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THE ASSOCIATION AND CITY BAR FUND HAVE TAKEN A MAJOR ROLE IN PROVIDING LEGAL ASSISTANCE TO VICTIMS AND OTHERS AFFECTED BY THE SEPTEMBER 11TH ATTACK ON THE WORLD TRADE CENTER. Soon after the attack, the Association publicized a hot line for victims and another inviting lawyers to volunteer. There was an outpouring of volunteers and thus far over 2,500 lawyers have been trained by the Fund to provide a variety of legal services.

Volunteers are at the Family Assistance Center at Pier 94 and in the other boroughs serving as notaries, assisting families with the filing of expedited claims for emergency relief to cover rent, utility bills, medical costs and other immediate expenses. Nearly 15,000 forms have been notarized. Volunteers at the Center also assist families in obtaining the Center's various services, and provide immigration law and estates information. Lawyers working with the City and the New York court system have helped over 1,700 families of missing victims complete affidavits that would enable them to obtain expedited death certificates.

The Fund is providing pro bono assistance to several hundred victims and families and small businesses with the wide range of serious legal problems they face, by matching each with a volunteer “facilitator” who will evaluate possible legal needs, address those needs the volunteer can address, find other volunteer lawyers to deal with problems in other areas of practice, and generally steer the client through the process of getting legal needs addressed.

The Association is working closely with other bar associations in the area, as well as representatives of legal services organizations, law schools, and many law firms to coordinate volunteer efforts. Volunteer coordination is greatly assisted by the lawhelp website. As other September 11th-related needs arise, the Association will make its best efforts to harness this volunteer talent to help deal with this enormous loss.


FORMER ASSOCIATION PRESIDENT SHELDON OLIENSIS WAS HONORED at a memorial tribute on September 24. Mr. Oliensis, who passed away in June, was praised for his exemplary legal career, and for his compassion and dedication to the public good, as demonstrated by his service to the Association, as President of The Legal Aid Society, as Chairman of the
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New York City Conflicts of Interest Board, and in other civic roles. The speakers at the event, who reflected upon the various aspects of Mr. Oliensis' public life, were: Association President Evan A. Davis; Chief Judge Judith S. Kaye, Daniel L. Greenberg, Beryl R. Jones, David Klingsberg, Fred N. Fishman, Robert B. von Mehren, David E. Watts and Lyn Oliensis.

* *

ON WEDNESDAY, OCTOBER 24, THE ASSOCIATION PRESENTED THE Kathryn A. McDonald Award for excellence in service to the Family Court to Judge Kevin C. Fogarty and Thomas V. Curtis. Judge Fogarty is a professor of law at St. John’s University School of Law and served as a Family Court Judge. Thomas Curtis has been a staff attorney with the Juvenile Rights Division of The Legal Aid Society since 1972. Both have demonstrated the commitment to children and the energy and dedication to the work of the Family Court that merit their receiving this award.

* *

FORDHAM UNIVERSITY SCHOOL OF LAW WON THE REGIONAL ROUND of the 52nd Annual National Moot Court Competition with Brooklyn Law School placing second. The competition is sponsored by the Association of the Bar of the City of New York and the American College of Trial Lawyers.

Both Fordham and Brooklyn will go on to join 26 other law schools to compete in the final round of the National Moot Court Competition, January 28-31, 2002 at the Association.

Best Individual Oral Argument was won by Jennifer Daly of Fordham Law School; second place went to Damon Suden, also of Fordham. The winner of the best brief was Fordham University; Brooklyn Law School and Rutgers University School of Law-Newark shared second place honors. The Award for Best Brief was a tie between Brooklyn Law School and Rutgers Newark Law School.

CORRECTION: Due to a technical error, “Dying Twice: Conditions on New York’s Death Row” by The Committee on Corrections and The Committee on Capital Punishment was published without footnotes in the Summer 2001 issue of the Record. The full report, including footnotes, is now available on the Association’s website (www.abcny.org) and from the Executive Director’s office. It will also soon be available from the Library in bound copies of The Record. We apologize for the omission.
Recent Committee Reports

Bankruptcy and Corporate Reorganization
Letter to Congressman Nadler Regarding the Bankruptcy Reform Act (H.R. 333/S.420)

Capital Punishment
Letter to Congress Supporting H.R. 2586, a Bill that Would Increase the Size of Panels in Military Capital Court Martials From at Least Five to at Least Twelve in Most Cases

Capital Punishment/Corrections
Dying Twice: Conditions on New York’s Death Row

Civil Rights
Salvaging Civil Rights Undermined by the Supreme Court: Extending the Protection of Federal Civil Rights Law in Light of Recent Restrictive Supreme Court Decisions

Consumer Affairs
Amicus Brief—Polontesky v. Better Homes Depot, Inc.
Consumer Class Actions in New York

Cooperative and Condominium Law
Contract of Sale for Cooperative Apartments

Corrections/Council on Criminal Justice/Drugs and the Law
Letter to Governor Pataki Regarding Reform of the Rockefeller Drug Laws

Corrections
Report on the Use of Stun Shields by the New York City Department of Correction

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Letter to Governor Pataki, Majority Leader Joseph Bruno, and Speaker Sheldon Silver re: Delaying Implementation of PINS Legislation
RECENT COMMITTEE REPORTS

Federal Courts
Letter to Senate and House Conferees Regarding Bankruptcy Reform Legislation H.R.333/S.220

Health Law
Letter to Alan Leibowitz, Acting Assistant Secretary of the Pension and Welfare Benefits Administration, Regarding the Department of Labor Claims Regulation

Immigration and Nationality Law
Letter to Congress Regarding H.R. 2975: Anti-Terrorism Legislation
Letter to the INS Commenting on INS No. 2171-01 Custody Procedures—Amending Period of Time in Which INS Must Make a Determination Following Arrest Without Warrant

International Human Rights
Letter to Presidente Alejandro Toledo of Peru Regarding the Case of Lori Berenson
Letter to Prime Minister and the President of Ethiopia Commending the Government’s Decision to Lift the Suspension on the Operation of the Ethiopian Women Lawyers Association

Non-Profit Organizations
Proposed Legislation and Memo to Amend the Not-for-Profit Corporation Law in Relation to the Dissolution of Not-for-Profit Corporations in New York

Social Welfare Law
Welfare Reform in New York City: The Measure of Success
Letter to Governor Pataki and Mayor Giuliani Urging the Adoption of Appropriate Measures to Mitigate the Harm to Low-Income New Yorkers Resulting from the September 11th Attack

Copies of any of the above reports are available to members by calling (212) 382-6624, or by e-mail, at kbopp@abcny.org.
It is a pleasure and an honor to speak to this distinguished group. It is also, and as always, a joy to come home. Even on this day and in this time of crisis and rebuilding, it is easy to see why New York is the greatest of cities. The spirit of the people of this city remains undiminished and I am proud of the way in which the local bar has responded to the needs of victims and their families. Much hard work remains to be done but I am confident that New York, the city of my birth and the community that formed me, will be both bigger and better than ever.

It is a privilege, as a new member of a New York firm, as a former Deputy Attorney General and, most importantly, as a member of the New York bar, to speak with you about something I believe to be a topic worthy of discussion—the importance of diversity in the legal profession. I think it is particularly fitting that we gather this evening in this city where we are endeavoring to define anew who we are as a community, as a nation, and as a people. Some will say that in light of the events of today and September 11th the question of diversity in the legal profes-
sion is not now a significant one. In my mind the issue remains an important one because there is a dimension to it that is too frequently not recognized. As President John F. Kennedy noted in discussing the persistence of a similar segregation in America in the early Sixties “we are confronted primarily with a moral issue. It is as old as the Scriptures and is as clear as the American Constitution.” If the promise of America is to be finally realized then surely the concepts that are the foundation of that promise must be found to exist in those places where those who are the guardians of our law reside.

Were he alive today, I am quite sure that Justice Thurgood Marshall, another lawyer with significant New York connections, would urge us all to fight for the things for which he stood: equality of opportunity, human dignity, the guarantee that our laws were applied equitably and for the good of the people. I am also fairly certain that the great Justice would take note of the changed circumstances we confront in the beginning of the new century. We now live in an America that is much more diverse than the one into which he was born about a century ago. The recently released census confirms this. The number of black and Hispanic people in the United States is roughly the same and, if current demographic trends continue, African Americans will no longer be the largest minority group in the nation. About one-third of the American people are from minority groups—up from one-fourth only ten years ago. Clearly our nation has become, and will become, more diverse. But what about our profession? Have we kept pace with these changes and, just as importantly, should we?

During the past couple of years, I have had the opportunity to address many different groups on this subject. Among these very distinguished audiences, this gathering stands out. As present and future leaders of the bar, you help to establish the standards of professionalism and ethics that govern the practice of law. As attorneys who have reached the pinnacle of the profession in the many different sectors you represent, you are role models for the next generation. As partners, senior and junior associates, government practitioners and law students you will shape the ways in which our profession serves the people not only of this nation but of the larger world as well. In short, this is a gathering of individuals with considerable power to mold the legal community. And with that power comes considerable responsibility.

In just a while, I will discuss how I believe you can play an active role in the pursuit of diversity in the law. First, I want to begin by describing a nationwide network known as the Lawyers for One America project. In
the fall of 1998, President Clinton asked me to take on a new assignment. He saw that our nation was making progress in its quest for racial healing, but he wanted to do more to quicken the pace of positive change. Despite a then booming economy, historically low inflation, and the lowest crime rates in thirty years, the President feared that too many Americans—principally ethnic and racial minorities—were being excluded from this prosperity. Thirty years earlier, the Kerner Commission on Civil Disorders had forecast this possibility when it concluded: "America is rapidly becoming two societies, one black and one white, separate and unequal."

These concerns prompted the President to launch his Race Initiative. As part of that initiative, he asked me to convene a group of lawyers to discuss what the legal profession might do to redress racial inequality and injustice, including the lack of diversity in our own ranks. I brought together an ad hoc group of fifteen or so individuals to serve as a planning committee and a brain trust. Members of this organization, the Presidents of the American Bar Association, National Asian Pacific Bar Association, National Bar Association, Hispanic National Bar Association, Native American Bar Association, the co-chairs of the Lawyers' Committee for Civil Rights Under the Law, and a few other key individuals began meeting in my office on a regular basis. After months of intense discussions and creative brainstorming, we built the foundation for a challenge to the legal community to recommit itself to increasing diversity in the legal profession and increasing access to legal resources for underserved communities.

The culmination of those initial meetings and exchanges was an event at the White House in July of 1999, at which the President issued a Call to Action to the legal community. Aptly, we met in the same room where, thirty-six years earlier, President Kennedy brought together two hundred-fifty lawyers to challenge them to participate in the burgeoning civil rights movement. That challenge, at a time when Alabama Governor George Wallace had defied a court order to admit black students to the state university—one of whom is now my sister in law—and civil rights leader Medgar Evers had been brutally murdered in his own driveway, led to the formation of the Lawyers' Committee for Civil Rights Under the Law. Although our times are in many ways less racially tumultuous, it is nonetheless appropriate that we convened in the shadow of President Kennedy to confront the racial inequities that had outlasted the 1960s.

President Clinton began his remarks that summer day by noting that "the challenge to build one America continues." He discussed some of the differences, and also some of the similarities, between the problems we confront today and the legacy of our nation's past. Then he called upon
the legal profession to take two concrete steps in the pursuit of diversity. First, he asked the lawyers present to “recommit [them]selves to fighting discrimination, to revitalizing our poorest communities, and to giving people an opportunity to serve in law firms who would not otherwise have it.” Second, the President called upon the legal profession to “set the best possible example,” to tear down the “walls in our hearts and in our habits.” And then he tasked me to report back on the progress of the legal community in meeting his twin challenges to diversify and to engage in Pro Bono activities.

The President’s Call to Action resulted in the formation of Lawyers for One America. An outgrowth of the planning group that began meeting in the fall of 1998, Lawyers for One America is a non-profit organization headquartered in San Francisco and dedicated to working with lawyers, corporations, law firms, law schools, bar associations, civil rights groups, and public interest organizations to meet the President’s challenge. Affiliated organizations include the American Corporate Counsel Association, the Minority Corporate Counsel Association, the National Bar Association, the Association of American Law Schools, National Association of Public Interest Law and the Association of the Bar of the City of New York.

Lawyers for One America worked to create a database of successful practices and programs that are aimed at increasing diversity at all levels of the legal profession and expanding access to legal services. Additionally, and in order to appreciate the obstacles we as a profession face, one committee of Lawyers for One America worked to compile reliable statistics on the current composition of different tiers of the legal community, from law students to academics, associates to partners, law clerks to judges. Meanwhile, individual legal organizations worked one-on-one with Lawyers for One America to take their own steps towards meeting the President’s challenge. In the case of the Justice Department, we hastened our efforts to develop a comprehensive eight point plan to recruit, hire and retain a more diverse pool of attorneys, to update our departmental pro bono policy, and to reach out to other federal agencies to encourage similar changes. Lawyers for One America delivered a comprehensive report of its activities to the President in the fall of 2000. I have a copy of the report here and urge you to visit the website at www.LFOA.org.

