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Comment

"Shopping" for Defendants: Market Liability Under the Illinois Drug Dealer Liability Act

I. INTRODUCTION

On August 11, 1995, Illinois Governor Jim Edgar signed into law the Drug Dealer Liability Act, creating civil liability for illegal drug dealing based on a market share theory. The avowed purpose of the Act was to place the cost of damages caused by the illegal drug market on those who profit from that market. Thus, a person who suffers a personal or pecuniary injury because of a drug user can now institute a cause of action against a drug dealer. The Act does not require proof that the dealer sold the drugs that caused the plaintiff's injury because the Act specifically provides for a "market liability" theory. Under this theory, which is notably distinct from other market share theories, a drug dealer can be liable to anyone who is injured by a drug user within the geographic area where the dealer sold drugs. Essentially, potential plaintiffs can go down to their local courthouse and get the name of a convicted drug dealer in their geographic area, bring a

2. ILL. COMP. STAT. ANN. ch. 740, § 57/25(b) (West Supp. 1996). The Act creates a form of market share liability whereby an individual who is injured as a result of the drug use of another person can sue anyone putting illegal drugs into the market, provided that the person was putting illegal drugs into the market in the same geographic area and at the same time that the drug user was buying drugs. Id. See infra part III.B for details on the Act's market share theory.
3. ILL. COMP. STAT. ANN. ch. 740, § 57/10 (West Supp. 1996). The Act states the purpose as follows:

The civil justice system can provide an avenue of compensation for those who have suffered harm as a result of the marketing and distribution of illegal drugs. The persons who have joined the illegal drug market should bear the cost of the harm caused by that market in the community.

Id. § 57/10(2).
4. Id. § 57/25(b)(1). This claim parallels traditional common law claims.
5. Id. § 57/25(b)(2).
6. See infra part II.B.
lawsuit against that convicted dealer, and recover all of their damages from that drug dealer.8

Illinois is not the first state to establish a drug dealer liability law. Four other states have recently enacted nearly identical statutes.9 In Michigan, for example, a court recently awarded two plaintiffs a $9 million default judgment against two convicted drug dealers.10 Undoubtedly, public frustration over the nation's drug problem motivated the Illinois General Assembly to enact the Drug Dealer Liability Act.11 The Act, however, violates several constitutional provisions.12 Additionally, the Drug Dealer Liability Act deviates from traditional Illinois tort law and undermines fundamental principles inherent in our system of justice.13

This Comment first examines the traditional common law tort requirement that a plaintiff must prove a causal link between his or her injury and the defendant's wrongful conduct.14 Next, this Comment explores the expansion of common law principles to include market share liability15 and the Illinois Supreme Court's previous rejection of

8. As long as the convicted drug dealer sold the same type of drugs at the same time and in the same area as where the injury was caused, he is liable for the plaintiff's damages. Id. § 57/25(b)(2). The Act expressly precludes convicted drug dealers from denying their participation in the drug market. Id. § 57/60(b). Thus, as long as the plaintiff can satisfy the minimal requirements of the Act, he or she is essentially guaranteed a judgment against a drug dealer, regardless of whether that drug dealer actually had anything to do with causing his injury. Further, unlike judicially devised market share theories, the Drug Dealer Liability Act does not provide for apportionment of damages in accordance with the defendant's market share. See id. § 57/25(b).


11. Representative Al Salvi, the law's sponsor, stated that "[p]eople would like to see accountability particularly with regards to the problem of drugs . . . . I'm trying to deal with it on a level where we have the power to sue, go after the pocketbooks of the drug dealers." Illinois House of Representatives Judiciary Committee, Report to the 89th Gen. Assembly (Audio tape 1995) [hereinafter House Judiciary Committee Report]. See also Michael McQueen & David Shribman, Battle Against Drugs Is Chief Issue Facing Nation, Wall St. J., Sept. 22, 1989, at A1 (reporting that many Americans are willing to try "almost anything" to solve the nation's drug problem).

12. See infra part IV. The Act creates an irrebuttable presumption of liability, in violation of the defendants' due process rights. See infra part IV.A.1. The Act also violates the proscription against multiple punishment contained in the Double Jeopardy Clause. See infra part IV.A.2.

13. See infra part IV.B.

14. See infra part II.A.

15. See infra part II.B.
that doctrine.\textsuperscript{16} This Comment then highlights four states that enacted laws imposing a form of market share liability on drug dealers\textsuperscript{17} and examines some of the constitutional issues raised by these laws.\textsuperscript{18}

After discussing the general legal issues underlying drug dealer liability laws, this Comment examines the legislative history of the Illinois Drug Dealer Liability Act\textsuperscript{19} and explains the recovery provisions of the Act.\textsuperscript{20} This Comment then analyzes three potential challenges to the Act: that it violates due process requirements by raising an irrational presumption of the defendant's liability;\textsuperscript{21} that it violates the multiple punishment prong of the Double Jeopardy Clause by imposing a second punishment on defendants with criminal convictions;\textsuperscript{22} and that it abrogates traditional common law principles, which are vital to the fair administration of justice.\textsuperscript{23} Lastly, this Comment proposes constitutional alternatives that will not only enable the legislature to meet its goal of compensating victims of the illegal drug trade but will ensure the integrity of due process guarantees afforded to every member of society, including drug dealers.\textsuperscript{24}

\section{BACKGROUND}

Illinois and other states enacted drug dealer liability acts, in part, because legislators perceived the common law as affording an inadequate basis for compensating the victims of drug users.\textsuperscript{25} This Part first provides an overview of some of the common law claims that victims of drug users may assert and explains why those claims are likely to fail against dealers who sold drugs to the user.\textsuperscript{26} This Part then explores common law market share liability theories, which some courts have adopted in special circumstances to expand the reach of tort liability past traditional causation concepts.\textsuperscript{27} Next, this Part gives a brief overview of drug dealer market share liability statutes enacted in

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\textsuperscript{16.} See infra part II.C.  
\textsuperscript{17.} See infra part II.D.  
\textsuperscript{18.} See infra part II.E.  
\textsuperscript{19.} See infra part III.A.  
\textsuperscript{20.} See infra part III.B.  
\textsuperscript{21.} See infra part IV.A.1.  
\textsuperscript{22.} See infra part IV.A.2.  
\textsuperscript{23.} See infra part IV.B.  
\textsuperscript{24.} See infra part V.  
\textsuperscript{25.} See, e.g., ILL. COMP. STAT. ANN. ch. 740, § 57/10(7) (West Supp. 1996).  
\textsuperscript{26.} See infra part II.A.  
\textsuperscript{27.} See infra part II.B-C.  
\end{flushleft}
four other states. Finally, this Part examines some of the constitutional issues raised by these laws.

A. Recovery Against Drug Dealers Under the Common Law

In theory, people injured by a drug user can bring common law civil claims against the dealer who sold the user the drugs. Three common law claims are particularly relevant: negligence, strict liability for abnormally dangerous activities, and strict products liability. Under each of these tort theories, however, the third party victim generally fails to prove all elements of the claim. Often, the plaintiff suing the drug dealer for a tort committed by a drug user faces serious difficulty in proving the causal link required in a common law tort claim. In a negligence action, for instance, the plaintiff must prove a reasonable connection between the defendant's act or omission and the damages suffered by the plaintiff. Similarly, in both strict liability for abnormally dangerous activities and strict products liability, the plaintiff must establish some causal relationship between the defendant and the injury-producing agent.

28. See infra part II.D.
29. See infra part II.E.
30. See, e.g., Prete v. Laudano, No. 337966, 1993 WL 21417 (Conn. Super. Ct. Jan. 25, 1993). In Prete, the court refused to dismiss a claim against a drug dealer for injuries inflicted by one of his customers based on strict liability theory. Id. at *1. See infra notes 41-43 and accompanying text.
32. Id.
33. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 263 (5th ed. 1984) [hereinafter PROSSER AND KEETON ON TORTS]. To constitute "proximate cause," the injury must be the natural and probable result of the negligence and must be of such a character as an ordinarily prudent person ought to have foreseen its probable occurrence. Ney v. Yellow Cab Co., 117 N.E.2d 74, 78-79 (III. 1954). It is not essential that the person charged with negligence foresaw the precise injury which resulted from his act. Id. at 78.
An intervening act, however, will break the causal connection between the original wrong and the injury, unless the intervening cause was itself probable or foreseeable. Id. This rule applies with equal force to criminal acts. Id. Thus, if at the time of the negligence, the criminal act might reasonably have been foreseen, the criminal act will not break the causal chain. Id.
34. PROSSER AND KEETON ON TORTS, supra note 33, § 103, at 713. The plaintiff in a strict liability action has the burden of proving that the "claimant's injury or illness was attributable to a dangerous condition of a product identified as being one that was supplied by the target defendant, either as a manufacturer or some other seller or supplier in the marketing chain." Id.
Additional prima facie elements of different strict liability theories could also typically defeat a plaintiff's recovery. First, under the claim of strict liability for abnor-
Causation normally requires identification of the tortfeasor. A fundamental principle of tort law holds that a plaintiff cannot recover unless he or she shows by a preponderance of the evidence that the named defendant caused the injury; mere conjecture or speculation is insufficient. Courts require identification of the tortfeasor as a prerequisite to recovery for several reasons. The identification requirement separates culpable parties from innocent actors and ensures that culpable parties are held liable only for injuries they actually caused. The identification requirement also prevents over-deterrence of useful activities.

These requirements generally preclude a third-party victim from recovering against a drug dealer. For example, a person mugged by a drug user may wish to sue the dealer who sold drugs to his attacker. Normally dangerous activities, the plaintiff would have to prove that drug-dealing is an abnormally dangerous activity. Restatement (Second) of Torts § 519 (1977). Under this theory, courts have generally confined liability to such activities as blasting, storing explosives, and aerial spraying. Bronfin, supra note 31, at 348. See also Doe v. Johnson, 817 F. Supp. 1382, 1398 (W.D. Mich. 1993) (refusing to declare sexual activity transmitting HIV an abnormally dangerous activity because it was outside the scope of the doctrine, which covers only "blasting, storing of inflammable liquids, etc."). One court has allowed a third-party victim to proceed against a drug dealer based on an ultrahazardous activity theory. Prete, 1993 WL 21417, at *1. See supra note 30. However, case law suggests that most courts would be reluctant to extend liability by recognizing drug-dealing as an abnormally dangerous activity. Bronfin, supra note 31, at 348.

Second, under the claim of strict products liability, the plaintiff must prove that the drugs sold by the defendant were in some way defective. Restatement (Second) of Torts § 402A(1) (1965). Courts are unlikely, however, to permit recovery for an injury caused by a product exchanged through an illegal transaction. Bronfin, supra note 31, at 350.

36. Id. at 328.
37. Id. at 329. The Smith court held: "The identification element of causation in fact serves an important function in tort law." Id.
38. Payton v. Abbott Labs., 437 N.E.2d 171, 188 (Mass. 1982). In Payton, the Massachusetts Supreme Court rejected the market share liability theory because it did not require identification of the actual tortfeasor. Id.
39. Prosser and Keeton on Torts, supra note 33, § 41, at 264. "Proximate cause" represents the limitation which the courts have placed upon the actor’s responsibility for the consequences of his conduct. Id. Professors Prosser and Keeton note: "In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond." Id. For practical reasons, though, liability could not be imposed for all actions. Id. Rather, legal responsibility must be limited to closely connected causes that are important enough that the law is justified in imposing liability. Id. This limitation is based on such policy considerations as justice and administrative efficiency. Id.
40. Smith, 560 N.E.2d at 329. See, e.g., id. at 341 (explaining that market share theories, which partially dispense with the causation requirement, force defendants to insure against industry-wide losses).
Under the common law, the plaintiff would have to identify the particular dealer and establish a causal link between the dealer’s drug-dealing and the plaintiff’s injury. Proving these elements would be extremely difficult in the absence of a criminal conviction against either the user or the drug dealer. Moreover, even where the user has been convicted, he may not know the identity of the person who sold him the drugs, or he may refuse to cooperate with the victim in locating the dealer. Therefore, the plaintiff would encounter difficulties using traditional tort doctrines to recover damages for injuries arising from the sale of illegal drugs.

B. The Origins of Market Share Liability

Market share theories have aided plaintiffs by lessening the burden of proving a causal link between the specific injuries suffered by the plaintiff and the named defendant. Under traditional common law tort claims, the plaintiff retains the burden of proving that the defendant caused the plaintiff’s injury. Nonetheless, some courts have departed from this long-standing rule because of the difficulty in proving causation in some circumstances. These courts instead have applied the market share theory of liability. Under this theory, once the plaintiff proves that the “true” tortfeasor probably includes the named defendants, the burden shifts to each defendant to prove that he or she could not have caused the plaintiff’s injuries.

