeasors and seek civil remedies from negligent, and often times criminally culpable, defendants.[122] Plaintiffs in such cases, through no fault of their own, have trouble proving causation. The *Sindell* court noted that the defendants were not principally to blame for the lack of causal evidence either, but that their conduct nonetheless played a factor in the deficiency of proof.[123] Defendants, however, play a much larger role in the unavailability of evidence that may indicate their participation in the illicit drug trade. Because of the risks of arrest and incarceration, drug-dealer defendants often go to great lengths to eliminate any basis of proof of business transactions between themselves and drug users.

As a result, plaintiffs under the MDDLA often have little evidence to offer showing a causal relationship between the defendant and the drug user, despite the defendant's obvious criminal conduct. Therefore, despite market share liability serving as the foundation for holding defendants accountable under the MDDLA, the extent of a defendant's liability is not based entirely upon the drug dealer's share in the illicit drug market because such evidence is difficult to obtain. Instead, the

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[121] *Id.* at 195.

[122] *See supra* notes 50-58, and accompanying text. As discussed earlier, drug users themselves may also recover damages under the MDDLA, but members of this class of plaintiffs are severely limited in the types of damages they may seek. Bent et al., *supra* note 45.

[123] Sindell v. Abbot Laboratories, 26 Cal. 3d 588, 610-11 (1980)

MDDLA more closely embraces the risk-contribution version of market share liability developed in *Collins* and permits a negligent defendant to be held liable for the total amount of damages awarded. This results in an incentive for drug dealers to implead other drug dealers who contribute to the risk of drug use in the target community so that they may share liability, and also serves the overarching policy interest of deterring drug distribution while encouraging defendants to identify those who participate in the illegal drug market.

E. Notable Cases Brought Under Drug Dealer Liability Acts

The first case filed under a state's DDLA was in Michigan in the case of *Ficano v. Clemens*.[124] In *Ficano*, two plaintiffs—the estate of an infant, Felicia Brown, who was born addicted to cocaine and eventually killed by her drug-addicted mother, and the Wayne County Sheriff's Department—brought suit against two convicted drug dealers.[125] Felicia Brown was under-developed as a result of her mother's drug abuse and died as a result of her heavy exposure to cocaine.[126] In 1995, the court entered a default judgment of $8.7 million against the two defendants.[127]

This case highlights several interesting points. First, the infant's estate, not her mother, brought suit with the Sheriff's office.[128] Instead of joining the lawsuit, Felicia Brown's mother was on trial for her murder.[129] She was eventually convicted of

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[124] No. 95-512918 (Mich. Cir. Ct. Wayne C'ty. 1995).

[125] Stasell, *supra* note 6, at 1035-36 (citing Mediation Summary of Plaintiff Robert A. Ficano at 3, 8; Stephen Jones, *Suit Targets 4 Drug Convicts for Damages in Tot's Death*, DET. FREE PRESS, May 3, 1995, at C3).

[126] *Id.* at 1036, n.87 (citing Mediation Summary of Plaintiff Robert A. Ficano at 5).

[127] Arnold Ceballos, *New State Laws Let People Sue Drug Dealers*, WALL ST. J., Jul. 16, 1996, at B1.

[128] *See* Stasell, *supra* note 6.

[129] Stasell, *supra* note 6, at 1066, n.87 (citing Mediation Summary of

second degree murder and received 15 to 25 years in prison.[130] Second, under Michigan's DDLA, the plaintiffs in *Ficano* demonstrated liability by showing that the defendants had been convicted of selling drugs in the same target community as that in which the plaintiffs sustained harm.[131] Nevertheless, while such a conviction served as prima facie evidence that the defendants participated in the distribution of illegal drugs for the two years before and the two years after the conviction,[132] defendants brought into court under any state's DDLA, including Michigan's, have the opportunity to rebut such presumptions based on criminal convictions if they show by clear and convincing evidence that they did not participate in the illegal drug market during the presumed time period.[133]

A more recent case was filed under South Dakota's DDLA.[134] In *Muhs v. Johnson*, the plaintiff, Jean Muhs, sued Wayne Johnson for damages resulting from a motor vehicle accident.[135] Muhs and her husband, Floyd, were driving along a highway when another car swerved into their lane and struck their vehicle.[136] Floyd Muhs died at the scene of the accident, and Jean Muhs suffered serious injuries, including a broken neck, legs, and back.[137] Mrs. Muhs was unable to attend her husband's funeral, could not speak clearly during the two to three weeks following the accident, had screws drilled into her head so that she could not move her neck, and could not walk

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Plaintiff Alan A. May at 3).

[130] Ceballos, *supra* note 127.

[131] Stasell, *supra* note 6, at 1036 (citing Corey Williams, *Ficano Seeks Assets of Drug Dealers in Beating Death of Child*, DET. NEWS, May 9, 1995, at B4).

[132] *See* MICH. COMP. LAWS ANN. § 691.1609 (West 2006).

[133] *Id.*

[134] No. 99-2870 (S.D., Minnehaha C'ty Cir. Ct. Apr. 20, 2000).

[135] American Trial Lawyers Assoc., *Counsel Obtains Verdict Against Drug Dealer Whose customers Caused Fatal Automobile Wreck*, LAW REPORTER, Vol. 43, No. 1 at 240 (2000).