It is clear that our work is not done. Within all parts of the legal profession, notwithstanding substantial gains in the last forty years, women and minority ethnic and racial groups continue to be vastly under-represented. Consider the following disturbing statistics:
Although elite schools like Harvard and Columbia report that, over a decade, at least 20% of their graduates have been from minority groups, only about 3% of all partners in the nation’s largest and most-profitable law firms are racial minorities. In the 77 largest firms in New York City, 34 out of 4400 partners are African-American—a rate of three-quarters of one percent. In the 40 largest firms in Chicago, only 46 out of almost 3000 partners are African-American.

Only fourteen general counsel of Fortune 500 companies are minorities, and eleven of them were named in the last four years. Overall, women comprise only 37% of the nation’s corporate counsel legal staff and racial minorities comprise only 9%.

7.2% of law students in this country are African-American, yet blacks represent 13% of the general population. The disparity among Latinos, 5.5% of law students versus 13% generally, is greater.

And the statistics on the judiciary are far from encouraging. Despite a considerable effort by the Clinton administration, there are about the same number of active African-American federal appellate judges today as when Jimmy Carter was President. Remarkably, we have made no real progress despite the addition of forty-seven seats on the federal Courts of Appeals between 1979 and 1999. Three-quarters of the federal circuit courts now have either no African-American or no Latino jurist. The Fourth Circuit, which exercises jurisdiction over a higher percentage of African-American citizens than any federal circuit save the District of Columbia, never had a black appellate judge until President Clinton, forced to use a recess appointment, named Roger Gregory to the court early this year. And the state courts are frequently even less diverse. In Florida, for example, seven out of every ten judges in the court system are white men.

There are other sources of discouraging statistics. Last year the National Law Journal identified what it thought were the one hundred most influential lawyers in our nation. By my count, ten of them were women, five were black, two were Asian and one was Hispanic.

As these statistics suggest, the disparities in the legal profession tend only to get worse as one traverses higher and higher career plateaus. The
percentage of minority partners at major law firms is minuscule even compared to the percentage of minority associates. And among the pool of partners, barely half of African-American partners at large law firms hold equity stakes, as compared to 70% of their white counterparts.

It is still harder for minority attorneys to make partner, notwithstanding the widespread use of affirmative opportunity programs in the private sector. According to one study, African-American partners are one-third more likely than whites to have attended a so-called “top-tier” law school. Undoubtedly, some of this disparity in the upper echelons will disappear in the coming years as the next generation of lawyers reach their professional prime. But to some degree, these disparities at the top are also a self-fulfilling prophecy. Without mentors and without role models to encourage their professional development, young minority lawyers are at a permanent disadvantage in moving up the career ladder. That is one reason why associates of color have consistently left firms at a higher rate than their white counterparts.

This overall lack of diversity within the legal profession adversely impacts our ability as lawyers to serve those most in need of assistance. According to a 1993 study by the American Bar Association, half of all low-income households have at least one serious legal problem a year, but three-quarters of that group have no access to a lawyer. Sadly, it is one legacy of our nation’s history that this class of unrepresented clients disproportionately consists of racial minorities, single mothers, battered women. Of course, attorneys of all stripes and backgrounds can and do serve this client base by devoting countless hours of free legal assistance; their efforts are most commendable. But a legal profession lacking in significant racial and gender diversity can only go so far in combating the sense of alienation that disadvantaged clients feel when regularly confronted by an establishment of a distinctly different color and sex.

For too many people, justifiably or unjustifiably, law is a symbol of exclusion rather than empowerment. It almost goes without saying that the criminal justice system is the bleakest example of this socioeconomic and racial divide. But this disheartening reality also applies to many other facets of life and the law—to landlord/tenant disputes, where families endure substandard housing conditions out of fear of eviction; to contracts, where consumers become trapped in cycles of debt and bankruptcy because retailers employ usurious credit terms; to families, where women endure physical abuse because they have little faith in law enforcement or the courts. The legal profession, however dedicated to pro bono service, will always lack some of the credibility integral to forging strong
attorney-client relationships so long as it bears little resemblance to the clientele it purports to represent.

But it is not only those from the lower socio-economic strata that are adversely affected by this lack of diversity. All of society is negatively impacted when a homogenous legal profession is unable to deal, as effectively as it might, with an increasingly smaller, more diverse world. One of our nation’s greatest assets in this new world is our racial and ethnic diversity and any profession that does not take advantage of this does so at its economic peril. If we are to compete effectively we must make use of all of our resources. It is illogical for any organization to think that it can recruit the greatest number of quality lawyers from something less than 100% of the available legal population.

There is an economic incentive as well. The chief legal officers of some of the nation’s largest companies have signed a “Statement of Principle” indicating that in making representation decisions they will give significant weight to a firm’s commitment and progress in this area. DuPont, General Electric and other corporations, for example, require law firms that work for them to complete an annual survey showing how diverse they are and whether they are successful in becoming more so. This makes sense: as the nation becomes more diverse, so too inevitably will the juries that decide the cases that are brought before them. The perspectives of minority lawyers in that regard can be invaluable.

The challenge in the years ahead is to employ the immense creativity of the legal profession in our quest for one America. I don’t need to remind this audience that lawyers are a clever lot; consider some of the more creative causes of actions or criminal defenses or prosecution theories you have heard over the years. This creativity can and should be harnessed in service of the cause of diversity. For instance, whatever your views on affirmative action, I believe that there are many ways to diversify our own ranks without inflaming the divisive debates that have undermined so many well-intentioned efforts in the past. Bar associations can work harder to promote mentorship programs for minority lawyers. Law schools can improve outreach efforts at single-sex and traditionally black colleges. Private practitioners can establish apprenticeship programs in conjunction with area public schools. Law firms can work to insure that minority attorneys are mentored, exposed to clients and given challenging, career defining work. These are all solutions that defy the notion that progress in the legal profession is a zero-sum game. We need not seek a guaranteed outcome for any individual or group, only a serious commitment to opportunity for all.
The Association of the Bar of the City of New York has set targets for increasing diversity among law firm partners to reflect the diversity of more junior attorneys at the firms. Your president, Evan Davis, convened a special day long session on diversity this spring.

San Francisco has for well over a decade served as a national leader in efforts by metropolitan bars to create greater racial diversity in the legal profession. One hundred legal employers in the city adopted the very ambitious “Goals and Timetables for Minority Retention” that committed them to hire and retain, in significant numbers, minority lawyers. Although they have not yet met the goals they set, they have made real progress.

In February 2000, I spoke to the Conference of Chief Justices of the State Supreme Courts. That organization unanimously passed a resolution in support of Lawyers for One America and committed itself to playing an active role in the pursuit of diversity. Following that meeting Chief Justice George of the California Supreme Court agreed to meet with managing partners and general counsels in San Francisco to discuss the importance of hiring minority lawyers and minority-owned law firms.

I urge all of you, students and practitioners alike, to take similar actions. And in taking action, you will inevitably take on the challenge of leading by example. For older lawyers please be mindful that your own generation will set the tone for other lawyers to emulate. The legal profession devotes a great deal of energy and resources to encourage its incoming crops of young lawyers to commit themselves to pro bono activities. While this emphasis is proper, we tend to forget that older lawyers, unencumbered by the stress of making partner or vice-president or paying off student loans, are often much better situated professionally and economically to devote extra time to pro bono enterprises and diversity activities. These are your friends, the godparents of your children, your former partners, your law school classmates. Call upon their services. Enlist them in your crusade, in our crusade.

Remember that you attained your present positions under the guidance and mentorship of others. Take active steps to assist and promote the careers of talented young minority and women attorneys, individuals who may not have ready access to the powerful social or family networks upon which many of us relied in that regard. I applaud the efforts that the Bar Association of San Francisco is taking to replicate a symposium for women and minority lawyers that explains the process for becoming a judge—a model based upon one created in Washington State. That model is now also being used by the National Bar Association and by the Bar Association of New York.
Over time, an individual’s or organization’s own hiring practices also tell a story about a commitment to diversity. Only 10 of the 448 clerks hired by the nine sitting justices of our nation’s Supreme Court have been African-American and only five were Hispanic. As you all well appreciate, legal positions in the organizations to which you belong are highly coveted assignments in the legal profession, both for the learning experiences they offer and the prestige that they carry. Make affirmative efforts to solicit and encourage applications from minority candidates. Re-assess selection criteria with an eye to leveling the playing field. Consider an applicant who does not enjoy all the socioeconomic advantages of her peers. I think you will be pleasantly surprised at the breadth of talented, qualified, applicants who are eager for the chance to prove themselves.

There is no question that, however strong our commitment, we cannot counteract this country’s unfortunate legacy of racial and gender inequality overnight, or even over the course of the next few years. But considering the strides the legal profession has already made, the obstacles before us now are imminently surmountable. It is true as I noted earlier that the world has changed significantly since the birth of Thurgood Marshall. The world will change even more in the next century. Though many seem to fear what is an admittedly uncertain future and look nostalgically back towards an America, that, in truth, never existed, I implore all of you, especially my younger colleagues, to embrace the coming years and make them your own. The desire to “return to normal” after September 11th is understandable but we should be selective in that quest. We should use this time to ask difficult questions of ourselves, of our profession. I urge you to craft new solutions to the old problems that continue to bedevil us and find innovative, contemporary ways to deal with future concerns. Always remember that positive change is possible. Never forget that man-made problems are susceptible to man-made solutions. You must not look at an imperfect world and consign yourself to merely existing in it. You must use your formidable skills and the power that you have, or will acquire, to make it better. You are some of the best and brightest, you have been superbly trained—you have a duty to the people of this nation. I hope that, as leaders in the legal community, you will assume a lead role in the coming years in advocating for both a new America and a new, more diverse profession. I implore you to join together in making the elusive dream of “One America” a concrete reality.

Thank you.
RECOMMENDATIONS

The Committee on Uniform State Laws of the Association of the Bar of the City of New York recommends:

1. That the Uniform Electronic Transactions Act ("UETA") be enacted in New York State. UETA will provide a more comprehensive framework for electronic transactions than existing law does and will allow New York State to be in step with the rest of the states. In addition, the adoption of UETA in New York, will eliminate uncertainty as to the extent of preemption of New York's Electronic Signature and Records Act ("ESRA")\(^1\) by the

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Electronic Signatures in Global and National Commerce Act ("E-Sign").

2. That with the adoption of UETA in New York, ESRA be reconciled with UETA by the New York State Legislature. This may be done either through the complete repeal of ESRA, or with the amendment of ESRA to have it apply only to electronic transactions undertaken by or with government entities. The latter alternative would be in line with Sections 17-19 of UETA, which contemplate that each state implement its own rules for government use of electronic signatures and records in adopting UETA.

3. That UETA be adopted in New York in its uniform version, without any non-uniform consumer provisions being included within its text. This Report does not make a recommendation as to the appropriateness of the consumer provisions in E-Sign. Nor does this report determine, but merely points out the difficult preemption issues involved in determining, whether the consumer provisions in E-Sign would continue to remain in effect once a uniform version of UETA is adopted in New York. Whether New York in adopting a uniform UETA should also enact separate consumer legislation relating to electronic transactions and signatures is a question that the Association of the Bar of the City of New York has not yet considered and on which it takes no position at the present time.

I. INTRODUCTION

For the past five years there have been many efforts to promulgate laws governing electronic commerce. As of this writing there appears to be only one state which has not enacted some type of law to provide legal recognition to an electronic signature. "Unfortunately, no two laws are the same—some only recognize electronic signatures used on government filings, while some laws only recognize an electronic signature generated by a specific technology." As a result of this non-uniformity, a particular electronic record, as well as the method of associating a party’s identity with that record, may be the effective equivalent of a writing and signa-
ture in one state, but not in another. Legal uncertainty about the effect and validity of electronic signatures and records arguably may have hindered the expansion of electronic commerce by causing a certain reluctance on the part of some businesses and consumers to conduct business purely by electronic means. It also may impose potentially redundant costs on participants who choose to transact business electronically by requiring written documentation of an on-line transaction or retention of paper records evidencing an on-line transaction. In recognition of the need to solve these problems, there have been several initiatives to adopt a uniform set of rules governing electronic transactions, both internationally and domestically.  

In the United States, one of the primary proponents of this initiative has been the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). Other significant efforts have been led by the United States Congress.  

In recent years, NCCUSL's drafting committees have taken electronic commerce into account when drafting Article 4A of the Uniform Commercial Code ("UCC") and producing revised Articles 5, 8, and 9. Current efforts to update the UCC to address electronic signatures and records in Articles 1, 2, and 2A are well underway. A parallel effort undertaken by NCCUSL outside of the UCC was the drafting of UETA.  

Approved on July 29, 1999 at NCCUSL's annual conference, UETA is designed “to facilitate electronic transactions”8 and, to that end, to clarify
The extent to which electronic records and electronic signatures should be treated as the legal equivalent of paper records and traditional signatures. The principle of legal parity of electronic data with their paper counterparts is central to UETA, serving as the primary mechanism for “eliminat[ing] barriers to electronic commerce.”