The California Supreme Court first established market share liability in Sindell v. Abbott Laboratories. In Sindell, the plaintiff alleged

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41. See Prosser and Keeton on Torts, supra note 33, § 41, at 263. See supra note 33 and accompanying text.
43. Bronfin, supra note 31, at 345. “[T]raditional common law doctrines fail both to deter potential drug dealers and to provide adequate means of recovery to the victims of these dealers.” Id. at 346.
44. See supra notes 35-40 and accompanying text.
45. See e.g., infra notes 54-57 and accompanying text.
46. The concepts underlying market share liability stemmed from the 1948 decision in Summers v. Tice, 199 P.2d 1 (Cal. 1948). In Summers, one of two negligent hunters injured the plaintiff. Id. at 1-2. However, because they shot simultaneously from the same direction and with identical guns, the plaintiff could not determine which of the two defendants injured him. Id. at 4. However, the court held that, as between an innocent plaintiff and negligent defendants, the defendants should bear the burden of proving their non-participation in the injury. Id. Thus, the court shifted the burden to each defendant to prove that his conduct could not have caused the plaintiff’s injury. Id.
47. See infra notes 50-52 and accompanying text.
that she developed cancer as a result of her mother's ingestion of diethylstilbestrol ("DES") during pregnancy.\textsuperscript{49} Although the plaintiff could not identify the specific manufacturer, the court created the market share liability rule to allow the plaintiff to recover from all manufacturers of DES, in proportion to their share of the DES market.\textsuperscript{50} The court's theory of liability required the plaintiff to join those defendants who, taken together, held a "substantial share" of the national DES market.\textsuperscript{51} The defendants could then exculpate themselves by showing that they could not have produced the DES that injured the plaintiff.\textsuperscript{52} Otherwise, the defendants would be held liable in proportion to their respective market shares.\textsuperscript{53}

The Sindell court based its adoption of market share liability on three policy considerations.\textsuperscript{54} First, the court stated that the negligent defendant, rather than an innocent plaintiff, should bear the cost of the injury.\textsuperscript{55} Second, the court asserted that the manufacturer was in a better position to bear the cost of the injury than the victim.\textsuperscript{56} Third,

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  \item Sindell, 607 P.2d at 925. Plaintiff represented a class of women who alleged that DES, a synthetic hormone, was administered to their mothers while they were pregnant with the plaintiffs for the purpose of preventing miscarriages. \textit{Id.} The class claimed that they were injured as a result. \textit{Id.} The named plaintiff claimed that she developed a form of cancer known as adenocarcinoma, which manifests itself after a minimum latent period of 10 years. \textit{Id.}
  \item Id. at 936. The court stated: "Where, as here, all defendants produced a drug from an identical formula and the manufacturer of the DES which caused plaintiff's injuries cannot be identified through no fault of plaintiff, a modification of the rule of Summers rationale is warranted." \textit{Id.}
  \item Id. at 937. The plaintiff alleged that the defendants, taken together, produced roughly 90% of the DES market. \textit{Id.} The court explained that if the plaintiff could establish this fact, the injustice of shifting the burden of proof to defendants to demonstrate that they could not have made the substance that injured the plaintiff was significantly diminished. \textit{Id.} The court did not quantify what constituted a "substantial" share. \textit{Id.}
  \item See, e.g., \textit{Id.} In Sindell, one defendant was dismissed after it filed a declaration that it did not manufacture DES until after the plaintiff was born. \textit{Id.}
  \item Id. The court held: "Each defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff's injuries." \textit{Id.}
  \item Id. at 936.
  \item Id. The court noted that in the instant case, as in Summers, the plaintiff was not at fault for failing to provide evidence of causation. \textit{Id.} Although the absence of such evidence also could not be attributed to the defendants, their conduct in marketing a drug that had delayed effects played a significant role in creating the unavailability of proof. \textit{Id.}
  \item Id. The cost of an injury may be an "overwhelming misfortune" to the injured person, whereas the manufacturer can distribute the cost among the public. \textit{Id.}
\end{itemize}
the court maintained that placing increased liability upon manufacturers would act as an incentive to enhance product safety.\textsuperscript{57}

After Sindell, several other states adopted variations of the market share theory.\textsuperscript{58} These variations all substantially ease the plaintiff’s burden of proving that a particular defendant caused the injury.\textsuperscript{59} State

\textsuperscript{57} Id. In a strong dissent, Justice Richardson criticized the majority’s expansion of traditional tort liability. Id. at 938 (Richardson, J., dissenting). He pointed out that under market share liability, the plaintiff can recover from a defendant even though the mathematical probability that the defendant caused the plaintiff’s injury is low. Id. at 939 (Richardson, J., dissenting). He argued that it was “wholly speculative and conjectural” whether any of the manufacturers named in the suit had actually made the drug that caused the plaintiff’s injury. Id. (Richardson, J., dissenting). Thus, he concluded that the majority’s market share theory improperly rejected more than 100 years of tort law, which previously required “matching” a defendant’s conduct to the plaintiff’s injury as absolutely essential. Id. (Richardson, J., dissenting). Justice Richardson relied on the words of Dean Prosser:

[Plaintiff] must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. \textit{A mere possibility of such causation is not enough}; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

\textit{Id.} at 940 (Richardson, J., dissenting) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 241 (4th ed. 1971)).

\textsuperscript{58} See, e.g., Conley v. Boyle Drug Co., 570 So. 2d 275 (Fla. 1990) (stating that the theory allows the plaintiff to bring suit against any manufacturer after showing a genuine attempt to locate and identify the particular manufacturer responsible for the injury); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y.) (holding that under the theory, defendants who sold DES for pregnancy use cannot exculpate themselves, even if they can prove that their product could not have caused the plaintiff’s injury), \textit{cert. denied}, 493 U.S. 944 (1989); Martin v. Abbott Labs., 689 P.2d 368 (Wash. 1984) (stating that the theory creates a rebuttable presumption that other defendants have an equal market share and are proportionally liable); Collins v. Eli Lilly & Co., 342 N.W.2d 37 (Wis.) (requiring that plaintiff only need commence suit against one defendant who manufactured DES, but the defendant may implead other potentially responsible defendants), \textit{cert. denied}, 469 U.S. 826 (1984). For a discussion of these and other cases, see Andrew B. Nace, Market Share Liability: A Current Assessment of a Decade-Old Doctrine, 44 VAND. L. REV. 395 (1991).

Only one federal district court has adopted market share liability in the same form as California. \textit{See} McElhaney v. Eli Lilly & Co., 564 F. Supp. 265, 270 (D. S.D. 1983). Most federal courts addressing the issue have declined to apply market share theories in the absence of any clear direction from the state’s supreme court. \textit{See}, e.g., Tidler v. Eli Lilly & Co., 851 F.2d 418, 427 (D.C. Cir. 1988) (reasoning that the market share theory requires “that we build on a new foundation, not on the structural underpinnings of the traditional common law of torts”); Morton v. Abbott Labs., 538 F. Supp. 593, 599 (M.D. Fla. 1982) (noting that market share liability “unquestionably represents a radical departure from the traditional concepts of causation” and that there was no indication that Florida would abandon such a fundamental principle); Pipon v. Burroughs-Wellcome Co., 532 F. Supp. 637, 639 (D. N.J.) (noting that there was no indication that the New Jersey Supreme Court would deviate from the causation requirement), \textit{aff’d}, 696 F.2d 984 (3d Cir. 1982).

\textsuperscript{59} \textit{See supra} note 58.
courts that have adopted a market share theory generally limit its application to cases involving pharmaceuticals. Some of these states have also applied the market share liability theory to cases involving other products. While much controversy surrounds the market share theory and its use by an increasing number of states, the United States Supreme Court has not yet ruled on the constitutionality of market share liability.

C. Market Share Liability in Illinois

The Illinois Supreme Court has refused to adopt any form of market share liability. In Smith v. Eli Lilly & Co., the court expressly rejected the market share liability theory. In Smith, the plaintiff

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60. See David M. Schultz, Market Share Liability In DES Cases: The Unwarranted Erosion of Causation In Fact, 40 DEPAUL L. REV. 771 (1991). A number of states that did not adopt market share theories in the DES context also rejected the doctrine with respect to other products. See Lee v. Baxter Healthcare Corp., 721 F. Supp. 89 (D. Md. 1989) (holding that even assuming Maryland recognized market share liability, the theory would not apply to breast implant cases); aff'd, 898 F.2d 146 (4th Cir. 1990); Shackil v. Lederle Labs., 561 A.2d 511 (N.J. 1989) (rejecting the market share theory in case involving diphtheria, pertussis and tetanus ("DPT") vaccine where the state had not previously adopted market share theory); Goldman v. Johns-Manville Sales Corp., 514 N.E.2d 691 (Ohio 1987) (rejecting market share theory in asbestos case where state had not adopted market share doctrine); Cummins v. Firestone Tire & Rubber Co., 495 A.2d 963 (Pa. 1985) (rejecting market share theory in case involving multipiece truck wheels where state had not adopted market share theory). In determining whether market share liability should be applied, most courts look to the "fungibility" of the product. Note, Presumed Innocent: Illinois' Rejection of Market Share Liability in Smith v. Eli Lilly & Company is 'Cause in Fact' To Celebrate, 24 J. MARSHALL L. REV. 869, 871-72 n.2 (1991). Fungible goods are defined by the Uniform Commercial Code as "goods . . . of which any unit is, by nature or usage of trade, the equivalent of any other unit." id. (citing U.C.C. § 201(17) (1991)). The fungible nature of certain products made by different manufacturers is what allows the imposition of market share liability. Id.


See also Florida Medicaid Third-Party Liability Act, Fla. STAT. ch. 409.910 (West 1993 & Supp. 1996), which allows the state to sue the tobacco industry and other product manufacturers to recover Medicaid payments attributable to product-related injuries based on a market share liability theory. Id. The tobacco industry and other large businesses have received strong support in the Florida legislature for repeal of the law. Bill Moss, Crime Bills May Stall In House Series, ST. PETERSBURG TIMES, Mar. 21, 1995, at 5B.


63. 560 N.E.2d 324 (Ill. 1990).

64. Id. at 337, 345. At least two other state supreme courts rejected market share liability for the same reasons. See, e.g., Mulcahey v. Eli Lilly & Co., 386 N.W.2d 67, 75 (Iowa 1986); Zafft v. Eli Lilly & Co., 676 S.W.2d 241, 246 (Mo. 1984).
claimed that she developed cancer as a result of her mother’s use of DES during her pregnancy twenty-five years earlier. Her complaint alleged various theories of liability, some of which invoked a market share theory. The court concluded that Illinois would not adopt any market share theory, and asserted several reasons to support its holding. First, the court determined that market share liability is often unworkable because, in many instances, little or no information exists to help the court determine relevant market shares. Second, the court was troubled by the significant likelihood that the actual manufacturer of DES consumed by the plaintiff’s mother was not named as a defendant in the suit. Third, the court was concerned that market share theories would make manufacturers insurers of their entire industry by effectively reducing drug availability, slowing research and development of new drugs, and increasing retail drug prices. Finally, the

65. Smith, 560 N.E.2d at 325. The plaintiff was diagnosed with clear cell adenocarcinoma of the vagina in 1978. Id. at 326. The plaintiff’s mother had taken DES tablets daily during the time she was pregnant with the plaintiff. Id. Although the plaintiff knew the color, size, and dosage of the drug her mother took, she was unable to identify the specific manufacturer of the product. Id. Records recovered from the pharmacy where her mother filled her prescriptions were insufficient to match the drug manufacturer to the drug dispensed to the plaintiff’s mother. Id.

66. Id. at 326. Plaintiff’s second amended complaint consisted of 11 counts sounding in negligence, strict liability, breach of express warranty, fraud, breach of implied warranty, violation of the Federal Food, Drug, and Cosmetic Act, conspiracy, concert of action, joint and several liability, and joint enterprise liability. Id. The thrust of these causes of action was that the drug companies failed to properly test DES and to adequately warn of its dangers. Id.

67. Id. at 337-40. Specifically, the court held: “We conclude that market share liability is not a sound theory, is too great a deviation from our existing tort principles and should not be applied in cases brought by plaintiffs who were exposed to DES while in utero.” Id. at 337.

68. Id. The Smith court had the benefit of the experiences of California trial courts, which had expressed “exasperation” with the task of attempting to formulate market shares. Id. The Smith court thus concluded that acceptance of market share liability would create a tremendous cost, both monetarily and in terms of workload, on the court system and litigants alike. Id. at 338. Further, if courts and juries were allowed to apportion damages when reliable information was not available, the result would be arbitrary determinations and wide variances between judgments. Id.

69. Id. at 338. The defendants presented evidence that 63 of the potential 81 manufacturers were never before the court. Id. at 338. Other defendants either were not served, had gone out of business, had merged with other companies, or were not amenable to suit in Illinois. Id. The court concluded: “To impose liability when it is quite possible that the defendant is not before the court is too speculative.” Id. Accord Payton v. Abbott Labs., 437 N.E.2d 171, 188 (Mass. 1982) (rejecting market share liability because of the risk that the actual wrongdoer was not among the named defendants).