[136] *Id.*

[137] *Id.*

for more than a year.[138] The vehicle that swerved into Muhs' lane was operated by Daniel Bolls.[139] Following the accident, Bolls and his passenger, Carrie Ann Walker, were immediately tested for narcotics and the results indicated that both were under the influence of marijuana and methamphetamines.[140] Walker told police that she and Bolls had received the methamphetamine from the defendant, Wayne Johnson, earlier that morning.[141] Although Walker and Bolls were charged with manslaughter, vehicular homicide, and ingestion of a controlled substance, Muhs filed suit against Wayne Johnson under South Dakota's DDLA seeking recovery for medical expenses, loss of consortium, and punitive damages.[142]

Unlike *Ficano*, the defendant in *Muhs* was represented in court.[143] Even so, the jury awarded a total of $268.7 million to Muhs, $250 million of which constituted punitive damages.[144] Under South Dakota's DDLA, Muhs was able to demonstrate liability by showing that Johnson provided Bolls and Walker with the drugs that caused them to swerve into Muhs' lane and collide with her vehicle.[145] *Muhs*, therefore, serves as an example of a suit against the first class of defendants included in the MDDLA—persons who knowingly distribute or participate in the distribution of an illegal drug, the use of which forms the basis of recovery.[146] Unlike *Ficano*, many of the criticisms resulting from the MDDLA's relaxed causation requirements do not apply in the context of a case like *Muhs*.

Despite this difference, *Ficano* and *Muhs* have several important similarities. Both cases help further the universal

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[138] *Id*.

[139] *Id*.

[140] *Id*.

[141] American Trial Lawyers Assoc., *Counsel Obtains Verdict Against Drug Dealer Whose customers Caused Fatal Automobile Wreck*, LAW REPORTER, Vol. 43, No. 1 at 240 (2000).

[142] *Id*.

[143] *Id*.

[144] *Id*.

[145] *Id*.

[146] MODEL DRUG DEALER LIABILITY ACT, *supra* note 41, § 6(b).

interest of providing victims of the illegal drug market with a remedy while deterring those who participate in the distribution of drugs. Further, the plaintiffs in both cases encountered the common problem of collecting the judgment from the liable defendants. Plaintiffs under the MDDLA can expect to have difficulty collecting judgments once a verdict has been reached because many defendants will not be able to satisfy a large award. However, with increased publicity and legislative support for the MDDLA, plaintiffs may begin to file suit against defendants more capable of fulfilling an adequate award. Even if a defendant is not capable of fully satisfying an award under a state's DDLA, the statute provides incentives for defendants to identify other participants in the illegal drug market so that they may share liability.

III. THE CONSTITUTIONALITY OF THE MDDLA

The Due Process Clause of the Fourteenth Amendment serves as a check upon the authority of state legislatures to deprive individuals of life, liberty, or property.[147] Accordingly, courts may review the fairness of procedures authorized by state legislation or the fairness of decisions in particular cases.[148] Additionally, the Double Jeopardy Clause of the Fifth Amendment provides that no person shall be "put in jeopardy of life or limb" for the same offense twice.[149] Critics of the MDDLA raise two constitutional challenges based on these principles: one, that the Act's statutory presumptions violate the procedural due process owed to defendants, and two, the Act violates the Fifth Amendment's protection against double jeopardy by subjecting defendants to multiple punishments for the same offense.[150] Despite these claims, case law, fundamental principles of procedural due process, and legislative history

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[147] *See* Tot v. United States, 319 U.S. 463, 467 (1943); RONALD D. ROTUNDA & JOHN E. NOWACK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 14.6 (3d ed. 2006).

[148] ROTUNDA & NOWACK, *supra* note 147.

[149] U.S. CONST. amend. V.

[150] *See, e.g.,* Stasell, *supra* note 6; Baar, *supra* note 6.

suggest that the MDDLA would survive such constitutional challenges.

A. The MDDLA Satisfies the Constitutional Requirements of the Due Process Clause

When performing a due process analysis, courts must first determine the threshold issue of whether the state has deprived an individual of life, liberty, or property.[151] Only after a court finds that the state has deprived an individual of any of these rights, must it then consider whether the procedure used by the state satisfies the requirements of the Fourteenth Amendment's Due Process Clause.[152] To help articulate what these requirements are, the Supreme Court developed a balancing test in *Matthews v. Eldridge*.[153] In *Eldridge*, the Court held that determining the constitutionality of a state's process for depriving an individual of life, liberty, or property required consideration of three factors: first, the private interest that will be affected by the state's action; second, the possibility of mistaken deprivation weighed against the value of procedural alternatives; and third, the state's interest, including the added burdens of requiring additional or substitute procedures.[154]

Because judgments awarded under the MDDLA would clearly constitute a deprivation of property, the more critical determination is whether the MDDLA satisfies the Court's three pronged balancing test handed down in *Eldridge*. Although even critics of the MDDLA concede that the Act provides defendants with three significant components of sufficient due process—notice of being sued, a trial to determine issues of fact, and a neutral decision maker—procedural due process challenges arise in regard to the Act's statutory presumption.[155]

Applied to the MDDLA's statutory presumption, the

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[151] ROTUNDA & NOWACK, *supra* note 147, § 17.1.

[152] *Id.*

[153] 424 U.S. 319, 335 (1976).

[154] *Id.*

[155] *See, e.g.*, Stasell, *supra* note 6; Baar, *supra* note 6.

