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The Oklahoma Drug Dealer Liability: A Civil Remedy for a "Victimless" Crime

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COMMENT

The Oklahoma Drug Dealer Liability Act: A Civil Remedy for a "Victimless" Crime

I. Introduction

The market for illegal drugs perpetuates violence, disintegrates communities, fosters corruption, and ruins lives. In the first half of 1997, illegal drug use was a factor in over 269,000 emergency room visits.[1] The Bureau of Justice Statistics reports that 21% of inmates convicted of property crimes were under the influence of drugs, and 16.3% were under the influence of both drugs and alcohol.[2] Similarly, 13.5% of inmates convicted of violent crimes said they were using illegal drugs when they committed their crime, and 14.3% were using both drugs and alcohol.[3] While criminal law has been used aggressively as a weapon in the "war on drugs," it has done very little for the war's victims: those injured by drugs or drug-related crime.[4] Civil law, however, has engaged the drug problem only as an instrument of deterrence and punishment (through civil forfeiture proceedings), and not in its traditional role of remediation.

On September 24, 1996, California Governor Pete Wilson signed into law a bill enabling victims of drug-related injuries to sue drug dealers.[5] Actor Carroll O'Connor's advocacy played an important part in this bill's passage.[6] The elder O'Connor (who played Archie Bunker on TV's *All in the Family*) sought compensation for the suffering caused by his son's drug-related suicide, only to find that the common law effectively barred recovery from dealers for injuries caused by illegal drugs that had been used voluntarily.[7] Ironically, O'Connor was himself prevented

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1. *See Semi-Annual Trends in Total Drug Episodes* at tbl. 6.12 (visited Oct. 11, 1998) <http://www.samhsa.gov/oas/dawn/dawnmidyr/dawn13a8.htm#E9E9>.

2. *See Percent of Convicted Jail Inmates Who Committed the Current Offense While Using Drugs or Alcohol* at tbl. 6.12 (visited Aug. 10, 1998) <http://www.albany.edu/sourcebook/1995/pdf/t632.pdf> ("Alcohol or drug use at time of offense by adults on probation"). These figures reflect only the most serious offense for which the offender is currently serving time. For example, an offender serving time for one count of grand larceny and five counts of petty larceny would be recorded in this survey only on the grand larceny charge.

3. *See id.*

4. Prevailing cynicism toward the effectiveness of United States drug policy seems to require that the phrase "war on drugs" appear in quotation marks.

5. *See California Governor Signs Drug Dealer Liability Bill*, WEST'S LEGAL NEWS, Sept. 26, 1996, *available in* 1996 WL 541308.

6. *See* Dennis Anderson, *Actor Carroll O'Connor Supports Bill to Sue Drug Dealers*, ASSOCIATED PRESS POL. SERV., June 6, 1996, *available in* 1996 WL 5387297.

7. *See id.* O'Connor's son, Hugh, killed himself in 1995 after a long battle with drug use. "I'd sue him up the bahzoo if the bill became law," O'Connor said of the man convicted of supplying drugs to his son. *Id.*

from suing under the new California law because of a clause barring the law's prospective application,[8] but his plight publicized a largely unrecognized trend in legislation assigning civil liability to drug dealers.

Eleven states now impose civil liability on drug dealers,[9] with Oklahoma passing its own drug dealer liability act in 1994.[10] All of these bills are sweeping in scope and radical in their approach; however, they have received comparatively little media attention to date. They have enjoyed little notoriety at the courthouse,[11] and public awareness of the issue is minimal.

What scant attention these laws have generated disparages the laws' constitutionality and deprecates their practicality. These concerns could explain their lack of use. This Comment demonstrates that Oklahoma's Drug Dealer Liability Act (ODDLA) can effectively address its goals of compensating drug dealers' victims and deterring the sale of illegal drugs. This Comment also responds to objections raised about the Act's constitutionality and effectiveness.

II. Common Law Bar to Recovery for Victims of Narcotics-Related Injuries

Traditional legal remedies fail to provide relief to drug dealers' victims. Absent a statute assigning liability to drug sellers, drug-related injuries must be borne by victims. While common law remedies may enable recovery against a user of illegal drugs who was responsible for an injury, they offer no hope for collecting against deeper, and perhaps, guiltier pockets higher up the chain of distribution.

Attempts to recover under theories of negligence, products liability, and strict liability for abnormally dangerous activity are frustrated by traditional common law principles.[12] Suits brought under theories of negligence are fruitless because the consumption of drugs, rather than their sale, would be found to be the proximate cause of any resulting injury to the user or to a third party.[13] Products liability theory is inadequate, because it covers only items "dangerous to an extent beyond that which would be contemplated by the ordinary consumer."[14] Because "the

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8. *See* CAL. HEALTH & SAFETY CODE, § 11716 (West Supp. 1996). The clause prohibits suits arising from injuries which occurred before the bill became effective.

9. *See* ARK. CODE ANN. § 16.124.102-112 (Michie 1987); CAL. HEALTH & SAFETY CODE, §§ 11700-11730 (West Supp. 1999); FLA. STAT. ANN. § 772.12 (West Supp. 1999); GA. CODE ANN. § 51-1-46 (1997); HAW. REV. STAT. § 663 D-14 (1997); 740 ILL. COMP. STAT. 57/1-85 (West Supp. 1998); IND. CODE § 34-1-70-1-20 (1997); LA. REV. STAT. ANN. §§ 9:2800.61-.76 (West Supp. 1999); MICH. COMP. LAWS § 691.1601-1619 (1994); 63 OKLA. STAT. §§ 2-424-34 (Supp. 1998); S.D. CODIFIED LAWS § 772.12 (Michie Supp. 1999); UTAH CODE ANN. §§ 58-37e-1-14 (1997).

10. Interview with Rep. John Bryant, Oklahoma House of Representatives, in Oklahoma City, Okla. (Apr. 11, 1997).

11. As of 1996, only one appellate court had reviewed a dealer liability law. *See* Ficano v. Clemens, No. 95-512918 (Mich. Cir. Ct. Wayne County 1995).

12. *See* 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, 346.

13. *See id.* at 351-52. Bronfin compares a suit by a drug user against his dealer to the traditional doctrine of dram shop liability, where a tavern customer's consumption of alcohol is viewed as the proximate cause of injury instead of the tavern owner's selling it.

14. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

ordinary adult drug consumer presumably knows the dangers posed by the use of illegal drugs, a drug dealer would only be liable under this theory if she had sold a drug more dangerous than normal."[15] Finally, strict liability for an abnormally dangerous or "ultra-hazardous" activity is inapposite. Even if a court were to consider the sale of illegal drugs to be an abnormally dangerous activity, this sort of liability does not extend to victims who contribute to their own injury,[16] as would be the case of a drug user who voluntarily uses an illegal substance.[17]

Despite these barriers, some hope may yet exist for actions brought under the theory of ultra-hazardous activity. In 1993, a Connecticut state court ruled that a jury would be allowed to hear such a claim against an alleged cocaine dealer.[18] In *Prete v. Laudano*, the plaintiff was assaulted and injured by a man who suffered from a "physical and psychological condition" brought about by ingesting "a large quantity of cocaine," which he allegedly bought from the defendant.[19] Prete claimed that cocaine is "an inherently dangerous substance, the sale of which gives rise to a substantial likelihood of injury to others."[20] The *Prete* court held that merely because Connecticut courts had not yet extended strict liability to drug dealers, the plaintiff should not be denied her chance to prove the facts establishing strict liability.[21]

These three common law barriers to lawsuits against drug dealers turn on one crucial element: once the drug user voluntarily consumes an illegal drug he becomes the proximate cause of any resultant injury. At that point, the dealer is no longer liable. Therefore, despite the favorable ruling in *Prete*, the prospects for recovery against drug dealers under common law are severely limited.