The work on UETA began in 1996, when a Drafting Committee was approved at the NCCUSL annual conference. Throughout the drafting process, the Drafting Committee remained committed to the notion of “media neutrality:” the idea that the same legal principles should apply to all transactions, whether based on paper or electronic media. Thus, in very general terms, UETA provides that where a law requires a writing or a signature, an electronic record or an electronic signature, respectively, suffices. Closely connected to this notion is the principle of “technology neutrality,” pursuant to which UETA refrains from requiring any specific technologies or business methods. In addition to the principles of media and technology neutrality, UETA remains primarily a “procedural” statute, creating an “overlay” of existing law that would keep changes in the underlying substantive law to a minimum. Accordingly, in most circumstances UETA does not alter existing legal requirements for contract formation, standards of care, or security procedures. Finally, like the UCC, whenever possible, UETA attempts to preserve the parties’ autonomy by allowing them in many cases to alter a default rule by agreement.

9. See Reporter’s Comment to § 6 of UETA.

10. Professor Patricia Brumfield Fry was designated Chair of the Drafting Committee; Professor D. Benjamin Beard was named Reporter for the project.

11. In this respect, UETA must be distinguished from other states’ laws, such as the Utah Digital Signature Act, Utah Code Ann. § 46-3-101 (2001), which authorizes the use of only a specific type of electronic signature, i.e., one in which a signature is created by using a specific technology. See also Minn. Stat. § 325K.01 (2001); Mont. Code Ann. § 2-20-101 (West 2001); Wash. Rev. Code Ann. § 19.34.900 (West 2001). ESRA mandates that an Electronic Facilitator identify “preferred technology standards relating to security, confidentiality, and privacy of electronic signatures and electronic records.” ESRA, § 2(c). In promulgating temporary regulations, the Electronic Facilitator has adopted a number of specific technological requirements for an electronic signature. See infra, Part V of this Report for a comparison of UETA and ESRA. Importantly, UETA is not intended to replace any digital signature statutes. Rather, “[t]o the extent that a State has a Digital Signature Law, UETA is designed to support and complement that statute.” See Reporter’s Prefatory Note to UETA.

12. While for the most part UETA is generally a procedural statute, it does contain certain provisions, such as § 16 (“Transferable Records”), that are difficult to characterize as merely “procedural.” See infra notes 54 through 60 and accompanying text for a more detailed discussion of the transferable record section.
II. UETA: SUMMARY

1. Scope

The scope of UETA is limited in three ways. First, with certain exceptions discussed below, UETA applies only to “electronic records and electronic signatures relating to a transaction.”13 The term “transaction” is defined as “an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.”14 The intent of the drafters of UETA was to read the term “commercial” broadly so as to include consumer transactions, such as retail merchandising, as well as transactions between two consumers.15

Second, UETA is a permissive rather than a prescriptive statute. It does not require a person to conduct business electronically.16 Moreover, it is an opt-in statute, i.e., it applies only between the parties that have agreed to transact electronically.17 Even where a party has agreed to conduct a certain transaction electronically, the party retains the right to refuse to use electronic records and signatures in other transactions.18

13. UETA § 3(a).
14. Id. § 2(16).
15. Reporter’s Comment to § 2(12) states, in part:

It is essential that the term commerce and business be understood and construed broadly to include commercial and business transactions involving individuals who may qualify as “consumers” under other applicable law. If Alice and Bob agree to the sale of Alice’s car to Bob for $2,000 using an internet auction site, that transaction is fully covered by this Act. Even if Alice and Bob each qualify as typical “consumers” under other applicable law, their interaction is a transaction in commerce. Accordingly their actions would be related to commercial affairs, and fully qualify as a transaction governed by this Act.

16. UETA § 5(a).
17. Id. § 5(b). Note that such an agreement does not have to be in writing and, in fact, may be implied. “Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties conduct.” Id. The Reporter’s comments direct the court to look at the totality of the circumstances, including inter alia the exchange of business cards containing parties’ e-mail addresses, or customer initiation of Internet communication by accessing web sites. See Reporter’s Comment to § 5.
18. UETA § 5(c).
Finally, there are transactions that are specifically excluded from UETA. Section 3(b) provides that UETA does not apply to transactions that are subject to:

- Laws governing wills, codicils, and testamentary trusts;
- Articles 3, 4, 4A, 5, 6, 7, 8, 9, and most of Article 1 of the UCC; 19
- The Uniform Computer Information Transactions Act ("UCITA"); and
- Any other law, if any, identified by the enacting state. 20

UETA may also apply to records and signatures accepted by or filed with state and local governments. Each governmental agency will determine if, and the extent to which, it will create and retain electronic records and convert written records to electronic records. 21 Similarly, each govern-

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19. Once revised Articles 2 and 2A of the UCC are adopted, UETA will not apply to them except to the extent provided in those revised Articles. See Reporter’s Comment to Section 3. The reason for this exclusion is similar to that of the exclusion for Revised UCC Articles 5, 8, and 9—namely, that these Articles have been recently revised to take into consideration electronic records and electronic signatures. For example, Revised Article 9 of the UCC, as approved by the American Law Institute and the National Conference of Commissioners on Uniform State Laws introduces a concept of “electronic chattel paper,” which is defined as a “chattel paper evidenced by a record or records consisting of information stored in an electronic medium.” In turn, the Uniform version of Revised § 9-102(69) defines the term “record” as “information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.” In certain instances, however, these Articles deliberately retain the requirement of a “writing” or a “signature.” For example, in order to transfer or assign a certificated security, Article 8 still requires an indorsement, which is defined in § 8-102(11) as “a signature that alone or accompanied by otherwords is made on a security certificate in registered form.” Because the revision process of these Articles already included a significant consideration of electronic practices, the UETA Drafting Committee decided to refrain from modifying these rules in UETA. UCITA was excluded for the same reason. UCC Articles 3, 4, and 4A were removed from the coverage of UETA because of their effect on payment systems. See Reporter’s Comment 5 to § 3. Revision of these Articles is expected in the near future.

20. Throughout the drafting process, the specific scope of UETA remained one of the most difficult issues confronting the Drafting Committee. Eventually a Task Force on State Law Exclusions ("Task Force") was formed to determine specific areas of law to which UETA should not apply. On September 21, 1998, the Task Force presented its Report to the Drafting Committee, listing specific exclusions. The Drafting Committee followed the Task Force’s recommendations.

21. UETA § 17.
mental agency will determine whether, and the extent to which, it will send and accept electronic records and electronic signatures to and from other persons, and otherwise create, use, store, and rely upon electronic records and electronic signatures.\textsuperscript{22}

2. Basic Rules of Validity and Legal Recognition

The fundamental premise of UETA is expressed in Section 7: namely, that the medium in which a record, signature, or contract is created, presented, or retained does not affect its legal validity. Specifically, this section contains three basic rules:

- A record or signature may not be denied legal effect or enforceability solely because it is in electronic form;
- A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation; and
- If a law requires a writing or a signature, the law is satisfied by an electronic record or an electronic signature.\textsuperscript{23}

In this respect, the term “electronic record” is defined as “a record created, generated, sent, communicated, received, or stored by electronic means.”\textsuperscript{24} An “electronic signature” is defined in UETA as “an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.”\textsuperscript{25} The Reporter’s comment expressly states that this definition “is intended to cover the standard web-page click-through process.”\textsuperscript{26}

In keeping with the above three rules, UETA also stipulates that if a law requires a person to provide information in writing to another person, then that requirement is satisfied if the information is provided by means of an electronic record, which the recipient is capable of accessing and retaining for subsequent reference.\textsuperscript{27}

\textsuperscript{22} Id. § 18.
\textsuperscript{23} These provisions reflect the principles of the UNCITRAL Model Law.
\textsuperscript{24} UETA § 2(7). In turn, a “record” is defined as “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.” Id. § 2(13).
\textsuperscript{25} Id. § 2(8).
\textsuperscript{26} See Reporter’s Comment to § 2(8).
\textsuperscript{27} UETA § 8(a). This rule applies only if the parties have agreed to conduct a transaction electronically, underscoring the voluntary nature of UETA.
3. Rules Applicable to the Process of Contract Formation

Formation of contract, including formation by electronic agents

As a practical matter, UETA provides three basic methods for forming an electronic contract. An electronic contract can be formed by the exchange of e-mail messages. This method may be used in combination with other forms of communications, such as paper or fax. An electronic contract can also be formed by the actions of electronic agents, i.e., through software that is programmed to initiate or respond to electronic message offers. Finally, an individual may enter into an electronic contract by using web site forms, i.e., by filling out an on-line form that is then accepted either by a return message or by shipment of goods.

Consistent with the principle of keeping changes in substantive law to a minimum, in most circumstances UETA does not alter the rules of paper contract formation when applying them in an electronic environment. It also provides that if a contract dispute arises and the terms of the contract are called into question, the terms are determined by the applicable substantive law.28

UETA does set forth substantive rules to address automated transactions, thereby assuring that contracts may be formed both by computers alone and by the interaction of a computer with an individual. Section 14(1) of UETA states that a contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms of agreement. An example of a contract entered into by two electronic agents is an interaction between software programs of an auto manufacturer and a supplier through Electronic Data Interchange ("EDI") designed to effectuate the replacement of inventory.29

Section 14(2) provides that a contract may be formed by the interaction of an electronic agent and an individual who acts either on his or her own behalf or on behalf of another person. This includes interactions in which the individual is free to refuse to interact, and the individual knows (or has reason to know) that his actions will cause the electronic agent to complete the transaction.30 The last provision validates an

28. Id. § 14(3).
29. UETA defines the term "electronic agent" as "a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual." Id. § 2(6).
30. Id. § 14(2).
anonymous click-through transaction in which each click by the individual indicates the individual’s consent to a particular item. Examples of this type of contract include purchasing of a book, an airline ticket, or a security on-line from the vendor or broker’s web site.

Time and place of sending and receipt of an electronic record

Time. Under UETA’s default rules, an electronic message is sent when it: (i) is addressed properly to the recipient (or directed properly to the information processing system designated or used by the recipient), (ii) is capable of being processed by that system, and (iii) enters an information processing system outside the control of the sender or a person sending a message on behalf of the sender. Similarly, an electronic message is received when it enters an information processing system controlled by the recipient in a form capable of being read by that system. This is true even if the recipient’s system is located in a place different from the place where the recipient is physically located, and even if the recipient is unaware of the receipt of the electronic message. One important consequence of this rule is that, just as a person needs to check his or her mailbox to retrieve the mail, a person who gives out his or her e-mail address will need to check his or her e-mail from time to time. The rules applicable to both “sending” and “receipt” are default rules and may be altered by agreement of the parties.

Place. An electronic record is deemed to be sent from the sender’s place of business and is deemed to be received at the recipient’s place of business. If the sender or recipient has more than one place of business, the effective place is the location “having the closest relationship to the underlying transaction.” If the sender or recipient has no place of business.

31. URC § 15(a).
32. URC § 15(b).
33. URC § 15(c).
34. URC § 15(e). This rule is consistent with the prevalent “mailbox rule,” which provides that acceptance of a paper document occurs at the time of dispatch, rather than upon receipt. Thus, a contract is formed even though the offeror has not yet received the acceptance. Earlier drafts of UETA provided that an electronic message was effective when received an attempt to respond to concerns about faulty technology. In approving UETA at the July 1999 annual meeting, however, NCCUSL decided to keep the traditional “mailbox rule” unchanged for electronic contracting.
35. URC § 15(d).
36. URC § 15(d)(1).
ness, the effective place is the person’s residence.37 These are also default rules that may be contractually removed or amended.

**Attribution**

Under UETA, an electronic record or electronic signature is attributable to a person if it was the act of that person.38 The Reporter’s comment explains that this also covers situations in which a person acts through a human agent or an electronic agent, e.g., a computer program.39

Attribution may be proven in any manner, including a showing of the effectiveness of any security procedure used in the transaction.40 It is interesting to note the difference between UETA’s approach to attribution and that of other statutes. For example, where a commercially reasonable security procedure between the sender and the receiving bank is in place, Article 4A of the UCC presumes that the sender did indeed send the message, and then gives an opportunity to the purported sender to rebut that presumption.41 One of the reasons for UETA’s deviation from the Article 4A approach was the fact that funds transfer fraud cases normally involve a large amount of money and entail a thorough internal or criminal investigation. As a result, the purported sender would have access to the information developed during the investigation that he or she can use to meet the burden of proof.42 In contrast, UETA covers a much wider spectrum of transactions; there may be no investigation involved and, if a party is pre-

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37. Id. § 15§8 (2).
38. Id. § 9.
39. See Reporter’s Comment to § 9. The term “electronic agent” is not intended to import general agency concepts; rather, an electronic agent is regarded as a tool that has no independent volition of its own. Therefore, as a general rule, the employer of the tool is responsible for the results obtained by the use of that tool. See Reporter’s Comment to § 2(6).
40. UETA § 9(a). UETA defines the term “security procedure” as “a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures.” Id. § 2(14).
41. Under §§ 4A-202 and 4A-203 of the UCC, where the parties have agreed to a “commercially reasonable security procedure,” a payment order sent in accordance with the security procedure and accepted in compliance with the security procedure is attributable to the sender, unless the sender proves that the payment order did not originate from a source that it controlled.
42. See Comment 5 to § 4A-203 of the UCC.
sumed to have sent a message, the party may not have enough information to rebut this presumption. Moreover, not all parties will have commercially reasonable security procedures in place. Accordingly, the UETA Drafting Committee decided not to follow the Article 4A presumptive approach.