70. Smith, 560 N.E.2d at 341. The court noted that market share liability would broaden manufacturers’ exposure to liability because they would need to insure against losses arising from products other than their own. Id. This added potential for liability would likely contribute to increased prices and decreased availability of new drugs. Id. at
court noted that market share theories actually treat plaintiffs who are unable to identify the particular manufacturer better than those who can.\textsuperscript{71}

In addition to offering specific reasons for declining to apply market share liability, the \textit{Smith} court generally noted that the market share theory deviated too far from traditional tort principles.\textsuperscript{72} The court observed that under traditional negligence and strict liability theories, the plaintiff must prove that the defendant caused the plaintiff’s injury.\textsuperscript{73} The \textit{Smith} court reasoned that under the market share theory, some defendants wholly innocent of wrongdoing toward a particular plaintiff would inevitably shoulder part or all of the responsibility for the injury.\textsuperscript{74} Thus, the court concluded that the market share theory was unsound.\textsuperscript{75} Although the \textit{Smith} court did not specifically hold

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\item \textsuperscript{71} \textit{Id.} at 338-39. The court noted that in a typical tort case, the plaintiff bears the risk that the defendant will be unable to assume financial responsibilities for the injuries caused. \textit{Id.} at 339. With the market share theory, however, liability is spread across members of the industry, reducing the risk that the plaintiff will be left without a solvent defendant. \textit{Id.} The theory therefore punishes plaintiffs who can satisfy the identification element and creates an incentive for plaintiffs not to locate the particular defendant. \textit{Id.}
\item Because the court decided not to adopt market share liability, it did not reach the constitutional arguments raised by the defendants. \textit{See} Joint Appellants’ Brief at 39-44, \textit{Smith v. Eli Lilly & Co.}, 560 N.E.2d 324 (III. 1990) (No. 67732) (arguing that the market share theory creates an irrational, unreasonable, and effectively irrebuttable presumption of defendant identification in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution).
\item \textit{Smith}, 560 N.E.2d at 343-44.
\item \textit{Id.} at 344; \textit{but cf.} Wysocki v. Reed, 583 N.E.2d 1139, 1145 (III. App. 1st Dist. 1991) (holding that a deviation from the rule of causation in fact was appropriate where plaintiff could not identify which of two manufacturers had made the drugs taken by her deceased husband, because it is more “unjust that an injured party receive nothing from two admitted wrongdoers because he can’t identify which one injured him than it is that both of two admitted wrongdoers should be held jointly and severally liable unless one can show by a preponderance of the evidence that the other caused the injury”), \textit{appeal denied}, 591 N.E.2d 994 (III. 1992).
\item \textit{Smith}, 560 N.E.2d at 340. The court noted that market share liability places the burden on defendants to disprove causation, regardless of whether the defendants have the ability to determine which party among them is actually responsible for manufacturing the injury-causing product. \textit{Id.} By contrast, in earlier exceptions to the causation rule, such as the alternative liability theory and \textit{res ipsa loquitur}, the parties all bore some culpability for causing the plaintiff’s injury or were very closely connected to the injury-causing activity or instrumentality. \textit{Id.}
\item \textit{Id.} at 344. The court held that “this is too great a deviation from a tort principle which we have found to serve a vital function in the law, causation in fact.” \textit{Id.} at 345. The causation requirement assigns blame-worthiness to culpable parties and limits the scope of liability, thus encouraging useful activities that could be deterred by the threat of exposure to excessive liability. \textit{Id.} at 329.
\end{itemize}}
that market share liability violated the “public policy” of the state, it
nevertheless squarely rejected the theory as unworkable and undesir-
able.76

D. Recovery Against Drug Dealers in Other States

Against the backdrop of available common law theories, at least five
states have adopted legislation imposing civil market share liability on
drug dealers.77 These statutes allow victims of torts committed by
drug users to recover from any drug dealer, as long as the dealer par-
ticipated in the drug market when and where the user obtained the
drugs leading to the injury.78 In addition to establishing a method by
which plaintiffs could be compensated for injuries caused by drug
users, these laws attempt to reduce drug-related crime.79

Currently, Illinois, Arkansas, Hawaii, Michigan, and Oklahoma
have enacted nearly identical drug dealer liability acts.80 All of the

remedy an injustice resulting from societal changes. Id. at 345 (Clark, J., concurring in
part and dissenting in part). Cause in fact, Justice Clark argued, “is not an end of the
legal system, but rather the means by which the legal system achieves its purposes.” Id.
at 346 (Clark, J., concurring in part and dissenting in part) (citing Shackil v. Lederle
Labs., 561 A.2d 511 (N.J. 1989) (O’Hern, J., dissenting)). Justice Clark argued that
when the means become inadequate to serve society’s changing needs, such means can
and should be modified. Id. (Clark, J., concurring in part and dissenting in part).

1994). The court in Millar-Mintz rejected the plaintiff’s assertion that Illinois law did
not preclude her from pursuing a claim under a market share liability theory, because the
Smith court did not expressly state that the market share theory was against the public
policy of the state. Id. at 282. The court concluded that “[w]hile the [Smith] court did
not utter the ‘magic language’ that the market share liability theory was against ‘public
policy,’ it is clear that the supreme court has found the concept unworkable under the law
of the State of Illinois.” Id. at 283.

77. See infra notes 80-81 and accompanying text.

78. See infra note 82 and accompanying text.

79. See, e.g., MICH. COMP. LAWS ANN. § 691.1601(2)(b) (West Supp. 1995) (stating
that one of the purposes of the Act is to “[a]ssess the cost of illegal marketing of con-
trolled substances against persons who profit from that market”).

80. See ARK. CODE ANN. § 16-124-101 (Michie Supp. 1995); HAW. REV. STAT. § 4-
36-663D (1995); ILL. COMP. STAT. ANN. ch. 740, § 57/1-85 (West Supp. 1996); MICH.
COMP. LAWS ANN. § 691.1601 (West Supp. 1995); OKLA. STAT. ANN. tit. 63, § 2-421
(West 1994).

Daniel Bent, a former United States Attorney from Hawaii, authored the model legisla-
tion for the Drug Dealer Liability Act, which has been enacted in Illinois and four other
Bent stated that the time he spent as a United States Attorney convinced him that the
criminal justice system, by itself, “was not going to solve [the nation’s] drug problem.”
Id. Thus, Bent devised the Drug Dealer Liability Act, after studying negligence law and
market share liability theories. Id. The American Legislative Exchange Council made
the Drug Dealer Liability Act one of its model laws in 1992. Id.

Drug dealer liability acts have been introduced in Louisiana, New Jersey, New York,
The Illinois Drug Dealer Liability Act statutes create civil liability for illegal drug-dealing based on a market share theory. Under these laws, persons injured as a result of the illegal drug market may sue any person who participated in that market, provided that three requirements are met: that the defendant sold drugs at the same time, in the same area, and involving the same type of drug as that used by the person who caused the plaintiff's injury. These drug dealer liability laws differ from traditional market share theories because they do not provide for apportionment of the plaintiff's damages. While each of these acts contains some minor differences, their effect is nearly identical. Ficano v. Clemens was the first suit brought under a drug dealer liability act. The plaintiffs in Ficano received a $9 million default judgment against two convicted drug dealers. Ficano involved two co-plaintiffs: a baby born ad...
dicted to cocaine who was allegedly killed by her drug-addicted mother, and the local sheriff’s department, which spent money on behalf of prison inmates addicted to drugs. The co-plaintiffs in Ficano did not offer proof that any of the defendants actually sold the injury-causing drugs, or that the defendants even knew each other. Rather, the plaintiffs showed that the defendants had been convicted of selling drugs in the Detroit area. The jury awarded a $1 million default judgment to the child’s estate, based on damages for her wrongful death and the pain and suffering caused by her cocaine addiction while she was alive. In addition, the jury awarded the sheriff’s department an $8 million default judgment.

E. Constitutional Issues Raised by Drug Dealer Liability Acts

Despite the commendable goals underlying the drug dealer liability acts, these statutes implicate several constitutional provisions, including the Due Process Clause and the Double Jeopardy Clause.

The remaining two defendants—one of whom is serving a life sentence—were in prison awaiting trial. Neither defendant was represented by counsel. Mediation Summary of Plaintiff Robert A. Ficano at 1, Ficano v. Clemens, No. 95-512918 (Cir. Ct. Wayne County Mich. 1995).

87. Mediation Summary of Plaintiff Robert A. Ficano at 3. The baby, Felicia Brown, was born addicted to cocaine, suffered intrauterine growth retardation, and remained underdeveloped for the duration of her life. Id. She was beaten to death at age twenty months. Id. at 5. At the time of the trial, Felicia’s mother, a recovering drug addict, was in jail awaiting trial for the killing. Mediation Summary of Plaintiff Alan A. May at 3.

88. Mediation Summary of Plaintiff Robert A. Ficano at 8. The sheriff’s office incurred costs for substance abuse programs and increased medical expenses. Id. It was estimated by the sheriff’s office that these programs cost Michigan taxpayers roughly $60 million per year. Id.

89. Drug Dealer Liability Law to be Tested in Detroit Case, GRAND RAPIDS PRESS, May 4, 1995, at C3. The lawsuit contended that the dealers were “financially responsible for the toddler’s death even though there was no proof that they were connected to her in any way.” Id.

90. Stephen Jones, Suit Targets 4 Drug Convicts For Damages in Tot’s Death, DET. FREE PRESS, May 3, 1995, at 1B. Wayne County Sheriff Robert Ficano stated, “Earline Brown’s actions are an example of what inevitably happens when drug demand meets drug supply.” Id.; see also Corey Williams, Ficano Seeks Assets of Drug Dealers in Beating Death of Child, DET. NEWS, May 9, 1995, at B4 (stating that drug dealers are liable not because they sold drugs to a particular plaintiff, but because they sold drugs in a particular area of Detroit).

91. Jones, supra note 90, at 1B.

92. Gary Heinlein, Drug Sellers Deal Blow to Seizures, DET. NEWS, Sept. 18, 1995, at 3. Although the sheriff’s office recovered money spent on drug-addicted inmates, Wayne County Sheriff Robert Ficano has called the Drug Dealer Liability Act a “useful tool” that law enforcement officials can employ to support their drug law enforcement activities. Id.

93. See infra part II.E.1.

94. See infra part II.E.2.
The Illinois Drug Dealer Liability Act

While the constitutionality of drug dealer liability laws has not yet been challenged in the courts, future challenges may result in the invalidation of these laws based on their unconstitutionality.

1. Due Process

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law." The clause requires state governments to create a fair adjudicatory process before impairing a person's "life, liberty, or property." Thus, in civil cases, the government must provide a "neutral decisionmaker," and must ensure that the trial is fair.

The Due Process Clause also prevents state legislatures from enacting laws that are procedurally unfair. In the evidentiary context, the clause limits the legislature's ability to create statutory presumptions, where the proof of one fact constitutes evidence of the existence of an ultimate fact sought to be proven at trial. When deciding whether a particular statutory presumption violates the Due Process Clause, courts apply a rational relation test. The presumption will be upheld if there is a "rational relation between the fact proved and the ultimate fact presumed." The presumption will not violate the Due Process Clause unless it is irrational or arbitrary.

Market share theories have invoked criticisms based upon the Due Process Clause because of the presumptions these theories create.

95. U.S. Const. amend. XIV, § 1. Similarly, the Illinois Constitution provides: "No person shall be deprived of life, liberty or property without due process of law." Ill. Const. of 1970 art. I, § 2. The Illinois Supreme Court applies decisions of the United States Supreme Court based on federal constitutional provisions to the construction of comparable provisions in the State Constitution. People v. Levin, 623 N.E.2d 317 (Ill. 1993). Thus, while this Comment focuses on the Federal Constitution, the Illinois courts would probably apply a similar analysis if such a challenge were made under the Illinois Constitution. But see People v. McCauley, 645 N.E.2d 923, 930 (Ill. 1994) (interpreting a state constitutional provision differently than the United States Supreme Court interpreted a comparable federal constitutional provision).

96. U.S. Const. amend. XIV, § 1; Rotunda & Nowak, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 17.1, at 201 (2d ed. 1992).

97. Rotunda & Nowak, supra note 96, § 17.1, at 201.

98. Id. § 17.6, at 245.

99. Id.


101. Graham, supra note 100, § 301.6.

102. See id.

103. Although defendants, courts, and commentators have raised criticisms of market
In *Sindell v. Abbott Laboratories*, for example, the defendants argued that the market share theory created a presumption of liability in violation of their due process rights. Under the court’s market share theory, once the plaintiff proved that a defendant manufactured DES, the product that injured the plaintiff, the court presumed that the defendant caused the plaintiff’s injury and shifted the burden to the defendant to prove that it did not cause the injury. Because any one of the 200 companies that manufactured DES could have caused this injury, the defendants argued that no rational relationship existed between the proved fact—that they manufactured DES—and the presumed fact—that they caused plaintiff’s injury. Thus, the defendants concluded that the market share theory deprived them of their due process rights.

The *Sindell* court, however, did not find a due process violation. The *Sindell* court conceded that the defendants’ due process rights might be violated if the five named defendants were declared to be the only tortfeasors, since a “substantial likelihood” existed that none of the defendants caused the injury. The court, however, relied on a different measure of the likelihood of causation: the percentage of sales of DES in the national DES market that resulted from the defendants.
Thus, "each manufacturer's liability for an injury would be approximately equivalent to the damages caused by the DES it manufactured." 4

2. Double Jeopardy

The United States Supreme Court has long held that the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for a crime after being acquitted of that crime; a second prosecution for an offense after being convicted of that offense; and multiple punishments for the same offense. 10 The protection against multiple punishment is deeply rooted in American history and jurisprudence. 11

More than a century ago, for example, the Supreme Court stated that "if there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence." 12 More recently, the Supreme Court rejected the view that the Double Jeopardy Clause applies only to punishment imposed in criminal proceedings. Rather, a "civil" sanction imposed and collected by the government may constitute punishment as well. 13

Courts must look to the purposes actually served by the sanction, rather than the nature of the proceedings where the sanction is imposed, to determine whether a sanction constitutes punishment under the Double Jeopardy Clause. 14 A civil penalty is considered remedial, and does not constitute punishment, if it merely reimburses the government for its actual costs incurred because of the defendant's crim-

10. *Id.* at 937. If the plaintiff could establish at trial that the defendants produced 90% of the DES marketed, there would be a corresponding likelihood that the defendants manufactured the DES which caused the plaintiff's injuries, and only a 10% likelihood that the offending producer would escape liability. 11

11. *Id.* at 938.