III. Alternatives to Drug Dealer Liability Laws

Three systems have been proposed to circumvent these common law barriers to recovery from drug dealers. One plan calls for stiffening judicial sanctions imposed at sentencing in a criminal drug trial.[22] The second solution, dubbed "gram-shop liability," emphasizes compensation of drug dealers' victims through a more narrowly focused and traditional application of tort law.[23] The third system is the sort of drug dealer liability statute adopted by California, Oklahoma, and ten other states.[24] All three proposals aim to deter illegal drug trafficking as well as provide relief for victims of injuries arising from drug use. While the first two plans lack the sweeping character of the new dealer liability laws, they are easier to assimilate

15. Bronfin, *supra* note 12, at 349-50.
16. *See id.* at 346-48.
17. *See id.* at 348.
18. *See* Prete v. Laudano, No. 337966, 1993 WL 21417 (Conn. Super. Ct. Jan. 25, 1993).
19. *Id.* at *1.
20. *Id.*
21. *See id.*
22. *See* Recent Legislation, *Tort Law — Civil Liability for Criminal Acts — Illinois Expands Civil Liability of Drug Traffickers*, 109 HARV. L. REV. 699, 704 (1996).
23. *See* Bronfin, *supra* note 12, at 345.
24. *See supra* note 9 and accompanying text.

into the existing constitutional and statutory framework. As demonstrated below, although each alternative has its own advantages and disadvantages, neither restitution nor gram-shop liability would serve these common goals as well as would drug dealer liability legislation.

A. Restitution

The first proposed plan allows carefully tailored settlements to be awarded to victims through mandatory restitution, assigned by a judge, to be paid as part of a criminal sentence.[25] Such a system would protect a defendant's rights and eliminate the need for a civil trial.[26] Judicial discretion is certainly an efficient means of recovery. Judge-ordered restitution to victims of drug-related crimes serves as an uncomplicated and expedient remedy, a component of punishment that prohibits unjust enrichment, and acts as a deterrent to other would-be drug dealers.

Currently, however, judicially ordered restitution is not a widely utilized option in drug cases, even at the federal level where courts are required to consider "the need to provide restitution to any victims of the offense" as part of the criminal sentencing procedure.[27] Indeed, restitution was ordered in only 194 of 15,463 federal drug trafficking cases in fiscal 1994.[28] Additionally, a recent addition[29] to the federal sentencing guidelines allows a court to demand "community restitution" should the defendant's crime cause "public harm" but has no "identifiable victim."[30] This provision is intended to mandate restitution in "victimless" drug cases.[31] Community restitution, however, does nothing to encourage the recognition and relief of actual drug-related injuries.

Despite the potential benefits of community restitution, individual victims' rights are better safeguarded through a civil suit. Civil discovery may reveal a dealer's hidden or unknown assets that could be used to satisfy a judgment. A civil trial also encourages the identification of new drug-related injuries that would not ordinarily come to light at a criminal sentencing. Not all of the consequences of a drug transaction may have developed by the time of a criminal trial, since the effects of illegal drugs often take time to manifest themselves. For example, marijuana smoke contains more carcinogenic chemicals than does tobacco smoke, and a consequent cancer might not be diagnosed until after a drug dealer was sentenced.[32] Hallucinogens, such as LSD and PCP, can cause violent behavior and effects such as

25. *See* Recent Legislation, *supra* note 22, at 704.

26. *See id.*

27. 18 U.S.C. § 3553(a)(7) (Supp. II 1996).

28. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1994, at tbl. 5.34 (Kathleen Maguire & Ann L. Pastore eds., 1995). This figure represents only a tiny fraction of the number of occasions when a fine was included in a sentence for drug trafficking: 2558 of those same cases in the same time period. *Id.*

29. *See* U.S. SENTENCING GUIDELINES MANUAL 324-25 (1997).

30. *Id.* at 325 background note.

31. *See id.*

32. *See* U.S. DEP'T OF EDUCATION, WHAT WORKS: SCHOOLS WITHOUT DRUGS (1989) (reproduced by Library of Congress).

flashbacks long after use has ceased.[33] Long-term amphetamine users may develop paranoid psychosis.[34] Since the identification of drug-related injuries does not follow the same schedule as the criminal justice system, there is no reason to allow relief for injuries apparent only at the moment of sentencing — or even to require a criminal conviction at all.

Furthermore, it is incongruous that the summary and potentially arbitrary assessment of damages by a trial judge is considered superior to the careful and exacting process of a civil trial. A civil trial allows a defendant to examine a plaintiff's evidence, to attack the legal elements of a plaintiff's case, and to dispute or appeal the amount of a judgment and ensure that it is commensurate with the degree of a plaintiff's injury. Restitution also allows no apportionment of a judgment according to the degree of a plaintiff's comparative responsibility. Even though a convicted drug offender might be "estopped from denying his participation in the drug market,"[35] he is still entitled to more protection through a civil trial than he would be when sentenced to mandatory restitution. Should a judge elect to assign a payment of restitution as part of a criminal drug sentence, he has effectively performed the function of a jury in a suit under a drug dealer liability act. The interests of justice, and both defendants' and victims' rights, are better served by an adversarial hearing in which a plaintiff's evidence can be put to the test.

B. "Gram-Shop Liability"

A second proposed alternative to drug dealer liability acts involves a statutory codification of "gram-shop liability" — an adaptation of the principles of tort law negligence and of "dram shop liability" (tort law relating to the liability of tavern keepers) to the illegal drug market.[36] This proposal would establish a much narrower opportunity for recovery, but would have the constitutional safety of embracing existing principles of tort law.

Under such a law, an innocent third-party victim harmed by a drug dealer's trade could seek recovery from the dealer only "if she could prove (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."[37] The proposed "gram-shop liability" statute further allows recovery by an underage drug user, but not by a knowing adult who willfully used drugs.[38] A knowing adult has the last clear chance to avoid the injury, by deciding not to use the illegal narcotics.[39] According to this theory, bearing the cost of a self-inflicted injury should help to

33. *See id.*
34. *See id.*
35. 63 OKLA. STAT. § 2-431(B) (West 1999).
36. *See* Bronfin, *supra* note 12, at 351-52.
37. *Id.* at 353.
38. *See id.* at 357-58.
39. *See id.* at 359.

deter drug use.[40] However, trends in national drug use suggest the deterrent effect of current tort law appears insignificant.[41]

While "gram-shop liability" law may be constitutionally safer than dealer liability legislation, it mandates that a plaintiff seeking recovery prove that the drugs the defendant sold were the proximate cause of the plaintiff's injury.[42] This requirement demonstrates admirable enterprise in defense of drug dealers' due process rights, but unfortunately it presents a practical bar to recovery by injured plaintiffs.