**Correction of errors**

One of the major concerns of the Drafting Committee, as well as observers, was the treatment of inadvertent errors in the electronic contract formation process. For example, in the case where a party attempts to buy merchandise at a vendor’s web site, the entire process of forming the contract consists of the buyer’s clicking through the vendor’s various interacting screens. If the buyer mistakenly clicks a wrong button or orders 100 copies of software instead of only ten, UETA provides substantive rules that allow the buyer to avoid the effect of the error in certain circumstances. On the other hand, UETA guards against situations where a party claims to have made a mistake in order to avoid a bad bargain. Accordingly, UETA contains three rules on errors:

1. If the parties have agreed to use a security procedure to detect errors, and one party has conformed to the security procedure but the other has not, and the non-conforming party would have detected the error had that party also conformed, then the conforming party may avoid the effect of the error.\(^{43}\)

2. In a transaction involving an individual and an electronic agent of another person, the individual may avoid the effect of his/her error if the electronic agent did not provide an opportunity for the prevention or correction of the error, and if at the time the individual learns of the mistake, the individual:
   (a) promptly notifies the other party of the error (and the lack of intent to be bound); (b) takes reasonable steps to return the consideration received; and (c) has not used or received the benefit or value of the consideration received from the other party.

3. If neither (1) nor (2) applies, the effect of the error is governed by other law, including the law of mistake.\(^{44}\)

4. **Special Rules**

   **Retention of electronic records; originals**

   Currently the laws of many states contain provisions that require

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\(^{43}\) Note that there is no requirement that the security procedure be commercially reasonable. The rule applies regardless of the strength of the security procedure.

\(^{44}\) UETA § 10.
46. See, e.g., N.Y. Insurance Law § 6611 (every co-operative property or casualty insurance company shall keep on file for at least seven years, checkbook stubs, bank statements, and canceled checks); N.Y. Aband. Prop. § 513-a (a broker or dealer must retain records, including canceled checks, for ten years); N.Y. Aband. Prop. § 1412-a (every person, co-partnership, unincorporated association, or corporation required to file a report of abandoned property shall retain for a period of five years records necessary to establish the accuracy and completeness of such reports. Records include canceled checks); Uniform Rules for the N.Y. State Trial Courts, Rule 202.52 (checkbooks, stubs, canceled checks, and bank statements for bank accounts maintained by a receiver or assignee must be maintained at the office of the receiver or assignee or his or her attorney, and shall be available for inspection by creditors or parties during business hours); U.S. Bankr. Ct. Rules EDNY, Rule 40 (a debtor-in-possession in a liquidating chapter 11 case, or a chapter 11 trustee if one has been appointed, within ninety days after completion of distribution, or such other times as the Court may direct, shall file with the Clerk of Court the latest original bank statement together with canceled checks); N.Y. Comp. Codes R. & Regs. Tit. 5, § 70.14 (in connection with a secondary materials technology adoption program, a program recipient must retain for a period of six years after the date of closing on the loan all canceled checks, receipts and contracts used in connection with the project. These records must be produced at the request of the Department of Economic Development for the purpose of verifying the cost of the project); N.Y. Comp. Codes R. & Regs. Tit. 12, § 550-3.1 (every labor organization and employer organization shall establish and maintain records that will provide in sufficient detail the necessary basic information and data from which the annual financial report may be verified, explained, or clarified, and checked for accuracy and completeness. Records include canceled checks. All records shall be kept available for a period of not less than five years after the end of the fiscal year); N.Y. Comp. Codes R. & Regs. Tit. 13, § 51.2 (the issuer or other offeree of a theatrical production company shall maintain records, including, but not necessarily consisting exclusively of, bank statements, canceled checks, and other documents).

47. UETA § 12(a).
be in its “original form.”48 The Reporter’s comment notes that this rule is consistent with Federal Rules of Evidence Section 1001(3) and Uniform Rules of Evidence Section 1001(3) (1974),49 which provide that if data are stored in a computer or similar device, any printout shown to reflect that data accurately is an “original.” Finally, UETA contains a special provision on checks: an electronic image of a check may be retained in lieu of a paper check as long as the image includes the information on both the front and back of the check.50 This rule is important for banks and their customers as it significantly reduces the need for physical transportation of paper checks and allows for a more efficient realization of the benefits of check truncation and check-imaging.

Admissibility in evidence
Consistent with the principle of legal equivalence, UETA prevents the non-recognition of electronic records and electronic signatures in a legal proceeding solely on the grounds that they are in electronic form.51 The Reporter’s comment explains that a party will still need to establish “the necessary foundation for the admission of an electronic record,”52 pursuant to applicable rules of evidence.

Transferable records
Although UETA does not apply to Articles 3 or 7 of the UCC, it contains an opt-in provision that allows for the creation of an electronic promissory note or document of title and defines how a person may obtain control over such a note.53 The requirements for “control” are nearly taken verbatim from Revised § 9-105 of the UCC, which governs how to take “control” of electronic chattel paper.54

48. Id. § 12(d).
49. See Reporter’s Comment to § 12.
50. UETA § 12(e).
51. Id. § 13.
52. See Reporter’s Comment to § 13.
53. UETA § 16.
54. A secured party’s control of electronic chattel paper under Revised UCC § 9-105 may serve three different functions: (1) as a substitute for an authenticated security agreement for purposes of attachment under Revised § 9-203; (2) as a method of perfection under Revised § 9-314; and (3) as a condition for obtaining enhanced priority under Revised § 9-330. Revised § 9-105 makes control of electronic chattel paper the functional equivalent of possession of tangible chattel paper.
For purposes of this section, a “transferable record” is an electronic record that: (1) would be an Article 3 note or an Article 7 document of title if the electronic record were in writing; and (2) the issuer of the electronic record expressly has agreed is a transferable record. Under UETA, a person who has control of a transferable record, is a holder of the transferable record. A holder of a transferable record has the same rights and defenses as a holder of an equivalent record or writing under the UCC, including, if the necessary requirements of the UCC are met, the rights and defenses of a holder in due course or a purchaser. No delivery, possession, or indorsement of an electronic note is required to obtain these rights. In a like manner, an obligor of a transferable record has the same rights and defenses as an obligor of an equivalent record or writing under the UCC.

This provision was much debated at the UETA drafting meetings, in part because of its substantive nature and also because it does not define who a holder is in the event that technology does not clearly demonstrate which party is in control, i.e., if there appear to be multiple holders. In view of what was thought to be the desirability of permitting electronic promissory notes, this provision was finally adopted as a stopgap measure with the expectation that the UCC would soon be revised to address the treatment of electronic negotiable instruments.

Notarization and acknowledgment
Finally, if a law requires that a signature or record be notarized, the law shall be deemed satisfied by the electronic signature of a notary.

5. Latest Developments in the States
California was the first state to adopt a non-uniform version of UETA, which was signed into law on September 16, 1999, and took effect on
January 1, 2000. However, since the passage of E-Sign into law, a uniform UETA, repealing the present statute has been introduced in California and has, as of this writing, not yet been adopted.\(^63\)

In enacting the present non-uniform statute, the California legislature chose to make several changes, largely for consumer protection purposes. For example, the California statute excludes from its scope laws that require a separate signing or initialing,\(^64\) as well as certain loan statutes that require notices that must be provided at the time of or following repossession or other action to foreclose on collateral. These notices include a notice of intent to dispose of a repossessed or surrendered motor vehicle; a balloon payment notice; and other post-default notices related to disposition, eviction, repossession, foreclosure, or collection on a mortgage.\(^65\) Statutes requiring a notice of utility shutoffs are also exempt.\(^66\)

The CaUETA also leaves outside its scope notices where non-response creates a legal obligation or a conclusive presumption or where the notice has a serious and immediate effect, including denial or cancellation of insurance and health-care service plan denials.\(^67\) Another CaUETA non-uniform amendment provides that an agreement to transact electronically may not be contained in a standard form non-electronic contract; there must be a separate agreement to this effect.\(^68\) Moreover, such an agreement “may not be inferred solely from the fact that a party has used electronic means to pay an account or register a purchase or warranty.”\(^69\) Importantly, this provision may not be varied by agreement.\(^70\)

Other non-uniform changes include the omission of UETA provision regarding transferable records,\(^71\) and the modification of the section dealing with notification.\(^72\) The above list of CaUETA’s exclusions is non-exhaustive.

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\(^64\) CaUETA § 1633.3(b)(4).

\(^65\) Id. § 1633.3(c).

\(^66\) Id.

\(^67\) Id. § 1633.5(b).

\(^68\) Id. § 1633.5(b).

\(^69\) Id. Cf. supra note 17 and accompanying text.

\(^70\) CaUETA § 1633.5(b).

\(^71\) Id. § 1633.16.

\(^72\) Id. § 1633.15.
In December 1999, UETA was enacted in Pennsylvania ("PaUETA"); it took effect on January 15, 2000. The Pennsylvania statute has also added a few special provisions to UETA, mostly relating to the use of "commercially reasonable" security procedures to attribute an electronic signature to a person in non-consumer transactions. Pursuant to PaUETA, an electronic signature is attributable to a person identified by an agreed upon security procedure if the person relying on the signature can show: (1) the commercial reasonableness of the security procedure; (2) the person's own good faith reliance on the procedure in accordance with the agreement of the parties; and (3) evidence that the security procedure indicated that a message came from the person to which an electronic record or signature is attributed. Conversely, if the signature was not in fact the act of the person identified by the security procedure, the signature will not be attributed to that person if he or she can satisfy the burden of establishing that the electronic record or signature was caused by an interloper who either: (1) was not entrusted at any time to act for the person with respect to the electronic signature, record, or security procedure; (2) lawfully obtained access to transmitting facilities of the person if such access facilitated the misuse of the security procedure; or (3) obtained information from a source controlled by the person to whom the signature is being attributed and who misused the security procedure. The provisions on security procedures may be varied by agreement.

The only consumer provision added to PaUETA is similar to one of CaUETA's amendments. It provides that non-electronic consumer contracts may not contain provisions authorizing electronic transactions without the separate and express agreement of the consumer. Such an agreement must expressly state the parts of the transaction authorized to be conducted electronically and the manner in which those electronic parts of the transaction will be conducted. In addition, like the California statute, PaUETA limits the manner in which a consumer may be deemed to have agreed to transact electronically. A consumer's consent may not be

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73. 73 Pa. Cons. Stat. §2260 ("PaUETA").
74.  id. § 2260.701(2).
75.  id. § 2260.701(3).
76.  id. § 2260.705.
77.  id. § 2260.901.
78.  id.
inferred solely from the fact that the consumer has paid for a purchase or registered a warranty electronically. Finally, the consumer provisions may not be varied by agreement.

Since January of 2000, UETA has been signed into law in thirty-five more states and the District of Columbia, bringing the total number of states that have enacted UETA to thirty-seven and the District of Columbia. Many of these states have adopted the uniform version; however, some states have chosen to make some non-uniform amendments. For example, the Minnesota UETA does not apply to statutes relating to requirements for recording a conveyance, power of attorney or other instrument affecting real estate, creation of a health-care directive, or instructions regarding intrusive mental-health treatment. The Maryland UETA, like the CaUETA, excludes laws or regulations governing notices concerning the cancellation of utility services; cancellation of health insurance or life insurance benefits; or notices of default, acceleration, repossession, foreclosure, eviction or the right to cure under a credit agreement, mortgage or a rental agreement for a primary residence of an individual. The Maryland UETA also excludes court orders, notices, and official court documents.

As of this writing, bills to enact UETA are pending in State legislatures of nine more U.S. States and the U.S. Virgin Islands.

79. Id.
80. Id. § 2260.903.
81. This Report does not attempt to analyze or identify all the variations to the uniform version of UETA which have been adopted in each state. Rather the following is a list of states which have enacted UETA, and includes states which have included significant non-uniform amendments: Alabama, Arizona, Arkansas, California, Delaware, District of Columbia, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia and Wyoming.

Of the above states: four (Arizona, Maryland, New Hampshire and West Virginia) have adopted amendments expressly deferring to the consumer provisions of E-Sign; and eleven others (Alabama, California, Delaware, Hawaii, Iowa, Louisiana, Mississippi, New Mexico, Ohio, Oklahoma and Pennsylvania) have either directly incorporated some or all of E-Sign's consumer provisions or added their own non-conforming consumer provisions.