13. Id. "In drafting his initial version of what came to be our Double Jeopardy Clause, James Madison focused explicitly on the issue of multiple punishment: 'No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence.'" *Id.* (quoting 1 ANNALS OF CONG. 434 (J. Gales ed. 1834)).


nal conduct. On the other hand, a civil sanction constitutes punishment if it is retributive, punitive, or deterrent in nature. States must impose such sanctions during the first proceeding, or not at all. Cases addressing the multiple punishments prohibition in the civil context involved government-imposed and collected sanctions. Examples of civil sanctions that courts have struck down as punishment in violation of the Double Jeopardy Clause include penalties, taxes, and civil forfeiture.

III. DISCUSSION

The Illinois legislature envisioned the Drug Dealer Liability Act not only as a means of compensating victims of the drug market, but also as a means of assisting law enforcement efforts in curbing drug-related crime. This Part first provides an overview of the Illinois General

117. Kurth Ranch, 114 S. Ct. at 1945. The central inquiry is whether the sanction imposed is rationally related to the damages suffered by the government. Id. at 1944.

118. Halper, 490 U.S. at 448; Towns, 646 N.E.2d at 1368.

119. Kurth Ranch, 114 S. Ct. at 1948. Some federal circuits hold that civil forfeiture actions do not violate the Double Jeopardy Clause because they are part of a single coordinated prosecution of the defendant, thus avoiding the “punishment” principles of Kurth Ranch and Halper altogether. See, e.g., United States v. One Single Family Residence, 13 F.3d 1493, 1499 (11th Cir. 1994) (holding that the simultaneous pursuit of criminal and civil forfeiture sanctions under a gambling statute was merely a “single coordinated prosecution” of the defendants and, thus, did not violate the Double Jeopardy Clause); United States v. Millan, 2 F.3d 17, 19 (2d Cir. 1993) (holding that civil forfeiture action was part of a single coordinated prosecution of the defendant that did not violate double jeopardy principles), cert. denied, 114 S. Ct. 992 (1994).

120. See, e.g., Halper, 490 U.S. at 447 (penalty imposed by government for violations of the federal civil False Claims Act constituted punishment for double jeopardy purposes); Kurth Ranch, 114 S. Ct. at 1948 (tax imposed by the government for violation of Montana’s Dangerous Drug Tax Act constituted punishment for double jeopardy purposes); United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1216 (9th Cir. 1994) (civil forfeiture action brought by the government constituted second punishment for double jeopardy purposes), cert. granted sub nom. United States v. Ursery, 116 S. Ct. 762 (1996).

121. Halper, 490 U.S. at 446.


123. $405,089.23 U.S. Currency, 33 F.3d at 1216. In U.S. Currency, the government brought a criminal prosecution and a separate civil forfeiture action against several defendants. Id. at 1214. The court stayed the forfeiture action pending the outcome of the criminal prosecution. Id. After the defendants were convicted, the district court granted summary judgment for the government in the forfeiture case. Id. The Ninth Circuit held that civil forfeiture under the federal statutes constituted punishment in violation of the Double Jeopardy Clause because the statute at issue served some retributive and deterrent functions. Id. at 1219.

124. See, e.g., ILL. COMP. STAT. ANN. ch. 740, § 57/10 (West Supp. 1996); HOUSE JUDICIARY COMMITTEE REPORT, supra note 11 (stating that the law is just “one more weapon in the war against drugs”).
A. Legislative Findings Supporting the Drug Dealer Liability Act in Illinois

The legislative findings of the Drug Dealer Liability Act ("the Act") focus on two issues: helping victims of the illegal drug market recover against drug dealers; and undermining the State's illegal drug market. First, the Illinois General Assembly stated that it adopted the Drug Dealer Liability Act in response to a third party victim's inability to recover damages from a drug dealer under traditional common law doctrines. The legislature noted that the drug trade exerts a "financial, physical, and emotional toll" on the residents of Illinois. Moreover, because of the common law difficulties in proving a drug user's particular dealer, victims of the drug trade face several barriers to recovery for their losses from drug dealers. The legislature determined that allowing plaintiffs to sue drug dealers under a form of market liability would eliminate this difficulty.

Second, the legislature indicated that the Act could serve as a "weapon" against the illegal drug market. The legislature determined that market liability destroyed market initiative and product
development when applied to legitimate markets.\textsuperscript{133} In addition, the legislature determined that drug dealers in a community are necessarily interrelated and interdependent, even if they do not always know one another.\textsuperscript{134} It found that drug dealers are at least indirectly related, in that each new dealer obtains the benefit of the existing illegal drug market to make illegal drugs available to him or her.\textsuperscript{135} Thus, the legislature intended market share liability under the Act to negatively impact all dealers in the illegal drug market.\textsuperscript{136}

The legislature clearly intended for the Act to deter drug dealers.\textsuperscript{137} In the Act's preamble, the legislature acknowledged that the criminal justice system is an important and effective weapon against the illegal drug market, but concluded that the law should also require those persons who participate in the illegal drug market to bear the \textit{financial} costs of harm caused by their activities.\textsuperscript{138} The legislature concluded that the threat of liability under the Act would deter some prospective

\begin{footnotesize}
\begin{enumerate}
\item[133.] \textit{Id.} § 57/10(9). Moreover, the legislature recognized that market liability provides for civil recovery by plaintiffs who are unable to identify the particular manufacturer of the product, allowing recovery from all manufacturers of the product who participated in that particular market. \textit{Id.}
\item[134.] \textit{Id.} § 57/10(8).
\item[135.] \textit{Id.} Additionally, the existing illegal drug market aids new entrants through its prior development of people as users. \textit{Id.}
\item[136.] \textit{See id.} § 57/10(8)-(9).
\item[137.] \textit{Id.} § 57/5. The purpose of the Act "is to establish the prospect of substantial monetary loss as a \textit{deterrent} to those who have not yet entered into the illegal drug distribution market." \textit{Id.} (emphasis added).
\item[138.] \textit{Id.} § 57/10. Representative Salvi, one of the Act's sponsors, stated: "We're simply trying to get at the drug dealer for the damage he causes." \textsc{House Judiciary Committee Report, supra} note 11. Similarly, the Act's Senate sponsor, Senator Peterson, stated: "The purpose of the bill is to create a system of monetary compensation for persons injured by [the] illegal drug market and create an incentive for users to identify the drug dealer." \textsc{Illinois Senate Transcript, 89th Gen. Assembly, Regular Sess., May 18, 1995, at 37 [hereinafter Senate Transcript]}. 
During floor debate of the Act, Representative Salvi stated, "Although the criminal justice system is an important weapon against the illegal drug market, the civil justice system can and must also be used." \textsc{Illinois House of Representatives Transcript, 89th Gen. Assembly, Regular Sess., Mar. 22, 1995, at 20 [hereinafter House Transcript]}. During a House floor debate, Representative Salvi touted the Act as a measure which may "very well help us shut down the illegal drug market in the State of Illinois." \textit{Id.} at 1. The legislature also concluded that allowing dealers who face a civil judgment for drug dealing under the Act to bring a suit for contribution against their own sources may "drive a wedge into the relationships among some participants in the illegal drug distribution network." \textsc{Ill. Comp. Stat. Ann. ch. 740, § 57/10 (West Supp. 1996)}. Representative Salvi called the Act the equivalent of "a cop on every block . . . . We will have individual Attorney Generals [sic] making sure that drug dealers do not profit from their illegal activity." \textsc{House Transcript, supra}, at 20. Representative Salvi stated: "This will eliminate the economic incentive for selling drugs in the State of Illinois." \textit{Id.}
\end{enumerate}
\end{footnotesize}
drug dealers, even if only a few suits were actually brought. The Illinois General Assembly did not discuss in detail whether the Act would survive a constitutional challenge. Nonetheless, a sponsor of the bill expressed confidence that no one would attack the law's constitutionality, stating, "[T]his is a very well crafted Bill... put together by some of the best minds in the country." The Act passed unanimously in both the House and Senate.

B. Recovery Against Drug Dealers Under the Illinois Drug Dealer Liability Act

The Act creates a cause of action for several classes of plaintiffs who may have suffered personal or pecuniary injury because of a drug user. Plaintiffs entitled to bring an action under the Act can recover economic damages, non-economic damages, exemplary damages, rea-

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139. The Act is specifically targeted at deterring first-time or casual dealers with non-drug related assets, who might well decide that, as a result of the Act, the added cost of entering the drug market would not be worth the benefit. ILL. COMP. STAT. ANN. ch 740, § 57/10(4) (West Supp. 1996).

140. The extent of the legislature's debate over the constitutionality of the law consisted of this colloquy, which took place on the House floor:

REPRESENTATIVE FLOWERS: Representative Salvi is this constitutional?...

REPRESENTATIVE SALVI: Absolutely. I don't think anybody will even raise a constitutional question about this bill. ...

HOUSE TRANSCRIPT, supra note 138, at 18.

Others have, however, raised the issue of the law's constitutionality. See David Heckelman, Civil Drug-Assets Law Will Trample Rights: Critic, CHI. DAILY L. BULL., Aug. 15, 1995, at 1. Jed Stone, president of Illinois Attorneys for Criminal Justice, stated that the statute's abrogation of defendants' due process rights "jumps off the page and slaps me in the face." Id.

In discussing a similar law in place in Michigan, Larry Dubin, a law professor at the University of Detroit-Mercy, suggested that courts may be leery of holding drug dealers liable for a specific injury without some direct connection between their act and the injury. Stephen Jones, Suit Targets Four Drug Convicts For Damages In Tot's Death, DET. FREE PRESS, May 3, 1995, at 1B. Dubin stated: "It is fine on the one hand to say that drug dealers should be punished for their illegal acts, but that function is served by our criminal justice system." Id.

141. HOUSE TRANSCRIPT, supra note 138, at 14.

142. In the Illinois Senate, the bill received 57 "yes" votes, zero "no" votes, and one "present" vote. SENATE TRANSCRIPT, supra note 138, at 37. In the Illinois House, the bill received 112 "yes" votes, zero "no" votes, and one "present" vote. HOUSE TRANSCRIPT, supra note 138, at 20.

143. Those entitled to recover under the Act include a parent, legal guardian, child, spouse, or sibling of a drug user; an individual who was exposed to an illegal drug in utero; an employer of a drug user; a medical facility, insurer, governmental entity, employer, or other entity that funds a drug treatment program or employee assistance program for a drug user or that otherwise expended money on behalf of a drug user; and a person injured as a result of the willful, reckless, or negligent actions of a drug user. ILL. COMP. STAT. ANN. ch. 740, § 57/25(a)(1)-(5) (West Supp. 1996).
sonable attorneys' fees, and other costs. Under the Act, plaintiffs may proceed under a traditional theory of recovery, or under the legislatively devised market share theory. Under the traditional theory, the plaintiff may seek damages from a specific drug dealer if the plaintiff can prove that the dealer sold the drugs that resulted in the plaintiff's injury. Alternatively, plaintiffs who cannot identify the drug dealer in the actual chain of distribution may proceed under the Act's market share theory by meeting three requirements.

In order to state a valid cause of action under the market share theory, plaintiffs must first show that their injuries occurred in the same area in which the dealer sold drugs, known as the "illegal drug market target community." The Act defines "illegal drug market target community," which grows in proportion to the amount of drugs the defendant possessed or distributed. The size of this community ranges from "Level 1," which includes only the Illinois Representative District in which the dealer operated, to "Level 4," which includes the entire State of Illinois.

To ensure the collectibility of any potential damage award, a plaintiff may seek an ex parte prejudgment attachment order against all assets of a defendant sufficient to satisfy a potential award. Courts may not use assets seized in a forfeiture action by any state or federal agency to satisfy a judgment, however. Furthermore, although the Act does not provide for apportionment of the plaintiff's damages according to the defendant's market share, it does create a right of contribution among multiple defendants.

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144. *Id.* § 57/25(c)(1)-(5). Economic damages include the cost of treatment and rehabilitation, loss of productivity, absenteeism, support expenses, accidents or injury, and any other pecuniary loss proximately caused by the illegal drug use. *Id.* § 57/25(c)(1). Non-economic damages include damages for physical and emotional pain, physical impairment, mental anguish, disfigurement, and loss of companionship, services, or consortium. *Id.* § 57/25(c)(2).

To ensure the collectibility of any potential damage award, a plaintiff may seek an ex parte prejudgment attachment order against all assets of a defendant sufficient to satisfy a potential award. *Id.* § 57/65(a)). Courts may not use assets seized in a forfeiture action by any state or federal agency to satisfy a judgment, however. *Id.* § 57/65(c). Furthermore, although the Act does not provide for apportionment of the plaintiff's damages according to the defendant's market share, it does create a right of contribution among multiple defendants. *Id.* § 57/55.

145. *Id.* § 57/25.

146. *Id.* § 57/25(b)(1).

147. *Id.* § 57/25(b)(2). See infra notes 148-59 and accompanying text.


149. *Id.* § 57/40. For example, under a "Level 1" offense, the "illegal drug market target community" of the defendant is defined as the Illinois Representative District where the defendant resides, attends school, or is employed. *Id.* § 57/40(1); see also *id.* § 57/15 (where "place of participation" is defined as "each Illinois Representative District in which the person participates in the illegal drug market or in which the person resides, attends school, or is employed during the period of the person's participation in the illegal drug market").

150. *Id.* §§ 57/15, 57/40.