Dram shop liability was a doctrine that evolved to deter the negligent dispensation of alcoholic beverages — drugs with which science is relatively familiar.[43] A jury can conclude with a fair amount of certainty that the four martinis an intoxicated driver consumed an hour before a car wreck impaired his reactions and caused the accident. It is unlikely that the glass of wine the same driver had a week ago was affecting his mind at the time of the accident. The long-term effects of alcohol are not significant factors in this sort of accident, and proximate cause can be readily ascertained. A plaintiff could claim with some certainty exactly which instance of alcohol abuse "contributed to the party's action that resulted in her injury."[44]

Conversely, the effects of various illegal drugs on the mind and body are highly unpredictable, and often not completely understood. For example, consider a driver who has a flashback caused by LSD consumed a year ago, loses control, and injures a bystander. It might be relatively simple to show that his taking that particular batch of LSD was the proximate cause of the flashback and accident. However, under "gram shop liability," a plaintiff would also be required to defeat the potential counterarguments that the flashback was instead an unforeseeable reaction between residual LSD and that morning's breakfast, or perhaps a particular brand of prescription medicine. If the user had mixed the drug with alcohol, or had taken it with legal prescription medication, proving proximate cause becomes much more difficult.[45]

Similarly, proximate cause would be relatively easy to prove in a case where the drug user has consumed the drug immediately before the injury and detectable traces remain in his system. Were this the only illegal drug the user had ever taken, proximate cause would be manifest. The odds, however, are very much against encountering this sort of straightforward case involving a singular, recent instance of drug use. Drug users often use many different drugs over time, and buy their drugs from different sources.[46] A plaintiff may well end up facing the impossible

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40. *See id.* at 359-60.

41. *See, e.g., Semi-annual Trends in Total Drug Episodes* (visited Oct. 11, 1998) <http://www.samhsa.gov/oas/dawn/dawnmidyr/dawn13a8.htm#E9E9>. Nationwide, drug abuse is down somewhat; one doubts, however, that the scarecrow of potential tort liability was a major factor in its decline.

42. *See* Bronfin, *supra* note 12, at 353.

43. *See id.* at 352, 355.

44. *Id.* at 352.

45. *See* DRUG IDENTIFICATION BIBLE 249 (Tim Marnell ed., 1993).

46. For descriptions of the chains of trafficking of different narcotics, see generally INTELLIGENCE DIV., DRUG ENFORCEMENT ADMIN., U.S. DEP'T OF JUSTICE, U.S. DRUG THREAT ASSESSMENT: 1993

dilemma of trying to prove that the methamphetamine a drug user took on Friday, rather than the crack cocaine he used on Wednesday, was the proximate cause of the user's psychotic episode on Sunday.

Further complicating the situation are differences in the chemical formulas of narcotics introduced through the manufacturing and distribution process. Drug dealers often buy their drugs from different suppliers, which may show great variation in quality and purity. Cocaine, for instance, is typically "cut" or treated with noxious substances (such as gasoline, hydrochloric acid, kerosene, sulfuric acid, ether, and acetone) at every stage of its production and distribution scheme.[47] Heroin is typically adulterated with caffeine (usually mixed in a 1:1 ratio) as well as quinine or strychnine in much smaller amounts.[48] Any variations in these formulae between suppliers or manufacturers could cause variations in the drug's subsequent effects, and thus create another basis for disputing that a particular dealer's narcotics caused a specific accident. Under these circumstances, a rigorous showing of proximate cause would be nearly impossible.

Another reason that a statute modeled on the doctrine of dram shop liability would be ineffective is that it could address only immediate consequences of use. While dram shop laws hold tavern keepers responsible for the torts of their intoxicated patrons for the extent of their intoxication,[49] they do not allow recovery for long-term effects of alcohol. Therefore, recovery against a bar owner by an infant born with fetal alcohol syndrome would not be allowed under dram shop laws. Under the same principle, a child whose development is retarded by its parents' drug use could not recover from drug dealers. A broader concept of fault is necessary if victims of more remote injuries, such as birth defects, are to find relief.

Finally, "gram-shop liability" provides only for recovery from the dealer who sold illegal drugs to the user; it permits no action against higher-level dealers who are less likely to be judgment-proof than those at the retail level.[50] In the heroin market, for example, drug wholesalers buy smuggled heroin at $15,000-$19,000 per kilogram; they dilute the heroin and sell to mid-level distributors for $50,000-$120,000 per kilogram.[51] The mid-level distributors, in turn, dilute the heroin again

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(1993) [hereinafter U.S. DRUG THREAT ASSESSMENT]. Crack cocaine customers have become wary consumers, as dealers sell unfamiliar customers low-quality or sham cocaine. *See id.* at 24. LSD dealers typically have multiple suppliers. *See id.* at 94. Also, due to the rate of arrest of street-level dealers, drug users will often need to seek out new sources.

47. *See* INTELLIGENCE DIV., DRUG ENFORCEMENT ADMIN., U.S. DEP'T OF JUSTICE, COCA CULTIVATION AND COCAINE PROCESSING 8 (1993).

48. *See* INTELLIGENCE DIV., DRUG ENFORCEMENT ADMIN., U.S. DEP'T OF JUSTICE, OPIUM POPPY CULTIVATION AND HEROIN PROCESSING IN SOUTHEAST ASIA 17 (1993).

49. *See* Bronfin, *supra* note 12, at 355.

50. *See, e.g.*, U.S. DRUG THREAT ASSESSMENT, *supra* note 46, at 28 (regarding crack-house workers).

51. *See* INTELLIGENCE DIV., DRUG ENFORCEMENT ADMIN., U.S. DEP'T OF JUSTICE, SOURCE TO THE STREET 7 (1993) [hereinafter SOURCE TO THE STREET]. See *id.* for a flow chart correlated with prices for Mexican heroin; other illegal drugs are given similar illustrations.

and sell it to street-level dealers in ounces for $55,000-$210,000 per kilogram.[52] At retail or street level, the heroin is sold for between $100 and $500 per gram.[53] Furthermore, many street-level crack dealers support a drug habit of their own.[54]

Street-level dealers have the slimmest profit margin of any stratum of the market; they run the greatest risks of arrest as well.[55] Certainly, fault lies all along the chain of drug distribution, yet plaintiffs would be denied recovery from the most solvent (and culpable) parties under "gram-shop liability." Without the threat of liability across the entire industry, the deterrent effect of this law would act only upon the street-level dealer — the analog of a bartender in dram shop liability.

C. Drug Dealer Liability Statutes

The third proposed system to permit recovery from drug dealers is the dealer liability statute. In 1992, former United States Attorney Daniel Bent drafted a law allowing recovery for injuries caused by illegal drugs.[56] The American Legislative Exchange Council (ALEC) adopted Bent's plan as model legislation.[57] Acting on the theory that producers and sellers of illegal drugs should be held to at least the same level of responsibility as are manufacturers of legitimate goods, dealer liability statutes created a new cause of action loosely based on theories of market share or alternative liability. Perhaps due in large part to their political appeal as a weapon in the war on drugs, and perhaps due to awareness generated by the O'Connor case in California, this approach is the option that has ultimately prevailed in state legislatures.[58]

In essence, drug dealer liability laws establish a cause of action sounding in tort for parties injured by illegal drugs. All of them are fairly similar, deriving from the same legislative source. All are quite broad in scope, imposing liability upon sellers or those who assist in the chain of commerce of illegal drugs within a target area. Dealer liability statutes also eliminate causation as a necessary element of such a claim, and instead impose liability upon proof of participation in the illegal drug market.