82. See Minn. Stat. § 325L.03 (2000).
84. Id. § 21-102 (c).
III. FEDERAL LEGISLATION: THE ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT

1. Introduction

In early 1999, Congress began considering the adoption of its own electronic commerce legislation. At that time, various electronic signature bills were introduced in both the House of Representatives and the Senate, but only two were approved. The House, approved H.R. 1714 on November 9, 1999, and the Senate, approved S. 761 on November 19, 1999. Both the Senate and the House bills had the objective of making electronic records and electronic signatures the equivalent of writings and manual signatures when required by law for the enforcement of obligations or in order to give them legal effect. Neither bill was intended to preempt UETA, which by that time had been approved at the NCCUSL annual meeting in July 1999 and was under consideration by the California and Pennsylvania State legislators. Rather, the House and Senate bills were designed to “protect and foster commerce during th[е] transition period [while States were in the process of reviewing and adopting UETA] by providing a predictable legal regime governing electronic signatures.”86 While designed to serve the same purpose, the two bills differed in many respects, including the scope, list of excluded categories of law, and pre-emption of state law.

In early spring of 2000, the House and the Senate bills went to conference for reconciliation. While the Conference Committee based the final legislation on the Senate version, many of the House provisions found their way into the reconciled bill. On June 8, 2000, the Conference Committee submitted a Conference Report, containing the reconciled bill. The reconciled bill, entitled The Electronic Signatures in Global and National Commerce Act,87 was adopted on June 14, 2000 by the House, on June 16, 2000 by the Senate, and was signed into law by the President on June 30, 2000.

E-Sign is a voluntary statute, except as it relates to federal and state government agencies with some limited exceptions discussed below. It does not require any person to agree to use or to accept electronic contracts or electronic signatures. Parts III(2) through III(7) below summarize E-Sign’s most significant provisions.

Determining E-Sign’s scope requires two initial levels of analysis. The first, whether the transactions sought to be regulated are “in or affecting

interstate commerce” is discussed in Part III(2) below, and must be analyzed to determine whether a given non-uniform state law affecting electronic signatures and records is purely intra-state, or local, in nature and thereby outside E-Sign’s ambit altogether. The second, whether a non-uniform state law which covers transactions “in or affecting interstate commerce” is consistent with E-Sign, and is therefore not preempted pursuant to E-Sign’s “exemption to preemption” provision is discussed in Part III(4) below. These two basic analyses are necessary in examining any non-uniform state law, to determine whether a given state law is valid or whether it is preempted by E-Sign.

2. Scope

Commerce clause

E-Sign applies to any “signature, contract, or other record” relating to “any transaction in or affecting interstate or foreign commerce.” This provision reflects the constitutional principle known as the “Negative” or “Dormant” Commerce Clause which limits the power of states to erect barriers against interstate trade. The United States Constitution grants to Congress the power “to regulate commerce with foreign nations and among the several states.” The Supreme Court has expanded this principle to prohibit states from regulating interstate commerce as violative of the constitutional provision delegating this authority only to Congress. In assessing state statutes that affect interstate commerce, the general rule has been stated as follows: “Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” If the state purpose is legitimate, then a balancing test will be undertaken to gauge the extent of the burden on interstate commerce, which is then balanced against the legitimate state interest. Where, on the other hand, a law is found to be “facially discriminatory” in that it favors in-state economic interests over out-of-state economic interests, then a presumption arises that the law was enacted to fulfill a protection-
ist purpose and the law will be subject to more demanding scrutiny. In order to overcome this presumption, a state must show that the law furthers a legitimate state interest and that this purpose could not be served as well by available nondiscriminatory means. 94

The traditional Commerce Clause balancing test, discussed above, must be contrasted with recent Supreme Court decisions that have eroded Congressional law-making authority pursuant to the Commerce Clause. In Prinz v. United States, 95 the Supreme Court struck down interim provisions of the Brady Handgun Violence Prevention Act that required States to enforce the Act’s requirement of background checks for prospective handgun buyers as violative of the principle of “dual sovereignty” 96 and as violative of the principle of separation of powers among the three branches of government, because a law permitting Congress to require state officers to execute federal laws would unconstitutionally reduce the President’s power. 97 In United States v. Lopez, 98 the Supreme Court struck down the Gun-Free School Zones Act, a federal statute making it a crime to be in possession of a firearm within 1,000 feet of a school, since possessing a gun within 1,000 feet of a school is a purely intra-state activity which does not “substantially affect” interstate commerce and can not be construed as “commercial activity.” 99

Despite these recent cases which restrict Congress’s power under the Commerce Clause, there is a general consensus, in federal courts, that transactions involving the use of the internet “affect interstate commerce” by their very nature. 100 This is a result of the global nature of the internet, the movement of information through servers in states unrelated to the

96. Pursuant to which states retain sovereign powers that co-exist with the sovereign powers of the federal government, thereby resulting in a division of power between state and federal governments. Id. at 922.
97. Id at 923.
99. Id at 560-561.
location of a given internet user, as well as other factors which make most internet transactions multi-jurisdictional.

Within the E-Sign framework, the Commerce Clause analysis comes into play in states, like New York, which have adopted their own electronic records and signature law and have not adopted UETA. Under standard Commerce Clause doctrines, such states would likely be found to have a legitimate state interest in regulating electronic transactions, but the burden on interstate commerce may be found to be disproportionate to that legitimate state interest. In New York, where uncertainty exists both as to whether E-Sign applies to a given interstate transaction, and as to whether ESRA applies to a strictly intra-state transaction, a benefits versus burdens Commerce Clause analysis may result in a finding that the burden that ESRA's provisions exert on interstate commerce exceeds any legitimate state interest. Such a conclusion would invalidate the state law.

Exemptions from application of e-sign
E-Sign does not apply to: (1) wills, codicils, and testamentary trusts; (2) family law matters; (3) the UCC, other than Sections 1-107 and 1-207 and Articles 2 and 2A; (4) court orders, notices, and official court documents, including briefs, pleadings, and other writings; (5) notices concerning: (a) the cancellation or termination of utility services; (b) default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual; (c) the cancellation or termination of health insurance or benefits or life insurance benefits; (d) recall of a product that risks endangering health or safety; or (6) documents required to accompany any transportation or handling of hazardous materials.

3. Basic Rules of Validity and Legal Recognition
Title I of E-Sign establishes two basic rules that apply to “any transaction in or affecting interstate commerce:”

- A signature, contract or record relating to such a transaction may not be denied legal effect, validity or enforceability solely because it is in electronic form; and

103. The term “Electronic signature” is defined very broadly as “an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or
A contract relating to such a transaction may not be denied legal effect, validity or enforceability solely because an electronic signature or electronic record was used in its formation. 104 This includes contracts or other records that were formed, created or delivered by using one or more electronic agents as long as the action of an electronic agent 105 is legally attributable to a person, which can be an individual; a commercial or legal entity, or a governmental agency. Thus, under the Act, contracts that are legally enforceable may be formed: (i) between an individual and a computer program (such as, for example, when an individual is buying on-line), or (ii) by the interaction between two computer programs without any human intervention.

General Rules of Retention: E-Sign allows the conversion of paper records into a purely electronic form. Under the Act, if a statute or regulation requires that a contract or other record be retained, this requirement is met by retaining an electronic record of the contract or record so long as the electronic record: (a) accurately reflects the information set forth in the paper contract or record; and (b) remains accessible to every person who by statute or regulation is entitled to access, in a form capable of being accurately reproduced for future reference. 106 Moreover, if a statute or regulation requires that a contract or other record be retained in its original form, this requirement is met if the electronic record meets the above criteria. 107 If the electronic record does not meet the above criteria, it will be denied legal effect. 108
Retention of Checks: The Act contains a special rule on check images. If a statute or regulation requires the retention of a check, this requirement is met "by retention of an electronic record of the information on the front and back of the check" in accordance with requirements of E-Sign's general rule of records retention. 109

Notarization and Acknowledgment: If a statute or regulation requires that a signature or record be notarized, acknowledged, verified, or made under oath, the statute or regulation shall be deemed satisfied if the electronic signature of "a person authorized to perform these acts" is attached to or logically associated with the signature or record. 110

4. Exemption to Federal Preemption
E-Sign adopts the basic framework of UETA, and encourages states to adopt the uniform law. However, E-Sign has a number of provisions that do not exist in UETA. E-Sign contains consumer protection provisions not found in UETA. At the same time, it does not contain many UETA provisions, such as attribution and correction of errors. Even the scope of E-Sign differs from that of UETA. As of this writing, UETA has been adopted in thirty-seven states and the District of Columbia and has been introduced in nine more and the U.S. Virgin Islands. Some states enacted a uniform version of UETA, although they may have excluded specified state laws from its scope as permitted by UETA Section 3(b)(4). Other states, have made non-uniform amendments to it. Still other states, such as New York, have adopted a different electronic signature/electronic record statute altogether.111 In addition, some states, such as Utah and Illinois, have more than one digital signature statute. E-Sign does not preempt a state's enactment of the uniform version of UETA. E-Sign's "exemption to preemption" provision also provides rules as to when and under what conditions a state's non-uniform electronic record and signature legislation is not preempted by E-Sign. E-Sign's "exemption to preemption" provision is complicated and raises many issues. As a result, it is far from clear how non-uniform enactments of UETA and other electronic signature/electronic record statutes, including ESRA, are affected by the Act.

Under E-Sign, a state statute, regulation, or other rule of law "may modify, limit, or supersede" the general rule of validity of the Act if the state statute:

109. Id. § 7001(d)(4).
110. Id. § 7001(g).
111. See Parts IV and V of this report for a discussion of ESRA.
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(1) is a uniform version of UETA;112 or

(2) specifies alternative procedures or requirements for the use
or acceptance (or both) of electronic signatures or electronic
records.

Such alternative procedures or requirements:

(i) must be consistent with the Act;

(ii) may not “require, or accord greater legal status or effect to,
the implementation or application of a specific technology or
technical specification for performing the functions of creat-
ing, storing, generating, receiving, communicating, or authen-
ticating electronic records or electronic signatures” and

(iii) if adopted after the date of enactment of the Act, must
specifically refer to it.

In applying the preemption provision to a given non-uniform ver-
sion of UETA, or to a state law affecting digital signatures and records,
the initial question is whether a look at the totality of the non-uniform
law is required in applying the consistency test, or whether a look at the
non-uniform law provision-by-provision is all that is required. The an-
swer that would leave more of the non-uniform state law intact, is that
the analysis should be provision-by-provision.113 Thus, inconsistent parts
of a non-conforming state statute would be preempted while other con-
sistent provisions, which, for instance, do not prefer a specific technol-
ogy, would survive. Although this procedure makes for a more compli-
cated analysis, it conforms with generally accepted Constitutional prin-
ciples of federal preemption, which permit state laws that are consistent
with existing federal law to survive while state laws that are inconsistent
with existing federal law are struck down.114

112. Any non-uniform exception to the scope of the uniform UETA enacted by an individual
state, under section 3(b) (4) of UETA, is “preempted to the extent such exception is inconsis-
tent” with Title I or with Title II of the Act. 15 U.S.C. § 7002(a)(1).

113. Other interpretations of how the E-Sign consistency provision should be applied include:
1) any non-uniform provision in a state law would result in the whole law being superseded
by E-Sign; or 2) individual non-uniform provisions of state law would not survive whether or
not they were “consistent” with E-Sign. See Patricia Brumfield Fyge, A Preliminary Analysis of
uniformact_articles/uniformact-article-uesta.asp.

114. See, Robert A. Wittie & Jane K Winn, E-Sign of the Times, E-Commerce L. Rep., August
As noted below, the prohibition against favoring a specific technology does not apply to laws governing procurement by governmental agencies.

5. Consumer Disclosures

E-Sign contains a consumer opt-in provision, which requires a consumer's affirmative consent for receiving any records by electronic means. Under the Act, prior to consenting, the consumer must be provided with “a clear and conspicuous statement” informing the consumer: (i) that the consumer can withdraw his or her consent to receive information electronically, and how to do so; (ii) whether the consumer’s consent applies only to records pertaining to a specific transaction, or to a set of identified categories of records; and (iii) whether the consumer may, upon request, obtain a paper copy of the electronic records and of the applicable fees charged, if any.115 In addition, prior to consenting, the consumer: (a) must be provided with information regarding the hardware and software needed for access to and retention of the electronic records; and (b) must consent electronically in a manner that demonstrates that the consumer is capable of accessing information in the electronic form.116 If at any point after receiving the customer's consent, the hardware and software requirements for access to electronic information have changed, the information provider must furnish the consumer with updated requirements.

A contract executed by a consumer is not, under Section 7001(c)(3) of E-Sign, to be denied legal effect or enforceability solely because of the failure to obtain the consumer's electronic consent.117 This would effectively permit a consumer to consent in a traditional, non-electronic manner. This provision would allow other factors, such as course of dealing, to be analyzed in determining the effectiveness of the consent and the contract's legal validity.