151. A "Level 1" offense is defined as possession of .25-4 oz. of cocaine, heroin, or methamphetamine; distribution of less than one ounce of cocaine, heroin, or methamphetamine; possession of 1-4 lbs. of marijuana; or distribution of less than 1 lb. of marijuana. *Id.* § 57/15. A "Level 4" offense is defined as possession of 16 oz. or more of cocaine, heroin, or methamphetamine; distribution of 4 oz. or more of cocaine, heroin, or methamphetamine; possession of 100 plants or more of marijuana; and distribution
Second, plaintiffs must show that the defendants sold the "same type of illegal drug" that caused their injury.\textsuperscript{152} The Act does not describe this requirement in detail.\textsuperscript{153} The Act's "Definitions" section, however, distinguishes between the sale of cocaine, heroin, or methamphetamines, and the sale of marijuana.\textsuperscript{154} Thus, the Act suggests that if the sale of cocaine caused the plaintiff's injury, he or she could not recover from a dealer who sold marijuana.\textsuperscript{155}

Third, plaintiffs must show that the defendant sold these drugs at the time the plaintiffs suffered these injuries.\textsuperscript{156} A defendant with a criminal conviction under state or federal law is estopped from denying participation in the illegal drug market.\textsuperscript{157} Furthermore, such a conviction constitutes \textit{prima facie} evidence that the defendant sold drugs for two years before the date of the act for which he or she was convicted.\textsuperscript{158} If the defendant does not have a conviction, plaintiffs must prove by clear and convincing evidence that the defendant participated in the illegal drug market at the time of their injury.\textsuperscript{159}

While the Act establishes a conclusive presumption that a convicted drug dealer participated in the illegal drug market,\textsuperscript{160} even where there is a criminal conviction, the plaintiff must still prove the timing, geographic, and type-of-drug elements of the claim.\textsuperscript{161} Once these elements are established, the defendant cannot exculpate himself by attempting to show that he did not cause the plaintiff's injury.\textsuperscript{162}

\textsuperscript{152} \textit{Id.} For example, a defendant found to have possessed .25 oz. of cocaine would be liable to anyone injured by a drug user in the Illinois Representative District where he lives, and if different, also the Illinois Representative District where he works. \textit{Id.} §§ 57/15, 57/40(1). A defendant found to have distributed 4 oz. of cocaine would be potentially liable to every person in the state who is injured by a drug user. \textit{Id.} §§ 57/15, 57/40(4).

\textsuperscript{153} \textit{See id.} §§ 57/15, 57/25(b)(2)(B).

\textsuperscript{154} For example, a "Level 2" offense means sale of 1-2 oz. of a "specified illegal drug"—defined as cocaine, heroin, or methamphetamine—or sale of 5-10 lbs. of marijuana. \textit{Id.} § 57/15. This section clearly distinguishes between the sale of cocaine, heroin, and methamphetamine, and the sale of marijuana. \textit{Id.}

\textsuperscript{155} However, the Act does not specifically state what is meant by "the same type of illegal drug," and there is no case law interpreting the Act. \textit{See id.} §§ 57/15, 57/25(b)(2)(B)).

\textsuperscript{156} \textit{Id.} § 57/25(b)(2)(C).

\textsuperscript{157} \textit{Id.} § 57/60(b).

\textsuperscript{158} \textit{Id.}

\textsuperscript{159} \textit{Id.} § 57/60(a). The plaintiff must prove all other elements of the cause of action by a preponderance of the evidence. \textit{Id.}

\textsuperscript{160} \textit{Id.} § 57/60(b).

\textsuperscript{161} \textit{Id.} § 57/25(b)(2)(A)-(C).

\textsuperscript{162} Presumably, the defendant cannot avoid liability by disproving causation, because causation is not one of the elements of the plaintiff's claim. \textit{See id.}
The liability established by the Act is distinct from existing market liability theories because the Act does not require courts to apportion damages in accordance with the defendant’s market share. Rather, the Act suggests that a defendant is liable for all of the plaintiff’s damages, provided that the plaintiff meets the other requirements of the Act.

In addition to third parties, drug users have a limited right of recovery under the Act. Drug users may sue only those defendants in the actual chain of distribution, and may recover only economic damages and reasonable attorneys’ fees. In addition, the former user may be partially responsible for his or her own injuries. This comparative responsibility will not bar recovery by the plaintiff, but will reduce the plaintiff’s damage award by the amount of his or her own liability. Comparative responsibility cannot, however, be attributed to a plaintiff who is not a drug user.

163. Id. § 57/25(b). During a House debate, Representative Salvi stated that the Drug Dealer Liability Act is “market share liability times ten.” HOUSE TRANSCRIPT, supra note 138, at 5. The liability created under the Act is similar to market share liability, in that it allows the plaintiff to sue even though he cannot identify the person who caused his injury. Id. Representative Salvi stated: “It’s very similar to that although it goes much further than that because . . . a major drug dealer in the State of Illinois who has lots of assets will find that hundreds of people throughout the State of Illinois will be [suing him . . . . This is civil liability times 1000 . . . so if you are interest[ed] in getting into the illegal drug market you [sic] better be very careful, because you’re going to get sued and if you have assets, you are going to have to pay.” Id.

164. Any person entitled to sue under the Act, except drug-user plaintiffs, can recover economic damages, non-economic damages, punitive damages, reasonable attorneys’ fees, and other costs of suit. ILL. COMP. STAT. ANN. ch. 740, § 57/25(c) (West Supp. 1996). The Act does not provide for apportionment of damages among multiple defendants according to their share of the illegal drug market, although it does provide a right of contribution among multiple defendants. Id. § 57/55.

165. Id. § 57/30. Before they can recover, however, drug users must disclose to law enforcement officers all personal knowledge of their drug sources. Id. § 57/30(a)(1). Drug users also must be drug-free for six months prior to filing suit and must remain drug-free during the pendency of the action. Id. § 57/30(a)(2)-(3).

166. Id. § 57/30(c)(1)-(3).

167. Id. § 57/50(a).

168. Id. The defendant sustains the burden of proving the plaintiff’s comparative responsibility by clear and convincing evidence. Id. § 57/50(b)).

169. Id. § 57/50(c).
IV. ANALYSIS

The drug problem in this nation is reaching epidemic proportions. The States legitimately aspire to protect innocent victims who suffer as a result of drug dealers’ illegal actions. Nonetheless, constitutional requirements cannot be adjusted to fit the gravity of the crime problem the State wishes to combat. If such an “adjustment” were allowed, our country’s fundamental ideals would gradually deteriorate. While the Illinois General Assembly’s goal is commendable, the means it employed violate the Constitution.

A. The Act Is Unconstitutional

1. Due Process

The Illinois Drug Dealer Liability Act creates an irrational and irrebuttable presumption of liability once the plaintiff establishes three elements under the Act. This presumption violates the Due Process Clause, which limits the power of state legislatures to make proof of one fact evidence of the existence of the ultimate fact sought to be proved. Statutory presumptions of fact violate the Due Process Clause if there is no rational connection between the fact proved and the ultimate fact presumed. A statutory presumption is thus invalid unless the presumed fact is more likely than not to flow from the proved fact.


172. Id. at 43.

173. See infra part IV.A. The Act creates an irrebuttable presumption of defendants’ culpability in violation of their due process rights. See infra part IV.A.1. The law also violates the constitutional proscription against multiple punishment when applied to defendants with criminal convictions. See infra part IV.A.2. Additionally, the law’s lack of a causality requirement abrogates fundamental tort principles employed to ensure a just result in civil cases. See infra part IV.B.

174. See supra notes 148-59 and accompanying text for a discussion of these elements.

175. See supra text accompanying notes 98-102.

176. See supra text accompanying notes 98-102.

Under the Act, the court presumes that the defendant caused the plaintiff’s injury if the plaintiff proves three facts: (1) the defendant sold drugs in the same “illegal drug market community” where the injury occurred; (2) the defendant sold the same type of drugs that the user used; and (3) the defendant sold drugs at the time the user caused the plaintiff’s injury. However, the presumed fact—that the defendant caused the plaintiff’s injury—has no rational relationship to these proven facts and fails to establish any reasonable probability that the defendant’s sale of drugs was involved in the plaintiff’s injury.

There are thousands of drug convictions each year in Illinois. It would be difficult to establish that it is more likely than not that any one of the convicted dealers who satisfy the Act’s three broad requirements caused a particular plaintiff’s injury. The Act thus authorizes plaintiffs—as “private attorney generals”—to recover from drug dealers for an injury that someone else caused.

Furthermore, the Act imposes liability on defendants for injuries that occur in an arbitrarily defined geographic area. For instance, in applying the Act, a court would presume that a defendant convicted of selling half an ounce of marijuana sold those drugs within the Illinois representative district where he or she lives. Such a presumption does not account for the fact that, while dealers may also sell drugs only within one city block, dealers may sell drugs to users in other areas of the city, other cities, and other states. It is unlikely that

179. See infra notes 181-86 and accompanying text.
180. In 1991, the State of Illinois incarcerated 5,192 persons for drug offenses. Fry, supra note 170, at 8. In 1994, more than 14,000 people were arrested on drug charges in Illinois. This number does not include arrests made in Chicago. ILLINOIS UNIFORM CRIME REPORTING SYSTEM, ILLINOIS STATE POLICE, ARREST SUMMARY REPORT (1994). In 1994, nationwide, roughly 1.3 million arrests were made by state and local police for drug abuse violations. CRIME IN THE UNITED STATES, supra note 170, at 217.
181. See Leary, 395 U.S. at 36. A statutory presumption is unconstitutional “unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.” Id.; see also supra text accompanying notes 98-102.
182. HOUSE TRANSCRIPT, supra note 138, at 20 (referring to plaintiffs as “individual Attorney Generals”). Additionally, the Act entitles a plaintiff to seek damages from a person who participated in the illegal drug market, even if that person had nothing to do with actually causing the plaintiff’s injury. ILL. COMP. STAT. ANN. ch. 740, § 57/25(b) (West Supp. 1996).
184. See supra notes 148-51 and accompanying text.
185. Many dealers sell to customers from other areas of the city or state. For example, in a drug sting on the west side of Chicago in which 49 people were arrested,
arbitrarily drawn political boundaries bear any relation to the area in which the defendant has actually caused injuries. Therefore, the Act, which permits the plaintiff to prevail without proving causation, is based on the presumption that because a defendant sold drugs somewhere to someone, the defendant's conduct thereby caused injury to the plaintiff. Such a theory rests on an illogical presumption, and fails to satisfy the requirements of due process.  

Moreover, the presumption of liability created by the Act is effectively irrebuttable. The Act establishes a conclusive presumption that a defendant with a criminal conviction participated in the illegal drug market. The plaintiff must prove only the geographic, timing, and type-of-drug elements of the claim. A plaintiff can easily prove these elements in cases where the prior conviction was for the same type of drugs, in the same area, and at the same time as the plaintiff's injury.

Once the three minimal elements are established, a defendant would presumably be liable under the Act even if he could prove that someone else sold the drugs causing plaintiff's injury. The basis of liability

41 of those individuals were from outside the area, several from the suburbs, and one from as far away as Wisconsin. John W. Fountain, 49 Alleged Buyers Arrested in Drug Sting, CHI. TRIB., May 3, 1994, at 5. See also Monica Copeland, Neighborhood Under Siege, CHI. TRIB., Dec. 29, 1991, at 1 (reporting that experts believe a south-side Chicago neighborhood has become a "mecca for Chicagoans from other neighborhoods and suburbanites seeking cheap, readily available narcotics"). Moreover, dealers have begun using mail services to sell drugs in other states and cities. Joseph Kirby, Pushers Discover Overnight Delivery, CHI. TRIB., Mar. 11, 1993, at 1. For example, authorities recently charged an Arizona man with interstate drug trafficking after he unwittingly sold 2 1/4 lbs. of cocaine to an Illinois law enforcement agent through the mail. Id. The man reportedly had many customers scattered across Illinois and other parts of the nation. Id.

186. The constitutionality of statutory presumptions will normally be analyzed under a rational relation standard, which requires minimal scrutiny by a court. Nance, supra note 100, at 673 n.81. See supra notes 98-102 and accompanying text. The Supreme Court, however, has invalidated statutes when applying the rational relation standard in certain cases. See, e.g., City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (holding a city's denial of a permit for the operation of a group home for the mentally retarded to be unconstitutional); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (finding a requirement that an employment commission conduct a conference within 120 days of a filing of a complaint to be irrational and arbitrary, in that the commission's failure to meet the 120-day requirement would deprive a complainant of the right to a hearing); United States Dept. of Agric. v. Moreno, 413 U.S. 528 (1973) (striking down as unconstitutional a provision limiting federal food stamps to households that contain related persons). Thus, when a statute exhibits no rational relation between means and ends, the statute is necessarily unconstitutional, even under a minimal scrutiny standard.  


under the Act is not a causal link between act and injury but the defendant’s participation in the drug market. In such a case, the Act would require the defendant to pay for an injury he clearly did not cause. The Act therefore has the effect of taking property of the defendant to pay for harm caused by someone else, over whom the defendant has no control. This irrebuttable presumption of liability violates defendants’ due process rights.