The various drug dealer liability acts have yet to affect the drug trade as dramatically as their authors and sponsors hoped. Nationally, the only case to test these laws was decided under Michigan's statute in 1994.[59] The estate of an infant beaten to death by her crack-addicted mother and the Wayne County, Michigan Sheriff's Department filed the action jointly against two convicted narcotics

52. *See id.*

53. *See id.*

54. *See id.*

55. *See id.*

56. *See 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.

57. *See Ill. Permits Suits Against Drug Dealers*, *supra* note 56, at A8.

58. *See* statutes cited *supra* note 9.

59. One source reported that the only case to test these laws was decided in Michigan in 1994. *See* Ceballos, *supra* note 56, at B10; *see also* Ficano v. Clemens, No. 95-512918 (Mich. Cir. Ct. Wayne County 1995).

dealers.[60] The default judgment awarded approximately $8 million to the sheriff's office and $1 million to the baby's estate.[61]

IV. Anatomy of Oklahoma's Drug Dealer Liability Act

Rep. John Bryant introduced a version of Bent's bill in the Oklahoma House of Representatives in 1994, where it passed on May 9 with minimal debate and virtually no media attention.[62] According to Representative Bryant, the bill was generally well received by interested parties such as district attorneys.[63] Legislative counsel anticipated no constitutional problems with the law.[64] Bryant explained that the ODDLA's purpose was twofold: to empower victims and to deter dealers.[65] He hoped it would "send shivers through those predators" by creating economic disincentives to drug sales.[66] Oklahoma became the second state to adopt such a law, shortly after Michigan.[67]

The ODDLA creates two separate forms of action. The first is dealt with in title 63, section 2-424 of the Oklahoma Statutes. Parties allowed to sue under section 2-424 include a drug user's immediate family, anyone exposed to an illegal drug *in utero*, a drug user's employer, or any entity which "funds a drug treatment program . . . for the individual drug user" or "otherwise expended money on behalf of the individual drug user."[68] This last class includes governmental entities,[69] which may be represented by a prosecuting attorney.[70] This type of action entitles a prevailing plaintiff to recover from a person who distributed illegal drugs directly to the individual drug user.[71] The plaintiff may also recover from a person who distributed the type of drugs the defendant used, at the time the defendant took them, within an area defined by the statute.[72]

Under section 2-424, third-party plaintiffs are entitled to recover both economic damages and non-economic damages for injuries, such as pain and suffering proximately caused by the illegal drug use.[73] They may also recover exemplary

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60. *See Clemens*, No. 95-512918 at 1.

61. *See id.* As of July 1996, only $25,000 of the judgment had been collected, half of which was to be placed in a trust fund for the infant's siblings.

62. *See* Interview with Rep. John Bryant, *supra* note 10.

63. *See id.*

64. *See id.*

65. *See id.*

66. *Id.*

67. Michigan's statute passed in February 1994; Oklahoma's statute passed in May 1994.

68. 63 OKLA. STAT. § 2-424 (Supp. 1998).

69. *See id.*

70. *See id.* § 2-434. Fearing double jeopardy concerns, California's Drug Dealer Liability Act departed from Oklahoma's example, and declined to allow states or governmental entities to sue under their Act. *See* Ceballos, *supra* note 56, at B10; *see also* CAL. HEALTH & SAFETY CODE §§ 11,700-11,730 (West Supp. 1999).

71. *See* 63 OKLA. STAT. § 2-425.

72. *See id.* § 2-424.

73. *See id.*

damages proximately caused by the illegal drug use, reasonable attorney fees, and the cost of suit.[74]

Plaintiffs under section 2-424 may recover from a defendant if they prove he "distributed, or participated in the actual chain of distribution of, an illegal drug that was actually used by the individual user."[75] Alternatively, a plaintiff may sue a drug dealer who has sold drugs in a specific area, termed a "target community."[76] The size of the target community varies in proportion to the amount of drugs at issue. For a relatively minor offense such as possession of one-quarter ounce of marijuana, termed a "Level One Offense," the target community extends to the borders of the county in which the offense occurred.[77] A "Level Four Offense," involving possession of over sixteen pounds of marijuana or sixteen ounces of other illegal drugs,[78] could expand a dealer's liability to include drug-related injuries across the entire state.[79] In addition to the element of area, a plaintiff under this section must also prove the defendant was "connected with" the same type of drug used by the individual drug user, and that the time of market participation and drug use were contiguous.[80]

The second cause of action, set forth in section 2-425, permits the individual drug user to recover for his own injuries.[81] This cause of action is more narrowly drawn, with an eye to avoiding unjustly enriching consumers of illegal drugs. An injured drug consumer is required to cooperate with law enforcement in building a criminal case against his supplier by disclosing "all information known to the individual regarding their [sic] source of illegal drugs" at least six months before initiating the action.[82] During this six-month period, and during the pendency of the action, the plaintiff must abstain from illegal drugs.[83] No penalty is provided for violation of this requirement, but presumably a plaintiff's use of illegal drugs during this period would constitute grounds for dismissal of the suit.

Individual drug users may recover neither non-economic nor exemplary damages.[84] Furthermore, comparative responsibility governs an individual drug user's award,[85] although the defendant bears the burden of proving the plaintiff's comparative responsibility. Should the defendant prove the plaintiff was to some

74. *See id.*

75. *Id.* § 2-424(B)(2). This form of action bears a passing resemblance to "gram-shop liability," but with the important distinction that under the ODDLA the plaintiff need only prove that the individual drug user actually used the defendant's drugs. There is no requirement under the ODDLA to prove those same drugs proximately caused his injury.

76. *Id.*

77. *See id.* § 2-422(5).

78. *See id.* § 2-422(8).

79. *See id.* §§ 2-422 to -427.

80. *See id.* § 2-424(B)(2)(b)-(c).

81. *See id.* § 2-425.

82. *Id.*

83. *See id.*

84. *See id.*

85. *See id.* § 2-423.

degree responsible for his own injury, the award is diminished "according to the measure of responsibility attributed to the plaintiff."[86]

Defendants may not exempt property from either cause of action.[87] A third party's payment of damages under indemnification or insurance contracts is likewise forbidden.[88] Unlike forfeiture statutes,[89] no requirement mandates proof that a defendant's property was used in the drug trade in order to seize the property, forfeiture suits against a drug dealer's property must be disposed of first; judgments under the Drug Dealer Liability Act are subordinate to forfeiture actions.[90] Also, on a motion from a prosecutor or governmental agency, a suit under the ODDLA may be suspended until criminal investigations and proceedings are complete.[91]

The standard of proof for participation in the illegal drug market is "clear and convincing evidence,"[92] while other elements must be shown by a preponderance of the evidence.[93] Perhaps the most controversial aspect of this law, however, is its effective presumption that a criminal conviction creates civil liability.[94] A defendant convicted of violating state drug laws "is estopped from denying participation in the illegal drug market."[95] Furthermore, such a conviction serves as "prima facie evidence of the participation of the person in the illegal drug market during the two years preceding the date of an act giving rise to a conviction."[96] Thus, a drug conviction within the "target community," and within two years after a drug-related injury in that target community, practically creates an undeniable presumption of liability for a drug-related injury under section 2-431.

V. Defenses to Drug Dealer Liability Suits

Unlike criminal sentences of restitution, which are judicially imposed, suits under the ODDLA offer a defendant an opportunity to defend himself. The causes of action outlined in the ODDLA ultimately resemble simple suits in tort. Liability must be established by "clear and convincing evidence."[97] Elements must be proven. Despite the extensive reach of dealer liability, a defendant is left with sundry means to avoid its grasp.