There are a few schools of thought as to whether the E-Sign consumer provisions would survive the adoption of a uniform version of UETA, when analyzed with the “exemption to preemption” provision of E-Sign. One interpretation is simply that an adoption of uniform UETA will completely supersede E-Sign—including its consumer provisions. Another in--

116. Id § 7001(c) (1)(C).
117. Id § 7001(c) (3).
interpretation centers on whether UETA is interpreted as containing a consumer provision that would modify E-Sign and be inconsistent with E-Sign’s consumer provisions. One view is that since UETA does not contain any consumer provisions per se, then the E-Sign consumer provisions survive the adoption of UETA. The other view interprets Section 8(a) of UETA to be a consumer protection provision that permits electronic consumer notification and would therefore supersede the E-Sign rule. Section 8(a) of UETA provides that if parties agree to conduct a transaction electronically and there is a legal requirement “to provide, send, or deliver information in writing to another person” that requirement is satisfied if the information is sent by electronic record capable of retention by the recipient at the time of receipt. A consumer is a “person” under UETA and pursuant to this view, UETA’s “consumer provision” would supersede E-Sign’s consumer provisions. It may be argued that it was not the intention of NCCUSL to define UETA’s Section 8(a) provision as one which is strictly “consumer” in nature. Moreover, whereas consumer protection provisions require traditional writings, the parallel UETA provision merely permits the transmission of a notice or information electronically where a law exists which requires the notice to be on paper if the parties agree to conduct business electronically.

Since the enactment of UETA, consumer advocates had argued that non-uniform consumer amendments to UETA were required to adequately protect consumer interests. With the enactment of E-Sign along with its consumer and “exemption to preemption” provisions, states intending to adopt a consumer provision as part of a non-uniform UETA were necessarily limited as to what they could include. This unique set of circumstances resulted in NCCUSL recently approving a compromise accord with consumer advocates represented by the Consumers Union to address consumer and preemption issues presented to states considering adopting UETA since E-Sign’s enactment. NCCUSL supports the incorporation of the compromise accord in states considering adopting UETA since the enactment of E-Sign as the best way to navigate E-Sign’s preemption provision. The accord does not represent a formal revision of the uniform official text of UETA but rather provides states enacting UETA with an optional consumer provision that is consistent with E-Sign as a way of achieving a balance with consumer interests. The accord suggests that such states alter UETA Sections 3(b)(3) and 3(b)(4), the latter of which is the bracketed provision permitting states to exclude laws from UETA’s scope, by deleting

118. UETA § 8(a).
the “and” following UETA Section 3(b)(3) and replacing UETA Section 3(b)(4) with the following text:

3(b)(4)(A) This [Act] does apply to a transaction governed by the Electronic Signatures in Global and National Commerce Act, 114 Stat. 464, codified at 15 U.S.C. 7001, et seq., but it is not intended to limit, modify or supersede Section 101(c) of that Act, and

(B) To the extent that they are excluded from the scope of the Electronic Signatures in Global and National Commerce Act, 114 Stat. 464, 15 U.S.C. at 7003, this [Act] does not apply to a notice to the extent that it is governed by a law requiring the furnishing of any notice of—

(i) the cancellation or termination of utility services (including water, heat and power);

(ii) default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by or a rental agreement for a primary residence of an individual;

(iii) the cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities); or

(iv) recall of a product, or material failure of a product, that risks endangering health or safety; or

(v) a law requiring a document to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.119

The accord has been characterized as a “deferral” to some of E-Sign’s consumer provisions, rather than an adoption of those provisions. The deferral to E-Sign Section 7001(c) and to the notices excepted from E-Sign’s scope and contained in E-Sign Section 7003(b)(2) are designed to limit the possibility that the particular state’s enactment of UETA would be viewed as non-uniform and inconsistent with E-Sign and thereby preempted. In addition, the deferral language assures that a state adopting UETA with the accord provision would continue to be consistent with E-

119. This language, approved by the NCCUSL Executive Committee at its annual meeting in August, 2001, is available upon request from Patricia Brumfield Fry, Chair of the NCCUSL Standby Committee for the Uniform Electronic Transactions Act at (573) 884-7761.
Sign in the event that E-Sign’s consumer provisions are later amended or avoided upon the making by a state regulatory agency of certain findings pursuant to Section 7004(c) of E-Sign.

In a state, such as New York, where a non-uniform electronic records and signature law has been enacted without any consumer provisions, the question arises as to whether E-Sign’s consumer provisions would apply. In such a state, if the non-uniform law were found to be preempted, E-Sign would apply along with its consumer provisions to transactions in or affecting interstate commerce. If the non-uniform law containing no consumer provisions were found not to be preempted, E-Sign’s consumer provisions might still apply with respect to transactions in or affecting interstate commerce. If an electronic transaction were in fact purely intra-state and the non-uniform law containing no consumer provisions were found to apply to the transaction, then arguably no special consumer electronic transaction requirements would have to be followed. If, on the other hand, a state, such as New York, were to adopt a consumer provision mandating written disclosure requirements as part of a non-uniform version of UETA, or otherwise, the provision would have to be consistent with E-Sign in order to avoid preemption in transactions in or affecting interstate commerce. If the consumer provision survived E-Sign’s consistency test and were not preempted, such provision would apply to transactions to which that state’s law would otherwise be applicable under ordinary state choice of law principles. Commentators have also noted that if a state has adopted a uniform version of UETA, it may be the case that E-Sign would not prohibit that state from adopting its own consumer provisions, whether or not inconsistent with E-Sign, because upon the state’s adoption of a uniform version of UETA, such consumer provisions would no longer have to pass E-Sign’s consistency test.

6. Applicability to Federal and State Governments

E-Sign does not purport to limit or expand the ability of any Federal regulatory agency, self-regulatory agency, or State regulatory agency to require that records be filed with that agency in accordance with specified standards or formats. Any such agency with existing rulemaking authority may issue its own regulation, order or other guidance with respect to

120. The term “Federal regulatory agency” is defined in 5 U.S.C. § 552(f), to include “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.” 15 U.S.C. § 7006(6).
applying or interpreting E-Sign's general rules of validity and legal recognition, as long as:

(1) The agency's regulation, order or guidance is consistent with the Act's general rules of validity and legal recognition; and

(2) The agency's regulation, order or guidance does not add to the requirements of the Act's general rules of validity and legal recognition; and

(3) The agency finds that, in connection with the issuance of its own regulation, order or guidance:

   (i) there is a substantial justification for the regulation, order or guidance; and

   (ii) the methods selected are substantially equivalent to the requirements imposed on records that are not electronic records and will not impose unreasonable costs on the use and acceptance of electronic records; and

   (iii) the methods selected do not require or accord greater legal status or effect to the implementation of a specific technology or technical specifications for performing the creation, storage, generation, receipt, communication or authentication of electronic records or electronic signatures.121

• A Federal or State agency may specify performance standards and requirements with respect to the record and contract retention provisions of the Act that will violate the Act's general prohibition against favoring a particular technology, if that agency determines that its requirements serve, and are substantially related to achieving, an important governmental objective.122

• A Federal or State agency may require that paper records continue to be retained, if that agency determines that there is a compelling governmental interest relating to law enforcement or national security for imposing such a requirement, and imposing its requirement is essential to attaining the compelling governmental interest.123

121. 11 U.S.C. § 7004(b) (2) (A), (B) & (C).
122. 11 U.S.C. § 7004(b) (3) (A).
123. 11 U.S.C. § 7004(b) (3) (B).
The Act’s prohibition against favoring a particular technology also does not apply to any statutes, regulations or other rules of law governing procurement by any Federal or State government, or any Federal or State agency or instrumentality.125

7. Transferable Records
While E-Sign does not apply to Article 3 of the UCC, it contains a stand-alone provision that allows for the creation of an electronic promissory note relating to a loan secured by real property and defines how a person may obtain control over such a note. The requirements for “control” are taken from Revised § 9-105 of the UCC, which governs how to take “control” of electronic chattel paper.

• Pursuant to E-Sign, a “transferable record” is an electronic record that: (1) would be an Article 3 note if the electronic record were in writing; (2) the issuer of the electronic record expressly has agreed is a transferable record; and (3) relates to a loan secured by real property.126

• E-Sign is similar to UETA in the following respects:

  a person who has control of a transferable record, is a holder of the transferable record; and

  a holder of a transferable record has the same rights and defenses as a holder of an equivalent record or writing under the UCC, including, if the necessary requirements of the UCC are met, the rights and defenses of a holder in due course or a purchaser. Delivery, possession, or endorsement of an electronic note is not required to obtain these

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124. Id. § 7004(d) (1).
125. Id. § 7004(b) (4).
126. Id. § 7021(a)(1)(A), (B), (C).
rights. Moreover, an obligor of a transferable record has
the same rights and defenses as an obligor of an equiva-
lent record or writing under the UCC.

- Unlike UETA, however, E-Sign's transferable record is limited
to mortgage notes.

Most provisions of E-Sign took effect on October 1, 2000. Only the
record retention provision of Title I took effect on March 1, 2001.

IV. THE NEW YORK ELECTRONIC SIGNATURES AND
RECORDS ACT (1999 SENATE BILL 6113)

1. Introduction

ESRA was signed into law on September 28, 1999, and took effect on
March 27, 2000. The New York statute provides general authorization
for the use of electronic signatures and records, designates the State Of-
fice for Technology ("OFT") as the "Electronic Facilitator" and delegates
to the OFT the duty of administering ESRA and issuing rules and regula-
tions related to electronic transactions. In promulgating such regulations,
the Electronic Facilitator is required "to develop guidelines for the im-
provement of business and commerce by electronic means" and to "iden-
tify preferred technology standards relating to security, confidentiality,
and privacy of electronic signatures and electronic records."129

On March 28, 2000, the OFT promulgated the temporary ESRA regu-
lations which took effect immediately. On August 7, 2000 revised Emer-
gency Regulations were promulgated and on October 18, 2000 the final
ESRA Regulations130 took effect.

ESRA is a voluntary statute. It provides that "[n]othing in this article
shall require any entity or person to use an electronic record or an elec-
tronic signature unless otherwise provided by law."131 The ESRA Regu-
lations contain a similar provision.132 The provisions contained in the ESRA

129. ESRA, § 103(2)(c). ESRA also requires that the rules and regulations be developed
through a cooperative public process involving state and local government agencies, private
entities and the public at large. id. § 103(2)(a).
131. ESRA, § 109.
132. See N.Y. Comp. Codes R. & Regs. Tit. 9, § 540.1(c) (2000).
Regulations are confusing, however, clearly stating the principle of technological neutrality in one section,\textsuperscript{133} while in another section acknowledging a specific technology which utilizes certificate authorities.\textsuperscript{134}

2. Electronic Signatures

Definition

ESRA provides that an electronic signature may be used by a person\textsuperscript{135} as an alternative to a traditional signature and that “the use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand.”\textsuperscript{136} An “electronic signature” is defined as:

an electronic identifier, including without limitation a digital signature, which is unique to the person using it, capable of verification, under the sole control of the person using it, attached to or associated with data in such a manner that authenticates the attachment of the signature to particular data and the integrity of the data transmitted, and intended by the party using it to have the same force and effect as the use of a signature affixed by hand.\textsuperscript{137}

Thus, under ESRA, an electronic signature must be “secure” in that it must be unique, capable of verification, and under the sole control of the person using it. Such a provision may require that an electronic signature meet certain technological standards. This security requirement is not contained in the UETA definition of an electronic signature and will be more fully discussed in Part V below. In addition, ESRA specifically prohibits the Electronic Facilitator from establishing “rules and regulations that seek to apportion fault or impose or limit liability relating to the use of electronic signatures.”\textsuperscript{138}

\textsuperscript{133} “The intent of this Part is to be flexible enough to embrace future technologies that comply with ESRA and all other applicable statutes and regulations.” ESRA, § 540.1(c).

\textsuperscript{134} ESRA, § 540.4(b).

\textsuperscript{135} The term “person” is defined very broadly in ESRA and includes “a natural person, corporation, trust, estate, partnership, incorporated or unincorporated association or any other legal entity, and also includes any department, agency, authority, or instrumentality of the state or its political subdivisions.” ESRA, § 102(4).

\textsuperscript{136} ESRA, § 104(2).

\textsuperscript{137} ESRA, § 102(3).

\textsuperscript{138} ESRA, § 104(1).