Eldridge test requires courts to balance 1) a drug dealer's private property interest; 2) the risk of a mistaken deprivation of the defendant's property; and 3) the government's interest in providing victims of the illegal drug trade with a civil remedy for their injuries.[156] As discussed earlier, the MDDLA creates a presumption of liability of a defendant after the plaintiff shows that the defendant: 1) distributed illegal drugs in the user's target community; 2) distributed the same type of illegal drug as was used by the drug user; and 3) was engaged in the distribution of drugs during the same time period in which the drugs were used.[157] Additionally, a defendant is collaterally estopped from denying participation in the illegal drug market if he has been convicted under either state drug distribution laws or the Comprehensive Drug Abuse Prevention and Control Act of 1970.[158] Opponents of the MDDLA claim that the Act fails under the *Eldridge* test because it "creates an irrational and irrebuttable presumption of liability once the plaintiff establishes [the] three elements."[159]

Admittedly, a statutory presumption cannot satisfy the due process clause without "some rational connection between the fact proved and the ultimate fact presumed."[160] However, opponents to the MDDLA support their position by erroneously contending that "a statutory presumption is thus invalid unless the presumed fact is more likely than not to flow from the proved fact."[161] Although this standard is applicable in some circumstances, the cited authority, *Leary v. United States*, does not apply to the MDDLA. Rather, *Leary* is clearly distinguishable as it considered the constitutionality of a *criminal* statutory presumption.[162] Given the many procedural safeguards

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[156] *Eldridge*, 424 U.S. at 335.

[157] *See supra* note 64 and accompanying text.

[158] *See supra* note 80 and accompanying text.

[159] Stasell, *supra* note 6 at 1047.

[160] *See* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 4 (1976); Tot v. United States, 319 U.S. 463, 467 (1943).

[161] Stasell, *supra* note 6 (citing Leary v. United States, 395 U.S. 6, 36 (1969)).

[162] *Leary*, 395 U.S. at 36.

provided to a criminal defendant that are not provided to a civil defendant, it follows that the Constitution would permit a lower standard for determining whether statutory presumptions in civil cases, as compared to those in criminal cases, satisfy the *Eldridge* test.[163]

In 1988, the Supreme Court confirmed the notion that statutory presumptions in civil proceedings receive less scrutiny than statutory presumptions in criminal proceedings.[164] In *Feicock v. Feicock*, a man was held in contempt for failure to comply with court-ordered child support.[165] The majority focused primarily on the different burdens of proof, holding that California's statutory presumption that an obligated parent remains able to make required child support payments would violate principles of procedural due process if applied in a criminal proceeding because the presumption "would undercut the State's burden to prove guilt beyond a reasonable doubt."[166] The Court emphasized that the relative high burden of proof required for criminal convictions prohibited the shifting of the burden of persuasion to the defendant, but "if applied in a civil proceeding, however, this particular statute would be constitutionally valid."[167] The Court further explained that if the state court only imposed civil remedies, "it would be improper to invalidate the result merely because the Due Process Clause, as applied in *criminal* proceedings, was not satisfied," thereby recognizing the distinction between civil and criminal statutory presumptions.[168] Consequently, any challenge to the constitutionality of the MDDLA's statutory presumption based upon the standard used for criminal statutory presumptions is

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[163] For a more in-depth discussion of the litany of procedural safeguards afforded to criminal defendants but not provided to civil defendants, *see, e.g.,* Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L. J. 1795, 1799 (1992).

[164] *See* Feicock v. Feicock, 485 U.S. 624 (1988).

[165] *Id.*

[166] *Id.* at 637.

[167] *Id.* at 637-38. (citing Maggio v. Zeitz, 333 U.S. 56, 75-76 (1948); Oriel v. Russel, 278 U.S. 358, 364-65 (1929)).

[168] *Id.* at 638 (emphasis added).

invalid because the MDDLA only provides for a civil remedy, and therefore, such challenges are in direct conflict with the Supreme Court's holding in *Feicock*.

The elements required by the MDDLA's statutory presumption, taken together with the Supreme Court's decisions, state case law, and defendants' ability to rebut the Act's statutory presumption, indicate that the presumption passes constitutional muster under the *Eldridge* test.[169] Even if the Court were to agree with critics' claims that the *Leary* standard for rationality of statutory presumptions is applicable to civil proceedings, the elements a plaintiff must prove before imposing liability on a defendant under the Act's statutory presumption clearly show that the presumed fact is "more likely than not" to have occurred. At a minimum, a defendant liable under the MDDLA must be shown to have distributed illegal drugs in the same target community as the user, to have distributed the same type of illegal drugs used by the user, and to have distributed drugs at the same time as when the user used drugs.[170]

The proof of such facts unquestionably makes it more likely than not that the defendant contributed to the plaintiff's harm by participating in the distribution of drugs to the user whose actions formed the basis for recovery. Therefore, the elements required for enforcement of the MDDLA's presumption satisfy the *Leary* standard. The Court's distinction between criminal and statutory presumptions demonstrates the Court's determination that a civil defendant's property interest may receive less protection than a criminal defendant's liberty interest.[171] As a result, the consideration of the second prong of the *Eldridge* test—the risk of erroneous deprivation of property—assumes greater significance in the determination of whether the MDDLA's presumption is constitutional.

Because the MDDLA allows the defendant to rebut the statutory presumption, the risk of erroneous deprivation of

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[169] *See Matthews*, 424 U.S. at 334; Tot v. United States, 319 U.S. 463, 468 (1943); Pierce v. Albanese, 144 Conn. 241, 250-52 (1957).