For example, "knowing" participation in the illegal drug market is a mental element required in actions under section 2-424. Thus, while under section 2-431

86. *Id.*
87. *See id.* § 2-432.
88. *See id.* § 2-426.
89. *See id.* § 2-503.
90. *See id.* § 2-432.
91. *See id.* § 2-434.
92. *Id.* § 2-431.
93. *See id.*
94. Note that a criminal drug conviction is not a required element of a cause of action under the ODDLA. A conviction merely stops the defendant from denying participation in the illegal drug market within the target community.
95. 63 OKLA. STAT. § 2-431.
96. *Id.*
97. *Id.* § 2-431.

a prior criminal conviction under state drug laws stops a defendant from denying "participation in the illegal drug market," it does not prevent the defendant from denying that his participation was *knowing*.[98] Because some of Oklahoma's criminal statutes criminalize the mere possession of illegal drugs,[99] regardless of the possessor's mental state, this element becomes crucial to a defense. Consider a hapless defendant who agrees to carry a present to someone in another city, only to find out upon his arrest that the package contains illegal drugs. Although this defendant would likely face criminal charges for drug possession, his ignorance would serve as a defense to suits under the ODDLA. The distinction is a fair one; dealer liability laws are intended to deter drug trafficking, not to punish it. An unknowing defendant has not demonstrated the same callous disregard for public safety as has a knowing and willful drug dealer.

Similarly, "participation in the illegal drug market," according to the Act's definitions, "does not include the purchase or receipt of an illegal drug for personal use only."[100] A defendant who can establish that drugs in his possession were solely for his own use has not participated in the illegal drug market, and thus is not liable under the ODDLA, although whether a prior criminal drug conviction would estop such a claim (under section 2-431) is not clear from the language of the statute. The logic behind this distinction is similar to that underlying the knowledge requirement; a defendant who intends to use drugs and suffer their consequences himself is not so blameworthy as a dealer who maliciously releases them upon the public.

VI. Criticism of Dealer Liability Statutes

Academia has been less receptive to dealer liability statutes than have state legislatures. The few scholars who have addressed dealer liability statutes have been skeptical, claiming the laws are unconstitutionally broad, and yet incapable of establishing real justice. Three arguments against dealer liability are discussed. First, the establishment of a statutory presumption of liability for convicted dealers and of political boundaries for liability are arbitrary and irrational presumptions, and therefore violate due process rights. Second, a state's civil suit against a previously convicted dealer violates double jeopardy protections. Third, the elimination of causation as an element of liability abrogates fundamental principles of tort law.

A. Dealer Liability Implicates Due Process Rights

The first objection is that dealer liability laws create statutory presumptions of fact which violate due process rights.[101] A rational connection between a fact to

98. *Id.*

99. *See, e.g., id.* § 2-402.

100. *Id.* § 2-422(9).

101. *See* Wendy Stasell, *'Shopping' for Defendants: Market Liability Under the Illinois Drug Dealer Liability Act*, 27 LOY. U. CHI. L.J. 1023, 1047-51 (1996). Stasell writes regarding the Illinois Drug Dealer Liability Statute, 740 ILL. COMP. STAT. ANN. 57/25(b) (West Supp. 1996), which is substantially similar to Oklahoma's statute, except that Illinois' law contains no provision permitting district attorneys

be proved and the fact presumed is required for such a statute to be upheld as constitutional.[102] Lacking a requirement that a plaintiff prove that it was the defendant's drugs which caused his injury, rather than drugs sold by anyone else in the area, a statute's presumption that participation in the drug trade equals causation is not a rational connection.[103] Another due process argument against dealer liability statutes is that the definition of "target communities" creates arbitrary political units that ignore the fungible nature of drugs. Because an injury in one part of the state may have been caused by drugs purchased elsewhere, liability is based on "an illogical presumption" which "fails to satisfy the requirements of due process."[104]

However, one might visualize the illegal drug industry as its own miniature economy. When supply is up, prices fall. When prices are low, people use more drugs, especially addictive ones. A scarcity of drugs in one city may cause an increase in the price somewhere else as drug supplies are redistributed to meet demand. Each of the thousands of individual transactions that constitute the drug market affects every other transaction, however slightly; it would be unrealistic to ignore this effect in crafting a public policy designed to remedy drug-related injuries and reduce the use and sale of illegal drugs.

Critics object to the arbitrary nature of drug dealer liability because there is a significant chance that a particular dealer's drugs were not the cause of a plaintiff's injury.[105] However, considering the interrelatedness of the drug market, any contribution to the supply of, or demand for, illegal drugs will bolster the industry. And as the industry grows, so does the risk of violence, addiction, and disease. Each seller of illegal drugs, through his participation in the illegal drug market, contributes to this risk. This risk is foreseeable, avoidable, rational, and should be actionable. As such, each dealer should bear a portion of the responsibility for a victim's injuries.

In light of this economic approach to drug liability, the political units set out in the ODDLA look less arbitrary. One constant in the dynamics of the drug trade is geography; cocaine is traditionally cheap in Miami where the supply is bountiful, and expensive in New York where the demand exceeds the supply.[106] While these variations might not be so dramatic between counties of rural Oklahoma, the drug markets in each community are tied directly to the risk and expense of drug-related injury.

In analyzing the Act's constitutionality generally, dealer liability laws may be compared to a similar statutory eradication of the cause requirement: the nationwide establishment of state workers' compensation statutes. One commentator provides a succinct history of the legislative reception of workers' compensation laws:

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to sue on behalf of victims or counties.

102. *See id.* at 1048.

103. *See id.*

104. *Id.* at 1047.

105. *See id.*

106. *See, e.g.*, SOURCE TO THE STREET, *supra* note 51, at 7.

> Workers' compensation in the United States grew largely out of the consequences of the Industrial Revolution. . . .
>
> Workers were often unable to obtain compensation because of the cost and complexity of bringing a tort action and because of the powerful defenses available to employers . . . . If an employee did bring a tort action, three main defenses allowed employers to escape liability . . . . "First, under the fellow servant rule, an employee could not recover damages from the employer if another employee had contributed to the injury . . . . Second, under the principle of contributory negligence, the injured employee could not recover damages if he had in any way negligently contributed to his own injury." Finally, under the "assumption of risk" doctrine, an employee could not collect damages in many instances because she was held to have assumed the risk of injury from the customary and observable dangers attendant upon the job. . . .
>
> . . . .
>
> . . . By 1911, ten states had adopted workers' compensation laws, and by 1917, the number of states had increased to thirty-seven. . . . [I]n 1949 all fifty states had workers' compensation systems.[107]

The history of workers' compensation law shows how a statutory remedy designed to repair injustice inherent in the common law soon became the law of the land.[108] By dispensing with a causation requirement, workers' compensation laws essentially imposed strict liability for workplace injuries upon the manufacturer. Initial concerns about the law's radical changes to the tort claims process have been answered, and workers' compensation is now a standard principle of American jurisprudence.