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The ESRA Regulations specify that, for purposes of ESRA, an electronic signature is “unique to the person using it” if: (i) the electronic signature cannot be duplicated as another person’s electronic signature; (ii) the unique identifying data used to create the electronic signature is capable of being generated only for one electronic signatory; and (iii) “it is computationally infeasible, at the time the electronic signature is made, to derive the original identifying information from information used to authenticate the electronic signature.”\(^{139}\) The regulations provide that an electronic signature is deemed “capable of verification if the electronic signature attached to or associated with the data is authenticated to the electronic signatory.”\(^{140}\) Further, an electronic signature is “under the sole control of the person using it” if the electronic signatory “assumes a duty to exercise reasonable care to retain control of the unique identifying information, so that the electronic signature is used only with the electronic signatory’s intent and knowledge.”\(^{141}\)

Finally, the ESRA Regulations provide that an electronic signature is considered to be “attached to or associated with data” within the meaning of ESRA if: (i) the electronic signature is linked to the data during transmission and subsequent storage, and (ii) should the data be changed or the signature be separated from the data, the change or separation is readily apparent to the parties.\(^{142}\)

By detailing criteria for acceptable electronic signatures, the ESRA Regulations do to some extent “prefer” those technologies. However the ESRA Regulations are careful to avoid mandating the use of specific technologies and appear to make application of its provisions to non-government entities “voluntary.”\(^{143}\) The ESRA Regulations, however, appear to allow only electronic signatures that satisfy the criteria contained in the ESRA Regulations the benefit of the ESRA presumption that, an “elec-

\(^{139}\) N.Y. Comp. Codes R. & Regs. Tit. 9, § 540.4(a)(1)(i) through (iii). Subdivision (iii) appears to mean, by requiring that authenticating information be “computationally infeasible,” that it would be virtually impossible to use authenticating information to reproduce an electronic signature.

\(^{140}\) Id. § 540.4 (a) (2).

\(^{142}\) Id. § 540.4 (a) (3). As previously indicated, ESRA specifically prohibits the Electronic Facilitator from establishing “rules and regulations that seek to apportion fault or impose or limit liability relating to the use of electronic signatures.” ESRA § 104(1). By imposing a duty of care on the part of the electronic signatory, the ESRA Regulations may run afoul of the statutory prohibitions on imposing or limiting liability.

\(^{143}\) Id. § 540.1(a) provides that the purpose of the regulations “is to establish standards and
tronic signature has the same validity and effect of a signature affixed by hand.” 144

Certificate Authorities

The ESRA Regulations specifically recognize the use of certain technologies that generally require digital signatures and that use “certificate authorities” 145 for the authentication of an electronic signature. The ESRA Regulations are careful to avoid adopting a public key system as the only approved alternative while at the same time they do succeed in preferring public key system technologies that use certificate authorities. 146 The ESRA Regulations require the certificate authorities doing business with government entities to maintain a statement of their procedures and practices, which must be publicly disclosed “to any person who requests the same.” 147 The statement must include a provision relating the certificate authority’s “obligation to maintain the confidentiality of personal information.” 148 Certificate authorities doing business with governmental entities must also comply with a laundry list of additional requirements which must include in their statement of practices the following information:

- Community and applicability—describing the types of entities with which the certificate authority does business and the applications for which certificates may be used.
- Identification and authentication policy.
- Key management policy—describing the security measures taken to protect its cryptographic keys and critical security param-

144. Id. § 540.1(e).
145. A “certificate authority” is defined as “a trusted party or government entity in a public key system that vouches for the authenticity of the individual or system in question by issuing certificates that are used for verification of electronic signatures produced by corresponding private keys.” Id. § 540.2(b).
146. The ESRA Regulations require that “[c]ertification authorities choosing to do business with government entities” must meet the standards and operating practices for certificate authorities as provided in the ESRA Regulations. Id. § 540.4(b).
147. Id. § 540.4(b)(2).
148. Id. § 540.4(b)(1)(b1).
eters, including management of keys from generation, through storage and usage, to archiving and destruction.

- Local security policy.
- Technical security policy—describing the software, hardware, and network security controls.
- Operations policy—describing the frequency of routine Certificate Revocation List (CRL) issuance, special CRL issuance, such as key compromise CRL, and certificate authority changeover.
- Legal—describing the liability and obligations of the parties. This information is required to be prominently displayed.
- Certificate and CRL standards.
- Policy administration—defining the individuals responsible for registration and maintenance of policy, including contact information.149
- Audit Policy—describing type and frequency of internal and external audits.

3. Electronic Records

ESRA defines an electronic record as “information, evidencing any act, transaction, occurrence, event, or other activity, produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human sensory capabilities.”150 ESRA further provides that electronic records shall be given “the same force and effect as those records not produced by electronic means.”151 The construction of this section, however, appears to suggest that the ESRA provisions regarding electronic records may be limited to their use by state and local government agencies. The ESRA provision recognizing the validity of electronic records is placed directly after reference to the use of electronic records by state and local government.152 This creates the impression that ESRA is meant to provide for the use of electronic records only by state agencies or local government entities, and applies to non-government entities only when such entity is a party to a

149. Id. § 540.4(b)(1)-(x).
150. ESRA, § 102(2).
151. Id. § 105(3).
152. By contrast, the ESRA provision regarding electronic signatures clearly applies to both private and to government entities.
transaction with the government. It is unclear under the electronic record provision whether the rights of private entities and individuals to use electronic records in lieu of paper documents when dealing with each other are also legally recognized.

This ambiguity represents a serious flaw in a statute designed to “facilitate electronic commerce” by providing legal certainty with respect to the effect and validity of electronic signatures and records used by individuals, businesses, and government. If Section 105 is indeed limited to government transactions, then the utility of both the electronic signature provision, which applies to both government and private transactions, and the authentication provisions would be significantly diminished. ESRA requires that an electronic signature be “attached to or associated with data.” If the electronic records provision does not apply to private transactions, then an individual’s electronic signature may not be used in a private transaction unless the signature is somehow “attached to” or “associated with” a paper document. Such a largely paper transaction could hardly be found to “facilitate electronic commerce.” Moreover, if the electronic records provision applies only to government and to transactions with government entities, it may be impossible to comply

153. ESRA provides as follows:

Section 105. Use of electronic records.

1. In accordance with rules and regulations promulgated by the electronic facilitator, state agencies and local governments are authorized and empowered, but not required, to produce, receive, accept, acquire, record, file, transmit, forward, and store information by use of electronic means. If any such agency or local government uses electronic records, it must also ensure that anyone who uses the services of such agency or local government may obtain access to records as permitted by statute, and receive copies of such records in paper form in accordance with fees prescribed by statute. No person shall be required to submit or file any record electronically to any state agency or local government except as otherwise provided by law. State agencies and local governments that obtain, store, or utilize electronic records shall not refuse to accept hard copy, non-electronic forms, reports, and other paper documents for submission or filing except as otherwise provided by law.

2. A state agency and local government shall have the authority to dispose of or destroy a record in accordance with the arts and cultural affairs law, regardless of format or media.

3. An electronic record shall have the same force and effect as those records not produced by electronic means.

154. ESRA § 102(3).
with the electronic signature provisions of ESRA in private transactions. Because an electronic signature in a private transaction is also required to be “attached to or associated with data” in such a way as to “authenticate” both the signature and the “integrity of the data transmitted,” it is difficult to imagine a situation where an electronic signature could ever authenticate the integrity of paper records where the statute refers to data transmission. Furthermore, the Electronic Facilitator’s duty to “develop guidelines for the improvement of business and commerce by electronic means” would be rendered meaningless if the statute applied only to governmental electronic records. Perhaps in making electronic signatures applicable to private entities the New York Legislature meant to include certain records or writings as part of the electronic signature itself. However, such an intention is not reflected in the statute.

Unfortunately, the ESRA Regulations fall short of curing this ambiguity. Section 540.5(a) of the ESRA Regulations merely reiterates the principle that an electronic record will have the same force and effect as a non-electronic record. Although the ESRA Regulations go into greater detail on the use of electronic records by government entities, they do not contain a comparable provision regarding the use of electronic records in private transactions. It remains unclear in a transaction between two private parties whether their agreement to use electronic records rather than paper documents is legally enforceable under ESRA. An understanding of how the electronic records provisions of ESRA were intended to be applied must wait for the promulgation of improved regulations by the Electronic Facilitator, for clarification from the New York Legislature itself, or for future court decisions interpreting the statute and its regulations.

4. Exclusions

ESRA carves out certain areas to which its provisions are not applicable. Specifically, ESRA does not apply to:

- Documents providing for the disposition of an individual’s person or property upon death or incompetence, or the appointment of a fiduciary for an individual’s person or property. This exception includes, but is not limited to, wills, trusts, do-not-

155. Id. See supra Part IV(2) for a discussion of electronic signatures. It is also notable that § 540.4(a)(4) of the ESRA Regulations does not seem to contemplate the “association” of an electronic signature with a paper document. See supra note 140 and accompanying text.

156. Id. § 103(2)(c).
resuscitate orders, powers of attorney, and health care proxies, but it does apply to contractual beneficiary designations;\textsuperscript{157}

- Negotiable instruments and other “instruments of title” that require possession of such an instrument in order to confer title. As is discussed in more detail in Part V(2)(B) below, such electronic instruments are permissible under ESRA if such document is created, stored, or transferred in a way in which only “one unique identifiable and unalterable version which cannot be copied except in a form that is readily identifiable as a copy;”\textsuperscript{158}

- Any conveyance or other instrument recordable pursuant to Article 9 of the Real Property Law.\textsuperscript{159} A deed or mortgage is an example of such an instrument; and

- Any other documents that the Electronic Facilitator has specifically excepted pursuant to its rules and regulations.\textsuperscript{160}

5. Personal Privacy Protection

ESRA contains personal privacy protections applicable both to government and to any private entity that acts as an “authenticator” of electronic signatures. Specifically, ESRA codifies a requirement that personal information compiled for electronic signature authentication may not be disclosed to third parties, whether the information was compiled by a person, corporation, or other entity, unless the information was required for such authentication.\textsuperscript{161} The ESRA Regulations clarify this provision to allow a “certificate authority”\textsuperscript{162} to disclose information necessary to issue a certificate.\textsuperscript{163} The statute broadly defines “personal information” to include: home address, work address, telephone number, e-mail address, social security number, birth date, gender, marital status,

\textsuperscript{157} I I § 107(1).
\textsuperscript{158} I I § 107(2).
\textsuperscript{159} I I § 107(3).
\textsuperscript{160} I I § 107(4). Note that the ESRA Regulations do not exclude other documents.
\textsuperscript{161} I I § 108(2).
\textsuperscript{162} N.Y. Comp. Codes R. & Regs. Tit. 9, § 540.2(b). See supra notes 142-146 and accompanying text for discussion of certificate authorities.
\textsuperscript{163} The ESRA Regulations provide that a certificate authority may not “disclose to a third party any personal information reported to the certification authority by the electronic signatory other than the information necessary to issue or authenticate the certificate.” I I § 540.6(c).
mother’s maiden name, and health data.\textsuperscript{164} The ESRA Regulations expand this definition by adding the phrase “but not limited to” the above referenced terms.\textsuperscript{165} The law also limits the disclosure of information reported to the Electronic Facilitator by a state or local government in connection with the authentication of an electronic signature by requiring the Facilitator not to disclose information that should not have been disclosed by the state or local government.\textsuperscript{166} Finally, ESRA includes electronic records within the scope of the New York Freedom of Information Law and the New York Privacy Protection Law.\textsuperscript{167}

6. Admission of Electronic Records into Evidence

ESRA also permits the admission of electronic records and signatures into evidence pursuant to the provisions contained in Article 45 of the Civil Practice Law and Rules (“CPLR”), including but not limited to Section 4539 of CPLR.\textsuperscript{168} Although pursuant to the CPLR, electronic writings, entries, prints and representations have been admissible in evidence as reproductions of originals, subject to some authentication requirements,\textsuperscript{169} the ESRA evidentiary provision expands the admissibility of electronic records and signatures in New York. ESRA includes within the documents admissible under the CPLR all documents covered by the ESRA definition of “electronic signatures” and “electronic records.”\textsuperscript{170} With the enactment of ESRA, admissible electronic documents are no longer limited to the categories set forth in CPLR Section 4359, but to the broader definitions of electronic record and signature found in ESRA. It is notable also, that the Uniform Civil Rules for the Supreme and County Courts in New York now include electronic filing pilot programs in Monroe and Westchester Counties.\textsuperscript{171}

\textsuperscript{164} ESRA, § 108(2).
\textsuperscript{165} N.Y. Comp. Codes R. & Regs. Tit. 9, § 540.6(c).
\textsuperscript{166} ESRA, § 108(1).
\textsuperscript{167} Id. § 108(1).
\textsuperscript{168} Id. § 106. The CPLR Article 45 is entitled “Evidence.” Section 4539 allows reproductions of originals including the electronic “imaging” of originals to be admitted in evidence when authenticated. N.Y. C.P.L.R. 4539 (McKinney 2001).
\textsuperscript{169} Id. § 4539(b).
\textsuperscript{170} ESRA, § 106.
\textsuperscript{171} The Chief Administrator of the Courts may establish a pilot program in which papers may be filed by electronic means (“FBEF”) for commercial claims in the Monroe County and

Many of ESRA's provisions apply exclusively to the government. As previously noted, the New York statute does not mandate the use of electronic records by state and local government. Specifically, ESRA provides that local and state governments are “authorized and empowered, but not required, to produce, receive, accept, acquire, record, file, transmit, forward, and store information by use of electronic means.” ESRA does mandate that if electronic records are used by governmental entities, they shall be made available to the public in paper form, unless otherwise required by law, and that no one may be required to submit files or records to a state or local government electronically. ESRA also requires that the government must assure that where electronic records are used, “anyone who uses the services of such agency or local government may obtain access to records as required by statute” and in accordance with prescribed fees. The ESRA Regulations simply parrot the above provisions, adding only a requirement that “government entities shall employ procedures and controls designed to ensure the authenticity, integrity, security, and, when appropriate, the confidentiality of electronic records.” The ESRA Regulations further provide that, absent specific statutory authority, government entities using electronic records “have the authority to specify the manner and format in which electronic records will be received” and must designate the receiving device. The ESRA Regulations also enable government entities to specify the manner and format in which electronic records are “produced, accepted, acquired, recorded, filed, transmitted, forwarded, acknowledged and stored.”