Admittedly, all market share theories involve some presumption of liability. Nonetheless, the constitutionality of market share theories remains an unresolved question of law. Moreover, “traditional” market share theories at least provide some measure of fairness to defendants by holding them liable for only a portion of the plaintiff’s damages. Traditional market share theories also require that the plaintiff name as defendants all those manufacturers who, taken together, had a substantial share of the market. Courts have recognized that such a large pool is necessary to make imposing evenly apportioned damages fair. The Drug Dealer Liability Act fails to

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189. ILL. COMP. STAT. ANN. ch. 740, § 57/20(a) (West Supp. 1996). The Act states: “A person who knowingly participates in the illegal drug market within this State is liable for civil damages as provided in this Act.” Id.

190. If the plaintiff meets the minimal requirements of the Act, however, the defendant appears to have no way of exculpating himself. See id. § 57/25(b). The Act provides for no affirmative defenses, but instead imposes liability if the three requirements are met. See id. The Act thus imposes a form of liability that exceeds strict liability, because a defendant can incur liability even where the plaintiff has not established causation, and even where the defendant proves that someone else actually caused the injury. See PROSSER AND KEETON ON TORTS, supra note 33, § 103, at 712-13 (noting that the plaintiff in a strict products liability action has the burden of proving that his or her injury is attributable to a dangerous condition of a product identified as being one that was supplied by the target defendant, either as a manufacturer or some other seller or supplier in the marketing chain).


192. “A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment.” Western & Atl. R.R. v. Henderson, 279 U.S. 639, 642 (1929).

193. See supra notes 58-61 and accompanying text.


195. See, e.g., Sindell, 607 P.2d at 931. The Sindell court held that it could not impose the whole liability for the plaintiff’s injuries on the defendants, but that it was reasonable to hold defendants liable for damages in proportion to their share of the DES market. Id. at 937.

196. Id.

197. Id. at 931. The Sindell court conceded that defendants’ due process rights might
provide even these limited measures of fairness, as defendants sued under the Act may be liable for 100% of the plaintiff's damages, despite the likelihood that they did not cause the plaintiff's injury.\textsuperscript{198} Thus, the Act adopts the relaxed causation principles of market share liability, while rejecting the principles courts have employed to protect defendants' due process rights. Such a scheme is unconstitutional.\textsuperscript{199}

2. Double Jeopardy

The Drug Dealer Liability Act also violates the constitutional proscription against double jeopardy.\textsuperscript{200} A nominally "civil" sanction constitutes punishment for double jeopardy purposes if it is retributive, punitive, or deterrent in nature.\textsuperscript{201} States must impose such sanctions during the first proceeding, or not at all.\textsuperscript{202} Despite its civil label, the Drug Dealer Liability Act is the "functional equivalent" of a criminal prosecution, because it has both deterrent and punitive purposes.\textsuperscript{203}
Deterrence and punishment of drug dealers are functions which should be left to the criminal justice system.\textsuperscript{204}

The Illinois legislature clearly intended for the Act to deter and punish drug dealers, not just to serve as a remedial measure.\textsuperscript{205} The legislature's intent to deter drug dealers is captured in its declaration: "Although the criminal justice system is an important weapon against the illegal drug market, the civil justice system can and must also be used . . . . The persons who have joined the illegal drug market should bear the cost of the harm caused by that market in the community."\textsuperscript{206}

\begin{itemize}
\item beyond a reasonable doubt); Gideon v. Wainwright, 372 U.S. 335, 343 (1963) (indigent defendants in state criminal prosecutions have a right to have counsel appointed for them).
\item \textsuperscript{204} See \textit{Halper}, 490 U.S. at 448. ""Retribution and deterrence are not legitimate nonpunitive governmental objectives."" \textit{Id.} (quoting \textit{Bell v. Wolfish}, 441 U.S. 520, 539 n.20 (1979)).
\item \textsuperscript{205} \textit{House Judiciary Committee Report}, \textit{supra} note 11; see \textit{supra} note 138. Additionally, lawmakers may have been spurred to pass the Drug Dealer Liability Act as a means of funding law enforcement activities, because civil forfeitures—traditionally used to finance drug investigations—have been dwindling. \textit{See Gary Heinlein, Drug Sellers Deal Blow to Seizures}, DET. NEWS, Sept. 18, 1995, at C1. Police report that money from drug seizures—which they use to finance drug investigations—is leveling off or shrinking as drug kingpins lease cars, put fancy homes in the names of relatives unaware of their illicit enterprises, and find other ways to avoid property seizures. \textit{Id.} Drug sellers also have begun laundering their money in ways more difficult to detect. \textit{Id.}
\item Wayne County Sheriff Robert Ficano, the first to bring suit under the Michigan Drug Dealer Liability Act, stated that law enforcement officers have to "become just as innovative" as the drug dealers. \textit{Id.} Ficano noted that one such "innovation" is the Drug Dealer Liability Act, under which he sued and received an $8 million judgment from two convicted drug dealers. \textit{Id.} Proposed changes to civil forfeiture laws may also make it more difficult for law enforcement agencies to seize drug-related property. \textit{See Jan C. Greenburg, Hyde: Ease Recovery of Seized Property}, CH. TRIB., June 22, 1995, § 1, at 14. United States Representative Henry Hyde has introduced a bill which would place the burden of proof on the government in civil forfeiture proceedings, so that property owners would no longer be required to prove their innocence in order to get their property back. H.R. 1916, 104th Cong., 1st Sess. (1995). The bill also creates a right to counsel for indigent property owners in civil forfeiture proceedings. \textit{Id.}
\item \textsuperscript{206} ILL. COMP. STAT. ANN. ch. 740, § 57/10(2) (West Supp. 1996). In \textit{Kurth Ranch}, the Court held that it was beyond question that the Montana legislature intended the tax to deter people from possessing marijuana, because the Act's preamble clearly stated that the tax would provide funding for anti-crime programs by "burdening" criminals rather than "law abiding taxpayers." \textit{Kurth Ranch}, 114 S. Ct. at 1946-47. Similarly, it is also indisputable that the Illinois legislature intended the Drug Dealer Liability Act to have a deterrent effect. The legislature clearly stated that the Act "serves as an additional deterrent to a recognizable segment of the illegal drug network," particularly small-time dealers who are likely to be deterred by the threat of liability under the Act. ILL. COMP. STAT. ANN. ch. 740, § 57/10(4) (West Supp. 1996). The legislature determined that "[s]ome new entrants to retail illegal drug dealing are likely to be deterred even if only a few of these suits are actually brought." \textit{Id.} § 57/10(12).\end{itemize}
The punitive intent of the statute can be seen in both the legislative findings and the legislative history of the Act. The Act's findings state: "The persons who have joined the illegal drug market should bear the cost of the harm caused by that market in the community." During a House debate, the Act's sponsor stated that the Act was the equivalent of "a cop on every block. We will have individual Attorney Generals [sic] making sure that drug dealers do not profit from their illegal activity."

The effect of the Act is also punitive. Damages allowed under the Act would substantially exceed the amount needed to make the plaintiff whole for the damage, if any, caused by the defendant. The Act expressly creates a right to recovery for governmental entities that expended money on behalf of a drug user, without any showing that the defendant actually caused the government's pecuniary injury. Under an identical provision in the Michigan Drug Dealer Liability Act, for example, the Wayne County Sheriff's Office recovered nearly $8 million from two convicted drug dealers for funds spent on behalf of drug-addicted prison inmates. Concededly, these damages are

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209. United States v. Halper, 490 U.S. 435, 452 (1989). In Halper, the defendant's liability under the Act was $130,000, even though the government's actual damages in investigating and prosecuting the false claims amounted to only $16,000. Id. The disparity between the government's actual expenses and the defendant's potential liability under the Act was sufficiently disproportionate that a sanction under the Act constituted a second punishment for double jeopardy purposes. Id. Arriving at the precise dollar amount at which a sanction accomplishes its remedial purpose but not a punitive effect involves an element of "rough justice." Id. at 449. However, where the defendant's liability is exponentially greater than the government's actual losses, the liability constitutes punishment. Id. Two defendants sued under the Michigan Drug Dealer Liability Act by the county sheriff's office were found liable for almost $8 million, even though there was no proof that this amount equaled the damages, if any, that the defendants actually caused to the plaintiff. Default Judgment Against Gwendolyn Y. Clemons and David H. Richow at 3, Ficano v. Clemons, No. 95-512918 (Cir. Ct. Wayne County Mich. 1995). There appears to be nothing in the Illinois Act which would prevent such a large award. See infra note 215 and accompanying text. The Act expressly provides for the imposition of punitive damages. Ill. Comp. Stat. Ann. ch. 740, § 57/25(c) (West Supp. 1996). Million-dollar damage awards which go well beyond, or are totally unrelated to, the damages actually caused by a defendant should be considered sufficiently disproportionate to constitute "punishment" for double jeopardy purposes.
210. Ill. Comp. Stat. Ann. ch. 740, § 57/25(a)(4) (West Supp. 1996). The Act provides: "One or more of the following persons may bring an action for damages caused by an individual's use of an illegal drug . . . (4) A medical facility, insurer, governmental entity, employer, or other entity that funds a drug treatment program or employee assistance program for the individual drug user or that otherwise expended money on behalf of the individual drug user." Id. (emphasis added).
remedial in the sense that they compensate the government for its actual loss. However, upon deeper analysis, the punitive nature of the sanction becomes apparent. The sheriff’s office did not offer proof that the defendants actually sold drugs to any of the prison inmates upon whom it had expended funds. Rather, it was presumed that, because the defendants were convicted of selling drugs in the same area, some of the inmates must have purchased drugs from the defendants. However, because there was no proof that the harm caused by a particular defendant sued under the Act equaled the sheriff’s million-dollar injury, the sanction is thus punitive as applied to that defendant.

There appears to be nothing which precludes an Illinois court from awarding such a large judgment. Thus, under the Illinois Act, a defendant can be criminally convicted and subsequently subjected to a “civil” lawsuit for damages totally unrelated or disproportionate to the defendant’s conduct. This provision presumably would allow the

212. Gentilozzi, supra note 86, at 6.
213. Id.
214. See supra note 180 (stating that in 1994, more than 14,000 people were arrested in Illinois on drug related charges). The chances that any random defendant who happens to fall within the Act’s three broad requirements actually caused the plaintiff’s injury are minimal. See supra notes 187-94 and accompanying text.
215. The Illinois legislature recently adopted tort reforms, which, among other things, place a $500,000 cap on non-economic damages and limit punitive damages. See ILL. COMP. STAT. ANN. ch. 735, §§ 5/2-1115.1(a), 5/2-1115.05(a) (West Supp. 1996). It is clear that the tort reform legislation was intended to apply to actions brought under the Drug Dealer Liability Act. See HOUSE TRANSCRIPT, supra note 138, at 4. However, the caps on punitive damages do not apply if the defendant has previously been criminally convicted for the act upon which civil liability is based. ILL. COMP. STAT. ANN. ch. 735, § 5/2-1115.05(d) (West Supp. 1996). Thus, where the drug dealer has already been criminally punished for his acts, there would be no limit placed on the plaintiff’s recovery of punitive damages.
216. Although Halper and the other cases discussed in this section all involve civil sanctions sought by the government, some commentators have suggested that civil suits by private litigants where punitive damages are imposed should constitute “punishment” for double jeopardy purposes. See CHARLES T. MCCORMICK, HORNBOOK ON THE LAW OF DAMAGES § 77, at 275-78 (1935) (discussing the argument that imposing punitive damages on a defendant in a civil suit and subsequently criminally prosecuting him violates the “spirit,” if not the letter, of the Double Jeopardy Clause). Here, private plaintiffs bringing suit under the Act may be viewed as arms of the state, in that they perform a general law-enforcement function. See HOUSE TRANSCRIPT, supra note 138, at 20. A private plaintiff who recovers punitive damages under the market share provision of the Act cannot be viewed as merely vindicating a violation of his own right, because he has not proved that the defendant was the one who violated that right. Rather, the Act authorizes the private plaintiff to “punish” the defendant for conduct that is detrimental to the public as a whole, but not the cause of the particular plaintiff’s injury. Such a scheme is more akin to criminal than civil liability. THOMAS HOLLAND, ELEMENTS OF JURISPRUDENCE 328 (12th ed. 1917). Thus, an argument could be made that the Double
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Illinois Attorney General's Office, local State's Attorneys offices, or local police departments to sue a drug dealer. The defendant in such a scenario would be forced to defend against the State's charges in two different cases, which the Double Jeopardy Clause prohibits. The Act has a clear remedial purpose, but it still constitutes "punishment" under the Double Jeopardy Clause because it serves both deterrent and punitive functions. Therefore, the Act cannot constitutionally be applied to drug dealers who have already been criminally punished for their acts.

B. The Act's Lack of a Causality Requirement Abrogates Fundamental Tort Principles

The Act abandons concepts that courts traditionally employed to ensure fairness to defendants in civil cases. In Illinois and else-
where, well-established principles of causation require that there be some reasonable connection between the defendant's act or omission and the plaintiff's injury. The Illinois Drug Dealer Liability Act abolishes these principles, giving private citizens the right to "punish" the defendant for conduct that is detrimental to the public as a whole but not the cause of the particular plaintiff's injury. Under tradi-

the defendant's assets? JUDITH J. THOMSON, RIGHTS, RESTITUTION, AND RISK 199-202 (1986). If anything about the defendant sufficed for this entitlement, the plaintiff could call upon anyone at random for compensation. Id. This prospect would be disruptive of freedom of action. Id. Thus, causality matters because it supplies the particular feature about the defendant that singles him out from everyone else. Id. When the plaintiff makes a claim against the defendant, it is presupposed that these particular persons have been linked together through causation. Ernest J. Weinrib, CAUSATION AND WRONGDOING, 63 CHI.-KENT L. REV. 407, 428-29 (1987). The concept of "wrongful loss" is inherently relational, because to describe plaintiff's loss as wrongful is to implicate the action of the person who inflicted the injury. Id. at 433. The victim is wronged only because the injurer has wronged him. Id. Tort law incorporates the relational aspect of wrongfulness by requiring the victim to be compensated by the tortfeasor. Id. The process of rectification thus mirrors the process of injury. Id. Just as the connection of tortfeasor and victim is essential to wrongful loss, so this connection is essential to the way tort law annuls this wrongful loss. Id.