B. Double Jeopardy

A second charge against drug dealer liability laws is that double jeopardy attaches when the state sues a criminal it has already convicted.[109] One critic cites evidence from legislative history that the Illinois Legislature intended the Illinois Drug Dealer Liability Act to serve a deterrent purpose, rather than just a remedial purpose for injured parties.[110] The statute could even be construed as punitive in effect, since it allows a third-party plaintiff to recover more than actual damages.[111] Thus, for the state to permit enormous judgments against criminals whom it has already

107. Renee L. Camacho, *A Comparison of Workers' Compensation in the United States and Mexico*, 26 N.M. L. REV. 133, 136-37 (1996) (quoting ORIN KRAMER & RICHARD BRIFFAULT, WORKERS COMPENSATION: STRENGTHENING THE SOCIAL COMPACT 14 (1991)).

108. For a general, contemporary history of the adoption of workers' compensation laws across the country, see J.E. RHODES, WORKMEN'S COMPENSATION (1917).

109. *See* Stasell, *supra* note 101, at 1051.

110. *See id.*

111. *See id.* at 1052-53.

punished is in effect a second punishment for the same offense.[112] For example, the amount of money that the Wayne County Sheriff's department was awarded in the Michigan example above is disproportionate to the amount of money that the state spent as a result of the defendant's drug sales.[113] It is also argued that the unique provision of Oklahoma's dealer liability law permitting a prosecutor to represent the state or a county government[114] allows for essentially a second prosecution by the state.[115]

The issue of double jeopardy is a valid one. One response to such criticism is that the particular purposes of this law can best be served by state involvement. Due to the widespread (and accurate) perception of drug trafficking as an extremely treacherous, violent business, victims may be reluctant to assert their right to recovery against a convicted drug dealer. Many lawyers, as well, might avoid taking on potentially dangerous cases. A district attorney's office, on the other hand, is ideal for handling this sort of lawsuit because its prosecutorial duties place its attorneys in adversarial contact with dangerous criminals every day. A district attorney will be prepared to take steps to minimize the dangers presented by a potentially violent defendant and give other parties the confidence to pursue such a suit.[116]

Double Jeopardy law has changed radically since *United States v. Halper*[117] in 1989. *Halper* held that a civil sanction that "cannot fairly be said to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purpose, is punishment as we have come to understand the term."[118] Since the ODDLA allows for one class of plaintiffs to collect punitive damages,[119] and since it prohibits indemnification or insurance for a judgment under the Act,[120] the ODDLA would have likely failed to pass constitutional muster under *Halper*.

After *Halper*, however, the U.S. Supreme Court retreated from the strict delineation of remedial, deterrent, and punitive state actions. This retreat culminated in *Hudson v. United States*.[121] Hudson was involved in a banking scandal in Tipton, Oklahoma. Hudson was assessed a "civil money penalty" under a federal statute in 1989, and then indicted criminally in the United States District Court for the Western District of Oklahoma.[122] Hudson claimed the criminal prosecution amounted to double jeopardy.

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112. *See id.*

113. *See* Ficano v. Clemens, No. 95-512918 (Mich. Cir. Ct. Wayne County 1995).

114. *See* 63 OKLA. STAT. § 2-434 (Supp. 1998).

115. *See* Stasell, *supra* note 101, at 1051-55.

116. The violent nature of the drug trafficking business illustrates a related aspect of drug dealer liability suits: the likelihood of frivolous suits under a drug dealer liability statute is very slim, given the drug trade's reputation for retaliation. There are many easier and safer ways of making money than suing drug dealers.

117. 490 U.S. 435 (1989).

118. *Id.* at 448.

119. *See* 63 OKLA. STAT. § 2-424 (Supp. 1998).

120. *See id.* § 2-426.

121. 522 U.S. 93 (1997).

122. *See id.* at 95-97.

The *Hudson* Court amended *Halper* in two significant ways. First, the Court indicated the threshold inquiry in double jeopardy questions was whether "the punishment at issue is a criminal punishment."[123] Second, it required scrutiny of the statute, rather than of the particular punishment, to determine whether a law provides for a criminal sanction.[124] Under *Hudson*, courts must first look for a clear indication within statutory language that a legislature intends a particular penalty to be civil in character.[125] *Hudson* then sets out seven "guideposts" to assess whether a statute is criminal in nature, regardless of apparent legislative intent to establish a civil penalty.[126] First, *Hudson* requires courts to consider whether the sanction involves an affirmative disability or restraint. Second, a court must decide if the sanction has historically been regarded as punitive. Third, a court must consider whether the sanction comes into play only on a finding of scienter. Fourth, a court must consider whether the sanction will promote the traditional aims of punishment: retribution and deterrence. Fifth, a court must determine if the behavior to which the sanction applies is already a crime. Sixth, a court must decide if an alternative purpose exists with which the sanction may rationally be associated. Finally, a court must ask whether the sanction appears excessive in relation to the alternative purpose assigned.[127] The Court noted immediately that "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil penalty into a criminal penalty."[128]

The Court applied this test to the federal banking statutes under which Hudson had been penalized.[129] First, the Court looked to the language of the statutes to determine whether Congress had indicated the penalties to be civil in nature. The statute's express establishment of "civil" penalties was found sufficient to satisfy the first part of the test.[130] The Court then examined the statute for criminal purpose or effect in light of the seven guidelines. Working its way through the guidelines one by one, the Court found that "the clearest proof" did not exist that the statutes were actually criminal, and therefore did not rise to the level of a separate criminal punishment of Hudson.[131]

An analysis of a statute under *Hudson* is an all-or-nothing affair. There is no question of penalties within specific cases rising to the level of punishment; a sanction is either punishment or it is not. Should a court apply *Hudson* to the ODDLA, then, it will need do so only once.

The ODDLA is explicit about the intended civil nature of its sanction: "[a] person who knowingly participates in the illegal drug market within this state is liable for

123. *Id.* at 101.
124. *See id.*
125. *See id.* at 99.
126. *See id.*
127. *See id.* at 99-100.
128. *Id.* at 100.
129. *See* Hudson v. United States, 522 U.S. 93, 96-97 (1997) (applying 12 U.S.C. §§ 84(a)(1), 93(b)(1), 504(a); 18 U.S.C. §§ 2, 371, 656, 1005).
130. *See Hudson*, 522 U.S. at 99 (applying 12 U.S.C. §§ 93(b)(1), 504(a) (1982)).
131. *See id.* at 99-102.

civil damages as provided in the Drug Dealer Liability Act."[132] Therefore, the ODDLA clearly meets the first prong of the *Hudson* test. The second test, examining whether the statute is *de facto* criminal, leaves more room for debate.

Hudson first recognizes that money penalties are not necessarily criminal in nature. Even the penalties assessed against Hudson, which were not based on any damages suffered by the government,[133] were characterized as civil.[134] The ODDLA's penalties are purely monetary and impose no "affirmative disability or restraint."[135] While the ODDLA's penalties may have, in part, a deterrent purpose, the existence of a deterrent effect may serve alternative goals as well. The penalties in *Hudson*, for example, served to "promote the stability of the banking industry."[136] The ODDLA's purpose of providing recovery to victims of illegal drugs and drug-related crimes would likely be construed to be a similarly valid alternative purpose.