[170] *See* MODEL DRUG DEALER LIABILITY ACT, *supra* note 41, § 6(b).

[171] *See* Feicock v. Feicock, 485 U.S. 624, 637-38 (1988).

property is not substantial enough to render the Act unconstitutional. Although plaintiffs under the MDDLA may impose liability upon defendants after proving three elements, any defendant, regardless of whether he has been convicted of a drug distribution offense, may offer evidence for the purpose of rebutting the presumption of liability.[172] Critics of the Act assert that "the presumption of liability . . . is effectively irrebuttable,"[173] but such claims lose sight of two important principles of the MDDLA. First, despite that a conviction for a drug distribution offense serves as prima facie evidence of a defendant's participation in the illegal drug market for the two years preceding the date of the plaintiff's injury, this provision only serves to collaterally estop defendants from denying having *ever* participated in the illegal drug market.[174] Therefore, defendants under the MDDLA who have prior convictions for drug distribution offenses may still offer proof that they did not participate in the distribution of illegal drugs either during the two years preceding the date of the plaintiff's injury or during the relevant time period during which the plaintiff's injury occurred. Such an evidentiary showing would enable a defendant to effectively rebut the Act's statutory presumption, allowing a reasonable jury to find in his favor.

Second, the MDDLA's critics also lose sight of the underlying principle that, because of the nature of the illicit drug trade, defendants brought into court via the MDDLA are in the best position to supply exculpatory evidence. Such a shift of the burden of persuasion would violate the Due Process Clause in a criminal proceeding, but may be constitutionally assigned to the civil defendant after the plaintiff has made a factual demonstration.[175] Moreover, though the Supreme Court has held that there must be a rational connection between the facts proved and a statutory presumption for it to be considered valid, it has also held that courts may consider the "comparative convenience

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[172] MODEL DRUG DEALER LIABILITY ACT, *supra* note 41, § 6(b), *see also supra* notes 79-84 and accompanying text.

[173] Stasell, *supra* note 6, at 1049; *see also* Baar, *supra* note 6, at 193.

[174] MODEL DRUG DEALER LIABILITY ACT, *supra* note 41, § 6(b).

[175] *Feicock*, 485 U.S. at 637-38.

of producing evidence of the ultimate fact."[176] That defendants are better situated to provide evidence as to their liability carries considerable weight as to the determination that the Act's presumption is rebuttable. Accordingly, the risk of erroneous deprivation of property is outweighed by the government's interest in providing victims of the illegal drug trade with an adequate and available civil remedy.

Additional due process challenges arise because of the Act's departure from traditional proximate cause requirements in favor of a risk-oriented approach to market share liability theory.[177] Nevertheless, the enactment of Dram Shop statutes and workers' compensation laws, together with the Supreme Court's repeated decisions to deny certiorari to cases permitting market share liability,[178] provide a sound basis for the constitutionality of the MDDLA's relaxation of proximate cause requirements.

The constitutionality of state Dram Shop acts also lends support to the MDDLA. In *Pierce v. Albanese*, Connecticut's Supreme Court considered whether the State's Dram Shop Act violated the Due Process Clause of the federal and state Constitutions on the grounds that the statute imposed civil liability on defendants who served alcohol without requiring a causal connection between the sale of intoxicating liquor and the intoxication which caused the plaintiff's injury.[179] The plaintiff in *Pierce* brought suit against a tavern owner under Connecticut's Dram Shop Act after being struck by an automobile operated by an intoxicated driver who had been sold

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[176] Tot v. United States, 319 U.S. 463, 467 (1943).

[177] *See, e.g.*, Stasell, *supra* note 6; Baar, *supra* note 6. For an explanation of the risk oriented approach to market share liability used by the MDDLA, *see Collins*, 116 Wis. 2d 166, 193-94 (1984), discussed *supra* notes 105-18.

[178] Meeks, *supra* note 20, at 344 (citing Sindell v. Abbot Labs., 607 P.2d 924 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989), *cert. denied*, 493 U.S. 944 (1989); Collins v. Eli Lilly Co., 342 N.W.2d 37 (Wis. 1984), *cert. denied*, 469 U.S. 826 (1984).

[179] 144 Conn. 241 (1957), *cert. denied*, 355 U.S. 15 (1957).

alcohol at the defendant's tavern.[180] The *Pierce* court recognized that the Connecticut Dram Shop Act "created an action unknown to the common law."[181] Nonetheless, the court upheld the statute on the grounds that, through exercise of its police powers, a state may modify or remove traditional common law principles to provide damages for injuries without violating constitutional requirements.[182]

The defendant in *Pierce* asserted that the statute violated the Due Process Clause as he should not be held liable absent a showing that the intoxicating liquor that he sold significantly contributed to the intoxication of the person whose conduct gave rise to the plaintiff's claim.[183] After determining that the statute was constitutional, the *Pierce* Court explained that "the statute does not require proof that the sale of intoxicating liquor produced or contributed to the intoxication of the person to whom it was sold."[184] Accordingly, after the plaintiff provided evidence that the driver to whom the liquor was sold was intoxicated, and that such intoxication played a role in the negligent operation of a vehicle, the *Pierce* Court upheld the trial court's jury instructions and affirmed the jury's verdict in favor of the plaintiff.[185]

Most Dram Shop laws, including the one at issue in *Pierce*, parallel the MDDLA in a number of ways and represent a constitutionally permissible departure from the common law's traditional causation principles.[186] Most notably, the majority of

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[180] *Id.* at 244-45.