223. Sindell v. Abbott Labs., 607 P.2d 924, 938 (Cal.) (Richardson, J., dissent-
ing), cert. denied, 449 U.S. 912 (1980). It may be argued that between an innocent plaintiff and a negligent defendant, the defendant should bear the loss for all the conse-
quences of his wrongful conduct. ROBERT E. KEETON, LEGAL CAUSE IN THE LAW OF TORTS 21 (1963). However, our system of jurisprudence does not permit holding wrongdoers liable for all the consequences of their acts. PROSSER AND KEETON ON TORTS, supra note 33, § 41, at 264. Rather, tort law redresses only those injuries which "proximately" re-
sult from a defendant's culpable conduct. Id. The concept that liability may be imposed based merely on a breach of duty, without causation being established, has long been rejected in American tort law. Smith v. Eli Lilly & Co., 560 N.E.2d 324, 344 (Ill. 1990). As Judge Learned Hand stated: "[S]o long as it is an element of imposed liability that the wrongdoer shall in some degree disregard the sufferer's interests, it can only be an anomaly, and indeed vindictive, to make him responsible to those whose interests he has not disregarded." Sinram v. Pennsylvania R.R., 61 F.2d 767, 770 (2d Cir. 1932). Thus, in order to recover, the plaintiff must show a violation of her own right, not merely a wrong to someone else. Palsgraf v. Long Island R.R., 162 N.E. 99, 100 (N.Y. 1928). Proof of negligence "in the air" is insufficient. Id. at 99. As Justice Cardozo stated in PALSGRAF, "Life will have to be made over, and human nature transformed," if persons were held liable for all consequences of their conduct. Id. at 100.

224. No case before Sindell ever imposed liability based solely on the notion of punishing wrongful conduct without first establishing causation. Cynthia L. Chase, Note, MARKET SHARE LIABILITY: A PLEA FOR LEGISLATIVE ALTERNATIVES, 1982 U. ILL. L. REV. 1003, 1018. The idea of punishing a wrongdoer solely on the basis of wrongful conduct resembles criminal rather than civil liability. HOLLAND, supra note 216, at 328. Blackstone described the difference between tort and crime as follows: "[Torts are an] infringement or privation of the private, or civil, rights belonging to individuals, con-
sidered as individuals; crimes are a breach of public rights and duties which affect the whole community, considered as a community." Id. The plaintiff in a civil action does not sue derivatively, or by right of subrogation, to vindicate an interest invaded in the person of another. PALSGRAF, 162 N.E. at 101. The plaintiff in tort sues for breach of a duty owing to himself. Id.
tional tort law principles, the plaintiff must prove that the defendant proximately caused his or her injury in order to recover. The existence of a causal nexus between a plaintiff's injuries and a defendant's conduct has been an indispensable element of tort law. It is well settled that "negligence in the air," where the defendant has committed a wrongful act but has not injured the complaining party, is an insufficient basis upon which to impose liability.

The causation element in traditional tort law serves several important functions. The causation requirement separates culpable parties from innocent actors and ensures that culpable parties are held liable only for harm they have actually caused. If courts held people liable for all unintended harms flowing from their acts, the legal consequences would be disproportionate to fault. The causation principle also ensures a just result in legal disputes. Societal interests at stake

225. Prosser and Keeton on Torts, supra note 33, § 41, at 263. "An essential element of the plaintiff's cause of action for negligence, or for that matter any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." Id.

226. See, e.g., Ney v. Yellow Cab Co., 117 N.E.2d 74, 78 (Ill. 1954). Before liability will be held to exist, the plaintiff's injury must have a direct and proximate connection with the defendant's conduct. Id. It is the existence of this cause and effect relationship which makes the negligence of the defendant actionable. Id. at 79. Professor Weinrib asserts that even though causation is under attack in American law in ways unimaginable a generation ago—as with the proliferation of market share and alternative liability theories—these attacks do not undermine the conceptual centrality of causation in tort law. Ernest Weinrib, The Special Morality of Tort Law, 34 McGill L.J. 403, 407 (1989). Professor Weinrib states: "Even in a case like Sindell, causation is still present in our thinking, just as one can have a sensation of a limb now amputated. Only because we recognize that causation is fundamental for tort law does the attenuation of that requirement in the Sindell case become a matter of celebrity." Id.

227. In order to recover, the plaintiff must show a violation of her own right, not merely a wrong to someone else. Palsgraf, 162 N.E. at 100.


230. Prosser and Keeton on Torts, supra note 33, § 41, at 267. "Proximate cause" is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of his conduct. Id. at 264. Limitation on the scope of liability is related to policy, in particular, what justice demands or what is administratively efficient. Id.


The reason underlying the run of doctrines and decisions on legal cause I believe to be simply a desire to reach a result which is in some sense just. Courts refuse to recognize all actually-caused consequences as legally caused, not chiefly because of doubt as to what is actually caused nor because there are only twenty-four hours in the day, but because it would seem unfair in many cases, and monstrous in some, to hold people responsible for all consequences
in legal disputes include the freedom of individual action, general security, the advancement of knowledge, and the importance of individual human life. Courts strike a balance between these competing interests by holding defendants liable for the normal and direct consequences of their acts, and leaving the burden for more abnormal and indirect consequences with the injured party. Courts have struck this balance in light of the fact that today’s plaintiff may be tomorrow’s defendant. It may be better for the plaintiff to forego recovery for an injury suffered today, thereby escaping the possibility of an unlimited and ruinous liability tomorrow.

Some may argue that drug dealers create an unreasonable risk of harm to the general public when they choose to participate in the illegal drug market and should therefore be culpable for their actions. It has long been recognized in this State, however, that the creation of risk or breach of duty alone, without proven causation, provides an insufficient basis upon which to impose liability. In Smith v. Eli Lilly & Co., the Illinois Supreme Court admonished that this important principle should not be ignored “merely because the defendants are members of the drug industry.” The Smith court found it “tempting” to impose liability based on the fact that the drug companies profited from the sale of a drug which may have been responsible for

which actually result from their wrongful acts.

Id. at 345. As an example, Professor Edgerton cites the law’s treatment of alternative causes, where the plaintiff’s injury would have occurred even if the defendant had not committed a wrongful act. Id. at 346. In such a case, our sense of justice demands that the defendant not be held liable. Id. at 347.

233. Id. at 349-51.

234. Id. at 351. For example, if D were to negligently or intentionally knock down A, and, before A could get up, X, acting alone, seized the opportunity to kill A by kicking him in the face, few courts would think it just to hold D liable for A’s death. Id. at 350.

235. Id. at 352. Even from the point of view of the plaintiff, the system of legal cause as it exists may be justified as “mutual insurance.” Id. The average plaintiff may be just as likely to commit wrongs, at least negligent wrongs, as the average defendant. Id. Thus, the plaintiff’s interests are also served by limiting liability for the consequences of wrongful acts. Id.

236. Id. at 352.

237. It is sometimes argued that justice always falls on the side of holding the wrongdoing defendant liable for all the actual consequences of his conduct, because the alternative would be to leave the innocent plaintiff to bear the cost of the injury. Id. at 349.


239. Id.

240. Id. at 340; see supra part II.B for a discussion of the drug industry’s role in the origins of market share liability.
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the plaintiff’s damages. Nevertheless, the court held that this temptation was not a strong enough reason to adopt a theory which significantly altered tort law while only providing a “markedly flawed” alternative with unclear ramifications. The same admonishment applies here.

Of course, the Drug Dealer Liability Act has considerable popular appeal. However, public sentiment should not dictate whether fundamental fairness principles inherent in our justice system apply to certain groups. Throughout history, public sentiment has often resulted in unfair treatment of unpopular persons who are viewed as “morally” culpable. Over time, emotions usually give way to reason, and the logic used to distinguish those persons is discredited. However, as Justice Douglas has noted, when the witch hunt is on, one who must rely on logic or reason “leans on a feeble reed.”

242. Id. The court noted that imposing liability based on a defendant’s perceived wealth would be an unsound principle that would result in a two-tiered system of justice. Id. “A system priding itself on ‘equal justice under law’ does not flower when the liability as well as the damage aspect of a tort action is determined by a defendant’s wealth.” Sindell v. Abbott Labs., 607 P.2d 924, 941 (Cal.) (Richardson, J., dissenting), cert. denied, 449 U.S. 912 (1980).
243. Sue? You Bet Your Life, PALM BEACH POST, Mar. 27, 1995, at 12A. “The selling point of the Drug Dealer Liability Act is the promise of instant riches for average citizens. If you can’t win the lottery or get rear-ended by a Rolls driven by someone with insurance, maybe you can strike it rich from a crook.” Id.
244. See, e.g., Adler v. Board of Educ., 342 U.S. 485 (1952) (upholding a statute which permitted New York school teachers to be fired based on their associations with the Communist Party); Korematsu v. United States, 323 U.S. 214 (1944) (upholding Japanese internment during World War II); 8 U.S.C. § 1251 (1988 and Supp.) (excluding persons from the United States based on their ideological beliefs, associations, or affiliations with alleged terrorist organizations, even though they have never committed a terrorist act).

245. For example, in the heat of the “Red Scare,” the Supreme Court upheld a statute allowing New York public school teachers to be fired based on their associations with the Communist Party. Adler, 342 U.S. at 490. The majority view in Adler, however, has since been discredited. See, e.g., Keyishian v. Board of Regents, 385 U.S. 589, 605 (1967) (recognizing that constitutional doctrines which emerged after Adler had “rejected its major premise”). See also supra note 244 (discussing Congress’ recognition of the unfairness inherent in World War II internment camps based on a person’s Japanese ancestry).
246. Recent acts of terrorism have inspired unfair treatment of foreigners. See
Because of public frustration over the nation's drug problem, drug dealers have apparently become the latest target. Indeed, there is nothing wrong with creating innovative ways to make drug offenders "pay" for their wrongful acts. The Illinois legislature should not, however, abrogate fundamental tort principles that ensure fairness to all litigants. Embarking on this road can only lead to unjust, and unconstitutional, results.


247. According to a nationwide poll, three out of four Americans have been touched personally by the nation’s drug problem. Michael McQueen & David Shribman, Battle Against Drugs Chief Issue Facing Nation, Americans Say, WALL ST. J., Sept. 22, 1989, § I, at 1. Forty percent of blacks and 15% of whites surveyed said they believed that almost all the crimes committed in their neighborhoods were drug-related. Id. Many respondents said they were willing to try "almost anything" to solve the drug problem. Id. One member of a Wall Street Journal focus group suggested putting drug offenders on "an Island right out in the Pacific." Id. Another member suggested putting users "in concentration camps for a while." Id.

Another poll found that 62% of Americans are willing to surrender "a few of the freedoms we have in this country" to solve the drug problem. Jack W. Germond & Jules Witcover, Public Reaction to Drug Problem Nears Hysteria, ST. PETERSBURG TIMES, Sept. 12, 1989, at 8A. Two-thirds of respondents said they would approve of police stopping cars at random to search for drugs, even if it meant that cars of law-abiding citizens were sometimes searched by mistake. Id. More than half supported mandatory drug tests for all Americans. Id.

Fear and frustration over the nation's gang problem has recently led to unconstitutional treatment of gang members. See City of Chicago v. Youkhana, 660 N.E.2d 34 (Ill. App. 1st Dist. 1995). In Youkhana, an Illinois appellate court struck down a Chicago ordinance which made it illegal to loiter on a public street with a known gang member. Id. at 41. The court found that the ordinance prohibited gang members from loitering because they were gang members, not because they were loitering. Id.; see also Brief of Defendants-Appellants at 8, City of Chicago v. Youkhana, 660 N.E.2d 34 (Ill. App. 1st Dist. 1995) (No. 93-3909) (arguing that the ordinance was unconstitutionally based on an assumption that gang members, if standing in a public place, will commit illegal activities).

248. For example, the Manhattan District Attorney's Office created an innovative and successful program to curb drug trafficking in urban apartment buildings. See Peter Finn, The Manhattan District Attorney's Narcotics Eviction Program, NAT'L INST. JUST., May 1995, at 2. Under the program, the district attorney's office brings actions to evict drug dealers under the state's Real Property Actions and Proceedings Law. Id. The law does not require the district attorney to prove that the tenant committed a specific crime. Id. Rather, the district attorney need only present evidence warranting the conclusion that the premises are being used for an illegal business. Id. Between June 1988 and August 1994, the program removed drug dealers from 2003 apartments and retail stores. Id.

249. As one court has stated, "[O]ur constitutional standards, fortunately, do not slide up and down a scale according to the gravity of the crime problem [the state] wish[es] to
A. A Constitutional Alternative to the Drug Dealer Liability Act

While the current Act may be unconstitutional, the legislature may still create a civil cause of action against drug dealers by basing the action on traditional elements of recovery in tort law. The legislature must eliminate the "market share" aspect of the law, because it unconstitutionally requires defendants to pay 100% of the damages for injuries that they more than likely did not cause. Allowing plaintiffs to sue for injuries actually caused by someone else abrogates important causation principles designed to ensure fairness to civil litigants. Additionally, the legislature must eliminate the provision allowing a governmental entity to recover damages with respect to defendants who have already been criminally punished. This provision constitutes a second punishment for double jeopardy purposes, because it allows the government to recover an amount well beyond, or even totally unrelated, to the damages actually caused by the defendant.