On the other hand, scienter is an element of actions under the ODDLA, since "knowing" participation in the drug market must be proved.[137] Another possible argument that the ODDLA is criminal in nature is that the act the ODDLA seeks to deter, trafficking in illegal drugs, is already a separate crime. The banking statute discussed in *Hudson*, however, also duplicated criminal conduct. The *Hudson* Court found this fact "insufficient to render the . . . sanctions criminally punitive" and noted that there is no "same-conduct" test for double-jeopardy purposes.[138]

On balance, the ODDLA appears to meet the *Hudson* Court's definition of a "civil" sanction. Even the evidence that tends to show the ODDLA was mistakenly labeled a civil remedy (i.e., the existence of a scienter requirement and its overlap with criminal statutes) does not rise to the high standard of "clearest proof" which *Hudson* requires. For these reasons, courts will likely find that district attorneys may represent the State and other plaintiffs in actions under the ODDLA, without violating defendants' constitutional double jeopardy protections.

C. Fundamental Principles of Tort Law

Illinois' dealer liability law has been called unfair because it "abrogates fundamental tort principles" of causation.[139] Because the element of causation protects several important interests, such as separating innocent from culpable actors and preventing injustice, damages should not be awarded without proving the relationship between a defendant's conduct and a plaintiff's injury.[140] Quoting Justice Cardozo in *Palsgraf v. Long Island Railroad*,[141] one commentator opines

132. 63 OKLA. STAT. § 2-423 (Supp. 1998).
133. *See Hudson*, 522 U.S at 96-97.
134. *See id.* at 103.
135. *Id.* at 99.
136. *Id.* at 105.
137. *See* 63 OKLA. STAT. § 2-423.
138. *Hudson*, 522 U.S. at 105.
139. Stasell, *supra* note 101, at 1055.
140. *See id.* at 1057-58.
141. 162 N.E. 99, 100 (N.Y. 1928).

that Illinois' Drug Dealer Liability Act grants relief for "negligence in the air" rather than for proximate cause.[142]

Another criticism of dealer liability laws is that the broad theory of "market share liability" used in apportioning liability under Illinois' Drug Dealer Liability Act violates fundamental principles of fairness.[143] While some state courts do not accept market share liability, the theory remains unsettled as a matter of Oklahoma law. Rather than embrace such a broad innovation through judicial decree, the Oklahoma Supreme Court has invited legislative efforts to impose market share liability through statute.[144] Furthermore, the scheme for apportionment of liability common to the various drug dealer liability acts, including the ODDLA, is actually closer in function and character to alternative liability, a more venerable and more widely accepted theory of tort law. Oklahoma courts hold alternative liability in higher esteem.[145]

1. Market Share Liability

Sindell v. Abbott Laboratories[146] was the source of the theory of market share liability. In *Sindell*, nearly 200 pharmaceutical companies had each marketed the synthetic estrogen DES, which was given to the plaintiff's mother during pregnancy. The plaintiff claimed that in utero exposure to DES caused her cancer later in life, but she could not identify the manufacturer of the medicine her mother had taken.[147] The *Sindell* court stated:

> In our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs.[148]

Fashioning such a remedy, the *Sindell* court held that if it were shown to be significantly likely that one of the five named defendants had in fact been the manufacturer of the drug in question, there is little injustice in shifting the burden of proof to the defendants to show they could not have made the medicine which the plaintiff's mother took.[149] The *Sindell* court applied this proportionality approach to the allocation of damages as well, holding that each defendant was liable for a proportion of the judgment commensurate with its proportion in the market of DES.[150]

142. Stasell, *supra* note 101, at 1057.
143. *See id.* at 1055.
144. *See* Case v. Fibreboard, 743 P.2d 1062, 1067 (Okla. 1987).
145. *See infra* text accompanying notes 173-75.
146. 607 P.2d 924 (Cal. 1980).
147. *See id.* at 931.
148. *Id.* at 936.
149. *See id.*
150. *See id.*

Market share theory, however, was not adopted in Illinois; the Illinois Supreme Court rejected market share liability as an unsound proposition in *Smith v. Eli Lilly*.[151] A concern of the *Smith* court was that "some defendants wholly innocent of wrongdoing toward a particular plaintiff would inevitably shoulder part or all of the responsibility for the injury."[152]

The future of *Sindell's* market share liability does not look much brighter in Oklahoma's courts. In *Wood v. Eli Lilly*,[153] the United States Court of Appeals for the Tenth Circuit Court declined to apply the market share liability theory in the context of DES litigation under Oklahoma law.[154] The Oklahoma Supreme Court addressed the question more thoroughly in *Case v. Fibreboard*.[155]

Case involved a sheet-metal worker who was exposed in various locations across Oklahoma to asbestos that had been produced by various manufacturers.[156] As a result of his exposure, he was injured and sued several different manufacturers of asbestos on a market share theory.[157] Discovery revealed that Case was not certain of exactly which products, produced by which manufacturers, he had been exposed.[158] Consequently, Case could not connect any of the manufacturers to the particular asbestos products to which he had been exposed.[159]

The *Case* court noted that *Sindell* dealt not with asbestos but with DES, which was "truly fungible" because it is manufactured from a single formula.[160] On the other hand, the "asbestos" that the plaintiff had been exposed to was not so simple, because it is commonly manufactured from six different minerals into six different products that pose varying degrees of danger.[161]

The *Case* court acknowledged that there were definite public policy reasons for allowing a victim like Case to recover against the asbestos companies.[162] However, without more accurate proof of causation, the court would not consider imposing a market share liability scheme. The court noted that "the creation of a program of compensation for victims of asbestos related injuries as a matter of policy is a matter for the legislative body and not for the courts."[163]

Given the varying manufacturing processes, sources, and additives of most illegal drugs,[164] the Supreme Court of Oklahoma would not likely find them to be fungible in the same sense as DES, i.e., manufactured to the same exacting standards. Thus, absent a clear statute such as the Drug Dealer Liability Act,

151. 560 N.E.2d 324 (Ill. 1990).
152. Stasell, *supra* note 101, at 1033.
153. 38 F.3d 510 (10th Cir. 1992).
154. *See id.* at 513-14.
155. 743 P.2d 1062 (Okla. 1987).
156. *See id.* at 1063.
157. *See id.*
158. *See id.*
159. *See id.*
160. *See id.* at 1065.
161. *See id.*
162. *See id.* at 1066-67.
163. *Id.* at 1067.
164. *See supra* notes 47-48 (regarding the composition and manufacture of heroin and cocaine).

Oklahoma would probably not extend market share liability to illegal drugs on a traditional theory of fungibility.

A true system of market share liability would be impossible to impose on a clandestine industry. No accurate method exists to determine the appropriate market percentages; authorities can only estimate how much of a certain drug is produced or sold within the state, much less what percentage was sold through a particular source. Attempting to apportion damages based on a drug dealer's actual share of the market is unrealistic. In fact, market share liability resembles the apportionment of the burden of causation within the ODDLA much less than does its parent theory of alternative liability.

The second and more important lesson of *Case*, however, is that while the Supreme Court of Oklahoma refused to adopt market share liability as a necessary function of common law, it deferred to the Oklahoma Legislature to provide a statutory scheme to advance the public policy interest of seeing that asbestos victims are entitled to recover.[165] Although courts generally have declined to expand the common law to allow victims of drug dealers to recover, just as they have been slow to adopt market share liability,[166] a legislative scheme to do so would likely be met with deference from the court.

2. Alternative Liability

The theory of alternative liability was first introduced in the California case of *Summers v. Tice*.[167] *Summers* involved three quail hunters. The two defendants both negligently fired at a rising bird with shotguns, and a pellet from one weapon struck the plaintiff in the eye. The court was unable to determine from which gun the pellet had been fired, but the negligence of only one hunter could have caused the injury.