[181] *Id.* at 249 (citing Fleckner v. Dionne, 94 Cal. App. 2d 246, 251 (Cal. Ct. App. 1949); Howlett v. Doglio, 402 Ill. 311, 318 (1949); Beck v. Groe, 245 Minn. 28, 35 (1955); Tarwater v. Atlanta Co., 176 Tenn. 510, 512 (1940); Demge v. Feierstein, 222 Wis. 199, 203 (1936)).

[182] Feierstein, 222 Wis. at 250 (citing Powers v. Hotel Bond Co., 89 Conn. 143, 147 (1915); Silver v. Silver, 108 Conn. 371, 377 (1928); Levy v. Daniels' U-Drive Auto Renting Co., 108 Conn. 333, 337 (1928); Verrilli v. Damilowski, 140 Conn. 358, 360 (1953)).

[183] *Id.* at 254.

[184] Pierce v. Albanaese, 144 Conn. 241, 263 (1957), *cert. denied*, 355 U.S. 15 (1957).

[185] *Id.*

[186] Courts have generally upheld the constitutionality of Dram Shop

Dram Shop Acts do not require the plaintiff to prove that the liquor provided by the defendant to the driver played a role in the driver's intoxication.[187] The *Pierce* court defended the constitutionality of such statutes:

> [I]f one desires to engage in the liquor business. . .he assumes of necessity the risk of a great variety of situations which could impose liability upon him. He is bound to presume that the liquor which he sells will be consumed sometime. The act does not impose absolute liability upon the [defendant] but leaves to him a number of defenses.[188]

Similarly, drug dealers assume the risks associated with conducting their business, including liability for the damage or harm they may cause. The overwhelming support for the constitutionality of Dram Shop legislation lends considerable strength to the assertion that the MDDLA's deviation from traditional causation requirements is constitutional.

In addition to dram shop legislation, workers' compensation laws also serve as an example of how legislatures may constitutionally modify or abolish specific fundamentals of tort liability.[189] Under the common law, employees were generally

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Acts. *See, e.g. Pierce*, 144 Conn. at 253 (citing Shell Oil Co. v. Superior Court of Los Angeles C'ty, 213 Cal. 596, 598 (1931)); Garrity v. Eiger, 272 Ill. 127, 134 (1916), *aff'd*, 246 U.S. 97 (1918) (holding that "in view of the broad authority of the states over the liquor traffic, and the established right to prohibit or regulate the sale of intoxicating liquors, we are unable to discover that there has been a deprivation of property rights in the legislation in question in violation of due process of law secured by the Fourteenth Amendment"); Bertholf v. O'Reilly, 74 N.Y. 509, 517 (1878); Kennedy v. Garrigan, 121 N.W. 783 (S.D. 1909).

[187] *Pierce*, 144 Conn. at 254.

[188] *Id.* at 252.

[189] Workers' compensation statutes have generally been upheld as constitutional, particularly in the face of challenges brought under the Due Process Clause. *See, e.g.,* Shaw v. Salt River Valley Water Users Ass'n., 69 Ariz. 309 (1950); Khoury v. Carvel Homes South, Inc., 403 So.2d 1043 (Fla. Dist. Ct. App. 1981), *cert. denied*, 412 So.2d 467 (Fla. 1982); Walters v. Blackledge, 220 Miss. 485 (1954) (holding that Mississippi Workers' Compensation Law does not violate Due Process Clause despite abrogating

unable to receive adequate awards for injuries resulting from their employer's breach of duty because of the "unholy trinity" of defenses available to defendants: contributory negligence, assumption of risk, and the fellow servant rule.[190] It followed that many industrial injuries went uncompensated, thereby forcing the employee—the least-capable individual—to bear the resulting financial burden.[191] The common law's inability to impose liability onto employers induced extremely poor working conditions, inhumane practices, and most significantly, a lack of an incentive for employers to improve their work environments.[192] Reluctant to take legislative matters into their own hands, the courts waited for legislatures to enact a change in the common law's rules for injured employees.[193]

Workers' compensation statutes also parallel the MDDLA on statutory and public policy levels. Under these statutes, an employer is subject to liability for the injuries arising out of his enterprise, regardless of whether he or the injured employee was negligent.[194] Put plainly, workers' compensation laws allow recovery not only in cases in which the employer has not breached a duty to the employee (e.g. an unavoidable accident), but also in cases in which the employee's own negligence was a factor in causing his injuries.[195] Therefore, both workers' compensation laws and the MDDLA deviate from the common law's causation requirement in order to allow plaintiffs to overcome the obstacles to recovery that otherwise permit negligent defendants to avoid liability.

While both the MDDLA and workers' compensation laws provide a civil remedy for plaintiffs who have suffered a demonstrable harm, each scheme also creates an incentive for

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right to bring suit for personal injury and subjecting employers to liability in the absence of neglect or fault).

[190] KEETON ET AL., *supra* note 13, § 80, at 568.

[191] *Id.* § 80 at 572.

[192] *Id.* § 80 at 573.