A law requiring the plaintiff to show causation would allow third parties to recover for their injuries while preserving defendants' due process rights. Such a statute would supply a presumption that the drug dealer is liable for the foreseeable results of his drug-dealing. This presumption is rational, and thus constitutional, unlike the current law. The proposed statute codifies the principle inherent in common


250. In particular, the legislature should require the plaintiff to show some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered. See PROSSER AND KEETON ON TORTS, supra note 33, § 41, at 263.

251. See supra part IV.A.1.

252. See supra part IV.B.

253. See supra part IV.A.2. If the defendant has not been criminally punished, the government is free to seek a civil judgment against him under the Drug Dealer Liability Act. See United States v. Halper, 490 U.S. 435, 450 (1989). The Halper Court stated that "[n]othing in today's ruling precludes the Government from seeking the full civil penalty against a defendant who previously has not been punished for the same conduct, even if the civil sanction imposed is punitive." Id.

254. See supra part IV.A.2.

255. See Bronfin, supra note 31, at 353. The proposed law would also ensure that defendants are only held liable for injuries that have a reasonable connection with their acts. See PROSSER AND KEETON ON TORTS, supra note 33, § 41, at 263. To be sure, it remains a steep challenge to prove causation in this context, but due process requires such proof.

256. See supra part IV.A. The presumption created by the proposed act is rational because there are a wide number of known effects of drug use. See infra notes 264-67 and
law negligence: that one who harms another when he breaches a duty of care should compensate the victim for his injuries. The proposed law would simply apply the rationale behind dram shop laws to the sale of illegal drugs. At common law, for example, bar owners were not liable for injuries caused by their intoxicated patrons because “the consumption, not the sale or service of alcohol, was viewed as the sole proximate cause” of the injury. States enacted dram shop laws to cure inadequacies in the common law and allow innocent third parties injured by intoxicated persons to recover against the bar owners who served the alcohol. Similarly, a law creating civil liability for illegal drug dealing would cure inadequacies in the common law and allow innocent victims to recover from drug dealers.

In order to recover, the plaintiff should have to prove (1) that the defendant’s illegal drugs were used by the person who injured him, and (2) that those drugs contributed to the person’s actions that resulted in his injury. The plaintiff must establish not only that the drug user who injured him used the defendant’s drugs, but that the drug use increased the likelihood that the user would injure others. Drug use causes a wide range of recognized, foreseeable consequences to the drug user, including cardiac failure, cerebral hemorrhaging, psychosis, depression, and even death. Injuries to third parties are

accompanying text. Thus, it is foreseeable that the person to whom the dealer sells drugs will be injured or will cause injury to others as a result of the drug sale. Id.

257. Bronfin, supra note 31, at 354. State and federal laws already establish that individuals owe a duty to refrain from selling drugs. Id. The proposed statute would impose civil liability on persons who breach this duty, if that breach proximately caused the plaintiff’s injury. Id.

258. Id. at 353.

259. Id. at 352 (citing El Chico Corp. v. Poole, 732 S.W.2d 306, 309 (Tex. 1987)). Under this rationale, it would seem that third parties injured by a drug user could not recover from the person who sold them the drugs. Id.

260. Bronfin, supra note 31, at 353-55 (citing Montgomery v. Orr, 130 Misc. 2d 807, 813 (N.Y. Sup. Ct. 1986)). The Montgomery court noted: “There seems to be little rationale to say that it is a crime to . . . [violate alcohol control laws] . . . for which you may be fined and/or imprisoned, but that you cannot be held civilly liable for doing so.” Id.


262. Id. at 354. The proposed law would also be an improvement over the common law for two reasons. Id. at 353. First, it would allow innocent victims to recover for their injuries. Id. Under common law doctrines, such persons can only recover directly from the drug user, who may lack financial resources. Id. Second, the proposed statute could effect the legislature’s goal of deterrence. Id.

263. Id. at 354.

264. Id. at 360 (citing Ian R. Tebbett, A Pharmacist’s Guide to Drugs of Abuse, 134 DRUG TOPICS 58 (1990)). At common law, the link between a drug sale and an injury to a third party would likely be seen as tenuous. Id. However, this reasoning is no longer
also foreseeable, as drug use is known to incite criminal activity and negatively affect judgment, motor reflexes, and coordination. Such a law would not differ dramatically from dram shop laws, which hold bar owners liable for the acts of intoxicated patrons, based on the known effects of alcohol use.\footnote{267}

Traditionally, courts have barred adults from recovering for injuries caused by their voluntary, illegal acts.\footnote{268} The proposed statute should continue the common law rule that adult drug purchasers cannot recover for their injuries.\footnote{269} Although some courts have observed that drug addicts do not "voluntarily" purchase drugs, the law should not allow drug users to recover for their own deliberate, illegal acts.\footnote{270} Allowing adult drug users to recover would eradicate the deterrent value of forcing them to bear the costs of their own injuries.\footnote{271} Further, granting drug users a cause of action would create a "safety net" that would ensure their ability to use illegal drugs safely.\footnote{272} Nevertheless, the proposed statute should allow underage drug users to recover from the person who sold them the drugs. Unlike adult drug purchasers, children are less able to comprehend the risks of using illegal

persuasive in light of advances in medical knowledge and increased public awareness of the effects of drug use. \textit{Id.} The proposed statute should recognize the increased knowledge about the dangers of drugs and regard drug sales as a potential proximate cause of injury. \textit{Id.}

\footnote{265} For example, roughly 25\% of inmates convicted of murder in 1989 were under the influence of illegal drugs when they committed the crimes. \textit{Allen J. Beck, U.S. DEP'T OF JUSTICE, PROFILE OF JAIL INMATES, 1989, at 1.}

\footnote{266} Bronfin, \textit{supra} note 31, at 361-62.

\footnote{267} \textit{Id.} at 353.

\footnote{268} \textit{Id.} at 358. For example, one court refused to allow a woman to recover from a pharmacist who provided prescription drugs to her husband, because her husband had illegally forged the prescriptions, in which the court held:

\begin{quote}
[A] person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party, or to maintain a claim for damages based on his own wrong or caused by his own neglect . . . or where he must base his cause of action, in whole or in part, on a violation by himself of the criminal or penal laws . . . .
\end{quote}

\textit{Id.} (citing Pappas v. Clark, 494 N.W.2d 245, 247 (Iowa Ct. App. 1992)).

\footnote{269} Bronfin, \textit{supra} note 31, at 360.

\footnote{270} \textit{Id.} at 359.

\footnote{271} \textit{Id.} at 360. As one court has noted, "shifting legal liability tends to diminish an individual's sense of personal responsibility for the consequences of his own conduct." \textit{Id.} at 359 (citing Ohio Casualty Ins. Co. v. Todd, 813 P.2d 508, 518 (Okla. 1991) (Opala, C.J., concurring)). In the dram shop context, courts have noted that allowing adult alcohol purchasers to recover for their own injuries would be "tantamount to creating a no-fault law for intoxicated persons." Bronfin, \textit{supra} note 31, at 359 (citing Allen v. County of Westchester, 492 N.Y.S.2d 772, 776 (N.Y. App. Div. 1985)).

\footnote{272} Bronfin, \textit{supra} note 31, at 360 n.60.
Due to their immaturity, children are likely incapable of making truly "voluntary" decisions about drug consumption. Thus, their drug use would not break the chain of causation.

The proposed statute should also continue to allow recovery by governmental entities that suffer pecuniary injury as a result of drugs sold by the defendant. The legislature, however, must amend the current law to permit the government, where the defendant has already been convicted, to collect only damages shown to be caused by that defendant. Any amount which extends beyond making the government whole constitutes a second punishment for double jeopardy purposes and cannot constitutionally be applied to defendants who have already been criminally punished.

B. Restitution for Victims of Illegal Drug Dealing

Existing restitution statutes could also be employed to provide compensation for persons injured by the illegal drug market. Under restitution statutes, courts are authorized to require the defendant to compensate his victim for actual out-of-pocket expenses as a part of his sentence. An order requiring the offender to make restitution serves the dual goal of making the offender responsible for his or her action and making the victim whole. Courts have invoked restitution as a criminal sanction since colonial times. In Illinois, the restitution statute provides for compensation for persons who suffer pecuniary or

273. Id. at 263. Under similar logic employed in dram shop laws, minors' use of alcohol does not break the chain of causation, because it is presumed that minors are incapable of making informed, voluntary decisions about alcohol use. Id. It has been argued that adolescents have more difficulty than adults in perceiving risks associated with alcohol use. Id. at 358 n.53 (citing Larry T. Patterson et al., Young Adults' Perceptions of Warnings and Risks Associated with Alcohol Consumption, 11 J. PUB. POL'Y & MARKETING 96 (1992)).


275. Id. at 363 n.78.

276. United States v. Halper, 490 U.S. 435, 450 (1989). The Court's decision does not "prevent the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding. In a single proceeding the multiple-punishment issue would be limited to ensuring that the total punishment did not exceed that authorized by the legislature." Id.


personal injury as a result of the criminal acts of the defendant.\textsuperscript{280} Under the statute, the court can order the defendant to compensate the victim for out-of-pocket expenses, losses, damages, and injuries caused by the defendant.\textsuperscript{281} The court cannot order the defendant to pay such damages as attorney fees.\textsuperscript{282}

The restitution statute applies to both victims of violent crimes and victims of nonviolent crimes.\textsuperscript{283} Thus, persons who suffer either pecuniary or personal injury as a result of drug-dealing could be compensated.\textsuperscript{284} The victim could seek restitution from either the drug user or the drug dealer. Moreover, an order making the offender responsible for restitution is a sanction that is proportionate to the crime, and thus, the offender is not deprived of due process.\textsuperscript{285}

\section*{VI. CONCLUSION}

With the adoption of the Drug Dealer Liability Act, the Illinois legislature has shown that if one hits a square peg hard enough and often enough, it will fit into a round hole, even though the board may be splintered in the process.\textsuperscript{286} In its desire to compensate persons

\begin{itemize}
\item \textsuperscript{280} ILL. COMP. STAT. ANN. ch. 730, § 5/5-5-6 (West Supp. 1996).
\item \textsuperscript{281} Id. § 5/5-5-6(b). Imposition of restitution in a criminal proceeding does not foreclose any civil remedy the victim may have. Id. § 5/5-5-6(i).
\item \textsuperscript{282} People v. Harrison, 402 N.E.2d 822, 825 (Ill. App. 4th Dist. 1980).
\item \textsuperscript{283} People v. Lowe, 606 N.E.2d 1167, 1172 (Ill. 1992). The Lowe court noted that the focus of the restitution statute is the victim, not the civil interests of the criminal. Id. at 1173. The victim has already suffered emotional and financial trauma and should be spared the additional expense, delay, and stress of civil litigation. Id.
\item \textsuperscript{284} Id. The Illinois Supreme Court has rejected due process challenges to the restitution statute. Id. In Lowe, the defendants argued that the order of restitution deprived them of their due process rights, "because the purpose of the probation system is to rehabilitate the offender, not to serve as a tool for the imposition of civil liability." Id. at 1172. The court has held that although the purpose of the Code of Corrections is to rehabilitate offenders and return them to useful citizenship, it also serves to prescribe sanctions proportionate to the offense. Id. at 1173.
\item \textsuperscript{285} The defendant's due process rights are protected because the trial court must determine whether the victim's claim is legitimate, based on information provided in the presentence report. Id.; see ILL. COMP. STAT. ANN. ch. 730, § 5/5-3-2(a)(3) (West 1992). If the offender claims that the presentence report is inaccurate, the trial court will conduct proceedings to determine whether the report is accurate. Lowe, 606 N.E.2d at 1173. A further protection is that the court, as in all proceedings, must consider the particular circumstances of the case to ensure that the restitution order is "appropriate and just." Id.
\item \textsuperscript{286} See Sindell v. Abbott Labs., 607 P.2d 924, 940 (Cal. 1980) (Richardson, J., dissenting). Justice Richardson encapsulates the faulty logic behind market share liability as follows:
\begin{quote}
Plaintiffs have been hurt by someone who made DES. Because of the lapse of time no one can prove who made it . . . . Plaintiffs have suffered injury and defendants are wealthy. There should be a remedy. Strict products liability is
\end{quote}
injured by the State's drug problem, punish drug dealers, and perhaps even tap a funding source for drug law enforcement, the Illinois legislature has lost sight of important constitutional principles. The Illinois Drug Dealer Liability Act is unconstitutional and should not be allowed to stand. Nevertheless, the legislature can and should enact a statute allowing recovery against drug dealers which employs traditional requirements of recovery in tort—requirements which ensure fairness to every litigant. Such a measure may not have the popular appeal of one which allows "instant riches" for average citizens. However, it would provide compensation for innocent victims of the illegal drug market, while protecting the due process guarantees afforded to every member of society, including drug dealers.

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unavailable because the element of causation is lacking. Strike that requirement and label what remains . . . 'market share' liability, proving thereby that if you hit the square peg hard and often enough the round holes will really become square, although you may splinter the board in the process.

Id. at 939-40.

287. Sue? You Bet Your Life, supra note 243, at 12A.