The *Summers* court held that the burden of proof should be shifted to the defendants to exonerate themselves.[168] "Ordinarily defendants are in a better position to offer evidence to determine which one caused the injury,"[169] but, the court reasoned, "[i]f the defendants are independent tort feasors and thus each liable for the damage caused by him alone, and, at least, where the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of his right to redress."[170] Concurrent with the ODDLA's right of contribution for defendants,[171] "[t]he wrongdoers should be left to work out between themselves any apportionment."[172]

165. *See Case*, 743 P.2d at 1067.
166. *See id.* at 1064 nn.6-8.
167. 199 P.2d 1 (Cal. 1948).
168. *See id.* at 5.
169. *Id.* at 4.
170. *Id.* at 5.
171. *See* 63 OKLA. STAT. § 2-430 (Supp. 1998).
172. *Summers*, 199 P.2d at 5.

Alternative liability was taken up by the Supreme Court of Oklahoma in *Hood v. Hagler*,[173] which involved a woman bitten by one of two nearly identical German Shepherds owned by different persons. Because the dog bit the woman from behind, she could not identify which dog bit her. The court adopted the *Summers* approach, because both owners had been negligent in maintaining their animals.[174] "[W]e do not believe that the plaintiff should, under the circumstances before us, be placed in the position of having to point to which of the two dogs actually bit her," the court opined, and laid the burden on the defendants to exonerate themselves.[175]

While *Hood* is still good law for dog bites, *Wood* declined to extend alternative liability to DES litigation.[176] *Case* also refused to extend alternative liability to litigation involving asbestos.[177] Nonetheless, *Case's* deference to statutory schemes of compensation suggests that the use of established principles of alternative liability within the ODDLA will be well received.[178]

This discussion of market share liability versus alternative liability is relevant to the ODDLA only insofar as it illustrates whether a similar system of liability, imposed across an industry, violates fundamental principles of tort law. In Illinois, it likely does. In Oklahoma, the principles of market share liability have not yet been sufficiently established to be considered "fundamental," although alternative liability has been expressly adopted. Because it permits joint and several liability instead of assigning blame based on market participation, the ODDLA is more closely related to alternative liability than to market share liability. The legislature did not create the ODDLA out of whole cloth, but instead simply adapted a principle of Oklahoma law instituted in *Hood* to the illegal drug market. As such, the ODDLA's exclusion of the element of causation did not depart from established principles of Oklahoma tort law.

VII. Conclusion

A final criticism of drug dealer liability legislation asserts that such laws are more of a popular political gimmick than serious, effective law.[179] Detractors claim that these laws will have little practical success in deterring the drug trade or in compensating drug dealers' victims.[180] Analyzing the economics of the drug trade, one article suggests that since drug dealers already risk jail time, civil forfeiture, and violence from competitors, the added deterrent value of a civil suit is minimal.[181]

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173. 606 P.2d 548 (Okla. 1979).

174. *See id.* at 553.

175. *Id.*

176. Wood v. Eli Lilly, 38 F.3d 510, 512 (10th Cir. 1992).

177. Case v. Fibreboard, 743 P.2d 1067, 1067 (Okla. 1987).

178. *Id.*

179. *See* Mark Hansen, *Just Say "See You in Court": Drug Users Can Seek Dealers' Cash Under New Liability Laws*, A.B.A. J., Dec. 1996, at 30.

180. *See* Note, *Tort Law — Civil Liability for Criminal Acts — Illinois Expands Civil Liability for Drug Traffickers*, 109 HARV. L. REV. 699, 703-04 (1996).

181. *See id.* at 701-02.

Furthermore, drug dealers typically "live in economically depressed neighborhoods, keep all of their assets portable, and deal exclusively in cash."[182]

The same article suggests that "the lure of easy lucre" may encourage prosecutors to neglect routine criminal investigations to pursue dealer liability actions.[183] Citing examples of existing windfalls of forfeited drug money, and the poor management they have received at the hands of law enforcement agencies, critics suggest that overzealous district attorneys will use dealer liability as a means of circumventing the limits of already broad drug forfeiture laws.[184]

The question of the ODDLA's practical effect as a source of remedies and as a deterrent to drug traffic will never be answered unless use of such statutes becomes widespread. Granted, it must withstand constitutional challenges before the question can be answered, but critics of this law claim that it would never work as a practical deterrent — usually within a few pages of advocating some weaker version of dealer liability.[185]

Obviously, the ODDLA is not a silver bullet that will dispense with America's drug problem once and for all. Assuming, however, that a few well-publicized test cases are successfully litigated, these laws have the potential to change radically the way the illegal drug market operates. For example, the discovery process of civil trials would be effective in penetrating the smokescreen surrounding laundered drug money. Ordinary forfeiture statutes cannot touch a vast amount of legitimately accumulated assets, as well as laundered funds, but no property is exempt from a judgment under dealer liability, which could potentially reach to the highest echelons of drug organizations.[186]

Furthermore, because a defendant need not have a criminal drug conviction to be sued under the ODDLA, recovery of drug money could occur even when enough evidence did not exist for a criminal charge. This lower threshold of proof may encourage personal injury attorneys, not just district attorneys, to initiate dealer liability actions. Conceivably, relentless litigation from the public and private sectors may cause the price of illegal drugs to escalate as traffickers' profits go toward legal fees in addition to their already high overhead.

Were narcotics legalized and produced under the protection rather than the condemnation of our legal system, traditional legal remedies would undoubtedly be extended to their consumers. For example, were cocaine or methamphetamines legally marketed by a major pharmaceutical company for recreational use, strict

182. *Id.* at 703.

183. *See id.*

184. *See id.* at 702-03.

185. *See e.g.*, Bronfin, *supra* note 12, at 365.

186. *See* 63 OKLA. STAT. § 2-432 (Supp. 1998). Realistically, the myriad difficulties in enforcing judgments internationally would tend to thwart most plaintiffs in suits against the highest levels of international drug trafficking organizations. Nonetheless, any assets held in the United States might be vulnerable to attachment under a judgment in an American court. Perhaps a state attorney general's office, especially one experienced with tobacco litigation, could successfully administer a complex international lawsuit against a drug cartel. The political capital to be generated by such a case is considerable.

products liability might be an applicable theory for recovery. If the risks of addictive, mind-altering drugs are found to outweigh their social benefit, their manufacturer may be held strictly liable for the injuries they inflict.[187] Were narcotics legalized and then produced under the same varying, unsafe conditions as they are while manufactured illegally, and sold without clear directions for use and warnings regarding their side effects, liability would be manifest under a theory of negligence, in addition to products liability.

The fact that narcotics are illegal should not prohibit legal remedies for both consumers and third parties. Unlike judicial sanctions and gram-shop liability, drug dealer liability laws safeguard the rights of the victim as well as those of the defendant. These laws address the short and long-term consequences of drug use and reach leaders within a drug organization's chain of command.

Despite arguments to the contrary, the ODDLA does not deprive defendants of constitutional due process rights, nor protections against double jeopardy. Nor does it violate principles of fundamental fairness. Instead, dealer liability represents a relevant and workable opportunity to address issues of drug-related injury, violence, and suffering. The victims of this "victimless crime" deserve a fair and effective remedy, and both plaintiffs and defendants deserve access to the protections afforded by the civil litigation process.

Clinton W. Taylor

187. *See, e.g.*, O'Brien v. Muskin Corp., 463 A.2d 298 (N.J. 1983).