[193] *Id.*

[194] *Id.*

[195] *See Walters*, 220 Miss. at 507. *See also* KEETON ET. AL, *supra* note 13, § 80, at 573.

defendants to refrain from tortious conduct. In the same way that workers' compensation laws were enacted to make working conditions safer, the MDDLA represents an effort to decrease the prevalence of illegal drugs. Workers' compensation acts rest upon the theory that "the cost of the product should bear the blood of the workman."[196] This theory holds that damages paid to injured employees should be absorbed by the employer as a cost of production, much like the servicing of machinery or other operating costs.[197] As the employer assumes these costs, he eventually passes them onto the consumer in the form of higher prices.[198] Similarly, the MDDLA has the potential to drive up drug dealers' production costs by subjecting them to liability for their conduct, thereby raising the cost of illegal drugs for consumers.

The MDDLA satisfies the constitutional requirements of the Due Process Clause for several reasons. First, the Supreme Court recognizes the distinction between criminal and civil statutory presumptions and provides that the burden of persuasion may be shifted to the defendant in a civil proceeding.[199] Second, the *Eldridge* Court's balancing test for determining the constitutionality of statutory presumptions indicates that the MDDLA's presumption comports with due process. Consider the application of the *Eldridge* test: the government's compelling interest in providing an appropriate civil remedy for victims, defendants' relatively low property interests, and the rebuttable nature of the MDDLA's statutory presumption all weigh in favor of upholding the Act's presumption. Finally, the Supreme Court recognized that "due process is flexible and calls for such procedural protections as the particular situation demands."[200] Therefore, given the

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[196] KEETON ET AL., *supra* note 13, § 80, at 573 (quoting Francis Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328, 401, 517 (1912)).

[197] *Id.*

[198] *Id.*

[199] *See Feicock*, 485 U.S. 624 (1988); *see also supra* notes 162-68 and accompanying text.

[200] *Matthews*, 424 U.S. at 334 (quoting Morrissey v. Brewer, 408 U.S.

obstacles to recovery that injured plaintiffs face due to the secretive nature of the illegal drug trade, the MDDLA's legislative deviation from traditional causation principles is within the limits of the Constitution.

B. The MDDLA Does Not Violate the Fifth Amendment's Protection Against Double Jeopardy

Although the MDDLA imposes civil liability on some defendants who may have already been subject to criminal liability, the Act does not violate the Fifth Amendment's Double Jeopardy Clause. The Supreme Court has consistently held that the Double Jeopardy Clause "protects only against the imposition of multiple *criminal* punishments for the same offense."[201] Therefore, because the MDDLA inflicts a civil, rather than criminal punishment, it passes muster under the Fifth Amendment. Nevertheless, the MDDLA's opponents claim that the Act violates defendants' protection against double jeopardy because the statute intends to punish and deter defendants.[202] In light of the Supreme Court's decision in *Hudson v. United States*, however, the MDDLA survives constitutional scrutiny under the Fifth Amendment's protection against Double Jeopardy.

In *Hudson*, the Supreme Court considered whether the Double Jeopardy Clause protected three defendants from being indicted for violating federal banking statutes after the government had already imposed monetary penalties in a civil suit arising from the same conduct. The *Hudson* Court ultimately determined that the monetary penalties enforced by the government in the civil proceeding were in fact civil, and therefore did not render the subsequent criminal prosecution violative of the Fifth Amendment.[203] Most significantly,

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471, 481 (1972)).

[201] Hudson v. United States, 522 U.S. 93 (1997) (*emphasis in original*) (citing United States ex. Rel. Marcus v. Hess, 317 U.S. 537, 548-49 (1943); Helvering v. Mitchell, 303 U.S. 391, 399 (1938)).

[202] *See, e.g.,* Stasell, *supra* note 6; Baar, *supra* note 6.

[203] *Hudson*, 522 U.S. at 96.

however, the Court abandoned its method of analysis in *Halper* largely on the grounds that the *Halper* Court failed to determine the threshold issue of whether a penalty was criminal in nature before applying the Fifth Amendment's Double Jeopardy Clause to the sanction at issue.[204]

Hudson held that the *Halper* Court improperly ignored traditional double jeopardy doctrine.[205] The defendant in *Halper* asserted his Fifth Amendment protection against double jeopardy after the government brought a civil action against him under the False Claims Act for conduct that had already resulted in a two year prison sentence.[206] The *Halper* Court, determining whether the punishment imposed was civil or criminal, considered only whether the sanctions were so inconsistent with the harm caused that it represented a criminal punishment.[207] *Halper* over-emphasized this single factor, essentially making it the determinative factor.[208] In response, *Hudson* held that "no one factor should be considered controlling as they 'may often point in differing directions.'"[209]

The Supreme Court's test for determining whether a punishment is criminal or civil requires consideration of two questions.[210] First, courts must ask whether the legislature either expressly or implicitly intended the sanction to be classified as a civil or criminal punishment.[211] Second, even it is found that the legislature intended a civil punishment, courts must determine whether the sanction is so punitive as to transform it into a

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[204] *Id.* at 96, 101.

[205] *Id.* at 101.

[206] *Halper*, 490 U.S. at 437-38.

[207] *Hudson*, 522 U.S. at 101. Although Halper violated the False Claims Act on 65 different instances, thereby subjecting him to liability for a penalty of $130,000, his conduct actually defrauded the government of approximately $600. *Id.*

[208] *Id.*

[209] *Id.* (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1963)).

[210] *Id.* at 99.

[211] *Id.* (citing United States v. Ward, 448 U.S. 242, 248 (1980)).

criminal punishment.[212] Considering the first question, the legislative intent of the MDDLA is clear. Much like Congress' enactment of the relevant statute in *Hudson*,[213] the MDDLA expressly provides that any monetary penalties imposed under its legislative scheme constitute civil remedies that may be obtained via civil proceedings. [214]

In answering the *Hudson* test's second question, several factors provide "useful guideposts,"[215] including: 1) to what extent, if any, the penalty involves an affirmative restraint such as imprisonment; 2) whether the penalty has historically been considered a punishment; 3) whether the sanction is imposed only after a finding of scienter; 4) whether the penalty encourages the traditional goals associated with criminal punishments such as retribution and deterrence; 5) whether the conduct giving rise to the penalty constitutes a criminal offense; 6) whether there is a possible alternative purpose for the penalty; and 7) whether the sanction is excessive with regard to the alternative purpose.[216] Additionally, *Hudson* explained that the factors must be applied to the statute on its face, and that "only the clearest proof" enables a court to convert what the legislature intended as a civil remedy into a criminal punishment.[217]

Much like the civil penalty at issue in *Hudson*, the civil remedies imposed under the MDDLA are not so punitive as to assume a criminal classification. The MDDLA seeks to provide a civil remedy to plaintiffs who have suffered a demonstrable harm, thereby compelling liable defendants to pay civil damages.[218] Any affirmative restraint resulting from the

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[212] Hudson v. United States, 522 U.S. 93, 99; 118 S.Ct. 488, 493 (1997) (citing United States v. Ward, 448 U.S. 242, 248-49; Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956)).

[213] *Id*. at 103.

[214] *See* Bent et al., *supra* note 45.

[215] *Hudson*, 522 U.S. at 99.

[216] *Id*. (*citing Mendoza-Martinez*, 372 U.S. at 169).

[217] *Id*. at 100 (*citing Mendoza-Martinez*, 372 U.S. at 169; *Ward*, 448 U.S. at 249).

[218] Bent et al., *supra* note 45.

defendant's conduct arises during a separate criminal prosecution. Additionally, monetary penalties have not historically been interpreted as constituting criminal punishments.[219] Moreover, the MDDLA furthers two goals traditionally associated with criminal punishments—retribution and deterrence. However, the Court recognized that "all civil penalties have some deterrent effect," and "if a sanction must be 'solely' remedial (i.e. entirely non-deterrent) to avoid implicating the Double Jeopardy Clause, then no civil penalties are beyond the scope of the Clause."[220] The *Hudson* Court explained that the deterrent effect or purpose of a civil sanction was insufficient proof that a civil penalty should be considered a criminal punishment because deterrence may permissibly serve as a goal of both criminal and civil liability.[221] Therefore, the MDDLA's secondary goal of deterrence does not render it violative of the protection against double jeopardy.

The MDDLA undoubtedly subjects defendants to civil liability for conduct that constitutes a criminal offense, but challenges to the Act's constitutionality lose sight of the fact that there is a rational alternative purpose to the legislation, namely providing victims of the illegal drug trade with a remedial course of action.[222] Under the *Hudson* test, this alternative purpose supports the proposition that monetary penalties imposed under the MDDLA are not so punitive as to transform the civil remedy into a criminal punishment. Moreover, the *Hudson* Court explained that civil liability arising from the same conduct that gives rise to criminal liability does not necessarily

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[219] Hudson v. United States, 522 U.S. 93, 104 (1997).

[220] *Id.* at 102 (citing Dep't of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 777 (1994) (holding that the presence of a deterrent purpose or effect was not determinative when considering if a sanction violated the Double Jeopardy Clause)).

[221] *Id.* at 105 (*citing* United States v. Ursery, 518 U.S. 267, 292 (1996) (rejecting the argument that civil forfeitures violate the Double Jeopardy Clause)). *See also* Bennis v. Michigan, 516 U.S. 442, 452 (1996) (holding that civil forfeiture's deterrent purpose is separate from any punitive purpose).

[222] Bent et al., *supra* note 45.

cause the monetary sanctions to assume a criminal nature, particularly when considering whether the sanction constitutes a violation of the Double Jeopardy Clause.[223]

After applying the factors set out in *Hudson*, it is clear that the civil remedy provided by the MDDLA does not amount to the clearest proof required by the Court to transform what was intended as a monetary sanction into a criminal punishment.[224] The legislative intent and insufficiently punitive aspects satisfy the standard established by the Supreme Court in *Hudson*. Therefore, the MDDLA does not violate the Fifth Amendment's protection against double jeopardy.

CONCLUSION

The MDDLA should be perceived as another legislative innovation created to help cure a social injustice presented under the common law. In addition to the need for remedial legislation to solve the causation difficulties victims face, a variety of different jurisdictions have accepted theories of market share liability. Most notably, the Supreme Court has repeatedly denied certiorari to appellants seeking to overturn decisions that have imposed liability via market share liability, including the risk-oriented approach to market share liability established in *Collins*.[225] The Supreme Court's recurring unwillingness to overturn decisions imposing liability based upon market share liability theory is particularly supportive of the MDDLA's constitutionality as the Act employs virtually the same market share liability model as was considered by the *Collins* Court.

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[223] *Hudson*, 522 U.S. at 105 (citing *Ursery*, 518 U.S. at 292; United States v. Dixon 509 U.S. 688, 704 (1993) (disavowing the same-conduct test in the context of double jeopardy violations)).

[224] *Id*. at 100 (citing *Mendoza-Martinez*, 372 U.S. at 169; *Ward*, 448 U.S. at 249).

[225] *See* Meeks, *supra* note 20, at 344 (citing Sindell v. Abbot Labs., 607 P.2d 924 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989), *cert. denied*, 493 U.S. 944 (1989); Collins v. Eli Lilly Co., 342 N.W.2d 37 (Wis. 1984), *cert. denied*, 469 U.S. 826 (1984)).

Moreover, the enactment of workers' compensation statutes and Dram Shop acts represent instances in which the legislature recognized a problem that the common law was ill-equipped to solve, and in response, enacted legislation so as to provide victims with a civil remedy. Both types of legislation have been held constitutionally valid across almost all jurisdictions,[226] and the MDDLA seeks to serve the same types of policy interests as these well-accepted statutes.

Last, in light of the Court's clear distinction between criminal and civil statutory presumptions,[227] and the rebuttable nature of the MDDLA's presumption of liability, the MDDLA satisfies the balancing of interests provided for in the *Eldridge* test. Furthermore, in addition to allowing for civil sanctions to serve deterrent purposes, the *Hudson* Court also required the clearest proof that the penalty imposed was so punitive as to alter what the legislature intended as a civil remedy into a criminal punishment, thereby overturning *Halper*.[228] As applied to the MDDLA, the Act's clear intent for the penalty to be civil, along with its insufficiently punitive nature under the factors laid out in *Hudson*, demonstrate that it does not violate the Double Jeopardy Clause. Taken together, these considerations heavily support the constitutionality of the MDDLA.

The potential effects of the MDDLA are also encouraging. At the heart of the MDDLA is the premise that participants in the illegal drug market are heavily motivated by the opportunity to acquire wealth.[229] Despite a highly skewed wage system, economists claim that many low-level drug dealers enter the illegal drug trade at a young age for the same reasons that small-town prom queens move to Hollywood and high school quarterbacks lift weights at 5 a.m.: "they all want to succeed in an extremely competitive field in which, if you reach the top,

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[226] *See supra* notes 186, 189.

[227] *See* Feicock v. Feicock, 485 U.S. 624, 637-38 (citing *Maggio*, 333 U.S. at 75-76 (1948); *Oriel* , 278 U.S. at 364-65 (1929)).

[228] *Hudson*, 522 U.S. at 100 (citing *Ward*, 448 U.S. at 249 (1980)).

[229] STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING 96 (Harper Collins 2005).

you are paid a fortune."[230] Although the rank and file members of an illegal drug operation stand to make relatively low wages, mid-to-upper level dealers can acquire sizeable salaries.[231] In fact, a field study of an illegal drug operation that was operating out of a large, industrial city recorded one of the operation's mid-level leaders as having earned monthly revenues of approximately $32,000—an annual total of $384,000.[232] After spending funds on business costs such as weapons, wholesale drugs, and payments to higher-level leaders, this mid-level leader was left with monthly profits of approximately $8,500, or an annual salary of just over $100,000.[233] Setting aside the fact that this income is, tax-free, the data for this mid-level leader nonetheless represents what many entrants into the illegal drug market strive for—affluence.[234] With high-level dealers earning upwards of $500,000 annually,[235] the MDDLA serves as an appropriate solution for enabling plaintiffs to subject wealthy drug dealers to liability, thereby permitting victims to receive an adequate remedy while providing a deterrent to future entrants into the illegal drug market.

Moreover, despite often severe sentencing guidelines, additional data indicates that criminal punishments are insufficient to serve as deterrents to participating in the illegal drug market.[236] One study reported overwhelmingly high risks of arrest and serious bodily injury to its dealers, and yet, the drug ring enjoyed an over-supply of labor.[237] The most alarming statistic was that one out of every four of the drug ring's dealers

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[230] *Id.* at 94-95.

[231] *Id.* at 97.

[232] *Id.* at 90-93.

[233] *Id.*

[234] *Id.* at 96.

[235] STEPHEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING 92 (Harper Collins 2005).

[236] *Id.* at 94.

[237] *Id.* Amongst each of the drug ring's members, the mean number of times arrested was 5.9, and the mean number of times having suffered non-fatal wounds or injuries was 2.4. *Id.*

had been killed since the inception of the operation.[238] Steven Levitt and Stephen Dubner effectively highlight the significance of this statistic by comparing it to death row inmates' chances of survival. For instance, in 2003, Texas—responsible for the most executions of any state in the U.S.—had over 500 prisoners awaiting execution on death row.[239] Of these 500 prisoners, 24 were executed in 2003, equaling approximately five percent of the state's death row inmates.[240] Evidently, drug dealers in the operation that was the subject of the economist's study had a much higher risk of death than prisoners awaiting execution on Texas' death row, yet market forces and an over-abundance of labor continually allowed the drug operation's leaders to pay low-level dealers comparably insignificant salaries.[241]

This data emphasizes the need for legislatures to utilize innovative schemes like the MDDLA in order to provide an adequate deterrent for those who consider becoming drug dealers, as well as the necessity for affording victims of the illegal trade a satisfactory remedy. That legislatures have historically enacted statutes deviating from traditional common law principles of liability in order to aid injured plaintiffs is strong support for the enactment of the legislation based upon the MDDLA. Not only are future drug dealers lured by the prospect of earning high salaries, many current dealers are capable of paying substantial judgments to injured plaintiffs. For these reasons, the MDDLA is an appropriate and constitutionally sound legislative proposal.

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[238] *Id.*

[239] *Id.*

[240] *Id.* at 94.

[241] STEPHEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING 95 (Harper Collins 2005).