The OFT is delegated a number of tasks under ESRA. As the Electronic Facilitator, it is given the task of promulgating rules and regulations consistent with the statute and is required to seek the advice of the attorney...
general, the comptroller, other state and local government authorities and private entities in developing such rules. Another task delegated to the Electronic Facilitator is to develop guidelines to improve electronic business and commerce through the identification of preferred technology standards relating to security, confidentiality and privacy of electronic signatures and records. Finally, the OFT is required to submit reports by November 1, 2002, and 2004 to the Governor and to the Legislature. The first of such reports is to include a summary of changes in technology; the use of electronic signatures and records in the public and private sectors; relevant court decisions; costs; a list of state and local governments that accept electronic records; and recommendations regarding amendment, continuation, or repeal of statutes relating to electronic signatures and records.

V. UETA COMPARED WITH NEW YORK’S ESRA

The Regulations implementing ESRA issued by the OFT do not resolve many of the issues raised by ESRA, most importantly as to the applicability of the ESRA electronic records provisions to private transactions. The ESRA Regulations indicate that their provisions are voluntary in regard to private transactions. Notwithstanding the fact that ESRA itself is voluntary as to government use of electronic records and signatures, the ESRA Regulations purport to be mandatory with regard to transactions by or with government entities that have elected to transact electronically. A comparison of UETA with ESRA follows.

1. Similarities

In regulating the comparable subject areas, UETA and the New York statute are not without similarities. Neither ESRA nor UETA is mandatory as to electronic signatures and electronic records. Each law requires that parties to a transaction must choose to proceed electronically. Both laws state the principle that electronic and traditional signatures and records shall have the same legal effect. Neither law attempts to supersede existing substantive law, except as it relates to traditional records and signatures. Neither statute addresses substantive issues such as legal sufficiency, reliability or authenticity, leaving such matters to other applicable law, and

178. ESRA, § 103(2)(a).
179. Id. § 103(2)(c).
180. 1999 N.Y.S.B. 6113 § 3.
to burgeoning case law. Both laws contain provisions authorizing, if the proper foundation is laid, the admissibility of electronic records and signatures in evidence. Although UETA contains parameters relating to the use of electronic records among agencies of government, neither UETA nor ESRA is mandatory as to the governmental use of electronic records and signatures. Finally, neither statute is applicable to wills and to testamentary trusts.

2. Differences

UCC generally

One of the most significant differences between UETA and ESRA is that the latter applies to certain transactions that are excluded from UETA’s scope. As noted earlier, UETA specifically does not apply to much of the UCC, including payment systems (UCC Articles 3, 4, 4A), documents of title (UCC Article 7), recently revised articles that are already media-neutral (UCC Articles 5, 8 and 9), revised UCC Articles 2 and 2A, as soon as these Articles are adopted, or to transactions subject to UCITA. The New York statute contains no such exclusions for transactions governed by the UCC. As a result, ESRA may modify the UCC requirements for a “signature” and “writing,” which may have a very negative effect on payment systems in New York.

Negotiable instruments

While ESRA does contain an exclusion for negotiable instruments, that exclusion is incomplete and inadequate because it permits all electronic negotiable instruments which meet certain conditions. As previously noted, the New York statute gives legal recognition to electronic negotiable instruments where an electronic version of a negotiable instrument “is created, stored or transferred pursuant to this article in a manner that allows for the existence of only one unique, identifiable and unalterable version which cannot be copied except in a form that is readily identifiable as a copy.” This provision, which introduces the concept of intangible negotiable instruments, effectively rewrites Articles 3 and 4 of the UCC. Using a non-uniform electronic signature statute, such as ESRA,

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181. Although the ESRA Regulations purport to be mandatory as to governmental transactions, ESRA itself is voluntary as to the government use of electronic records and signatures. ESRA § 105.

182. See infra Part VII for discussion.

183. ESRA, § 107 (2).

184. Although the NCCUSL drafting committee for Articles 3 and 4 of the UCC met in April
to make amendments to the UCC is inappropriate and may, in fact, present serious risks. The UCC represents an integrated system containing numerous interlocking rules, and existing commercial practice has evolved pursuant to those rules. In addition, other statutes, such as the Bankruptcy Code, rely on UCC Article 3 concepts and practice.\textsuperscript{185} Any statutory alteration of this scheme poses a risk of unintended consequences. Article 3 and 4 instruments (negotiable notes and orders including checks and drafts) often represent large values held by or handled through financial institutions. Changes in the UCC framework may introduce legal uncertainty. The mixture of legal uncertainty, large values, and a chain of inter-bank transfers is a classic recipe for systemic risk. Any changes to UCC Articles 3 and 4 should, therefore, be made with the utmost care, in consultation with experts in the field and only after thorough consideration of each section of the UCC.

Moreover, it is important to note that the ESRA provision that permits electronic negotiable instruments is much broader than the parallel provision contained in Section 16 of UETA. ESRA encompasses all types of negotiable instruments, including electronic checks, whereas UETA permits only electronic notes.\textsuperscript{186} The application of the ESRA provisions authorizing electronic checks in New York presents serious legal questions. For example, what type of “electronic check” is covered by ESRA—checks created electronically from their inception, or checks that are converted from paper into electronic form, or both? If the paper check conversion was contemplated, are check images considered “electronic negotiable instruments” under ESRA? If two or more apparently authentic and identical electronic checks are signed by a consumer and presented for payment to a drawee bank, which of the checks presented is valid, and how many times would a drawee bank be obligated to pay?\textsuperscript{187} How would a payee indorse an electronic check in light of ESRA’s requirement that electronic negotiable instruments be in “unalterable” form?\textsuperscript{188} None of these ques-

\textsuperscript{185} See, e.g., 11 U.S.C. §§ 101(49), 362(b)(11), 541(c).  
\textsuperscript{186} See supra Part II, notes 53-60 and accompanying text.  
\textsuperscript{187} UETA, on the other hand, expressly provides that an obligor of a transferable record has the same rights and defenses as an equivalent obligor under the UCC. See UETA § 16(e).  
\textsuperscript{188} UETA provides that electronic promissory notes may be altered, if readily identifiable as authorized or unauthorized, UETA § 16(c)(6).
tions is answered in ESRA itself, or in the ESRA Regulations. Even if ESRA were amended to permit only electronic notes, it would still be inadequate because it does not include provisions relating to the rights and defenses of a holder of an electronic negotiable instrument. UETA, on the other hand, establishes a legal framework for electronic promissory notes. It specifies that a holder (as defined in UCC Section 1-201(20)) has the same rights and defenses as a holder of an equivalent record or writing, including the rights and defenses of a holder in due course, a holder to which a negotiable document of title has been duly negotiated, or a purchaser.

For all the foregoing reasons, the introduction of electronic checks into the scope of ESRA does not appear to be well considered. While facilitating innovations is important, this provision may have a serious negative impact on the check collection process and other payment systems in New York and, consequently, in the rest of the country.

3. Other Differences
In addition to the differences discussed above regarding the treatment of matters otherwise covered by the UCC, UETA and ESRA are different in many other respects.

189. Note in this respect that the UETA Drafting Committee had specifically considered and rejected the idea of having UETA extend to electronic checks. The Reporter’s Comments expressly state that “[i]mpacting the check collection system by allowing for ‘electronic checks’ has ramifications well beyond the ability of this Act to address.” See Comment 2 to § 16 of UETA. In deciding to leave checks out of UETA’s scope, the Drafting Committee relied on the Report of the UETA Task Force on State Law Exclusions, issued on September 21, 1998. The Report cautioned that:

Unless a section by section review of [Articles 3, 4, and 7] is undertaken, there is always the possibility that extending the UETA to cover negotiable documents will result in unintended consequences. A separate initiative, on electronic payment systems, might do a better job of covering the issues. Concern has also been expressed that the creation of an electronic equivalent to a negotiable order (check or draft) involves making important policy decisions concerning payment systems, which are outside the proper scope of the UETA. For example, certain existing rules, such as the imposition of transfer and presentment warranties on transferees may not make sense if a third-party registry model is used. In addition, excluding the definition of checks and drafts from UETA may make sense because it might not be possible to distinguish between an electronic check and an Article 4A payment order ... once the writing requirement is removed from the definition of “order” in Article 3.


190. UETA § 16(d).
The ESRA definition of an electronic signature appears to require a “secure” signature as opposed to the more liberal analogue found in UETA, which does not require such features as uniqueness, capability of verification, or being under the sole control of the purported user. In fact, pursuant to UETA, any “electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record” suffices as an electronic signature. The ESRA Regulations also require that certain minimum technological requirements be met: first, that the signature cannot be duplicated as another person’s signature; second, that the unique identifying data used to create the electronic signature may only be generated for one electronic signature; third, that it be “computationally infeasible” to derive original identifying information from the information used to authenticate the electronic signature; and fourth, that in order to be “capable of verification” the signature must be traced back to the electronic signature’s origins. Only certain encryption technology is capable of meeting these New York standards. As a result, it would appear that a name typed at the end of an e-mail message from an individual would qualify as the individual’s electronic signature pursuant to UETA but not pursuant to ESRA. Although not certain, it appears, pursuant to ESRA, that even the use of an electronic signature made up of a four-digit PIN number typed after the entry of a name or identifier would be precluded in New York State. UETA’s provisions are less restrictive and more validating of existing business practices concerning electronic signatures. That advantage may, however, come at a price i.e. it may provide greater latitude for forgery.

The ESRA Regulations require that a signature be attached to the data during transmission and storage, and that any change or separation be readily apparent to the parties. The ESRA Regulations also impose a duty upon the electronic signatory to exercise reasonable care to keep control of the unique identifying information included in their signature. UETA contains no parallel provision.

191. Pursuant to UETA, parties may agree to use security procedures to verify their respective electronic signatures; however, the use of a security procedure is not required for an electronic signature to be valid. UCC § 9. See discussion supra Part II.

192. N.Y. Comp. Codes R. & Regs. Tit. 9, §§ 540.4(a) (1), (2).

193. Id. § 540.4(a) (4).

194. Id. § 540.4(a) (3).
• Only ESRA addresses privacy protection issues. 195
• Only ESRA specifies that it does not apply to real property transactions pursuant to Article 9 of the New York Real Property Law, such as deeds and mortgages. 196

UETA goes much farther than ESRA in identifying specific electronic transactions and detailing their legal significance, in analyzing the effect of electronic transactions and their variation by contract, and in addressing the effect of electronic errors and the ability of states adopting UETA to exclude other specifically identified laws from its effect. UETA contains numerous provisions about which the ESRA is silent:

• UETA authorizes automated transactions. It authorizes agreements between an individual and an electronic agent 197 as well as agreements between electronic agents. 198 The latter is an example of a fully automated contract and effectively authorizes agreements between machines, absent any human oversight or participation. ESRA contains no parallel provision.

• UETA provides methods for dealing with and correcting errors in automated transactions. 199 ESRA contains no parallel provision.

• UETA defines security procedures. 200 In defining electronic signatures, ESRA refers merely to the signature being “capable of verification” and “under the sole control” of the person using it.

• UETA addresses contract issues such as privity by allowing automated transactions and contract formation and by recognizing the legal validity of contracts formed using electronic records. ESRA contains no parallel provision.

• Variations from the provisions of UETA are specifically authorized pursuant to agreement. 201 ESRA contains no parallel provision.

195. ESRA, § 108.
196. Id. § 107(3).
197. UETA, §§ 2(6), 14(2).
198. Id. § 14(1).
199. Id. § 10(1), (2).
200. Id. §§ 204.
201. Id. § 541.
• UETA authorizes writing requirements contained in substantive law to be satisfied by an electronic record, if agreed to between the parties and if the electronic record is capable of retention by the recipient at the time of receipt.\textsuperscript{202} ESRA contains no parallel provision.

• UETA provides that a law which requires that information be displayed or delivered in a certain manner (such requirements are often included in consumer protection laws) will not be affected by UETA unless that law permits the parties to vary the requirement by agreement and the parties do so.\textsuperscript{203} ESRA contains no parallel provision.

• UETA provides that an electronic record will satisfy a law requiring retention of a record for evidentiary, audit or other purposes unless the adopting state has, after the effective date of UETA, enacted a law, which prohibits the use of electronic records for a specific purpose.\textsuperscript{204} ESRA contains no parallel provision.

• UETA authorizes electronic notarization, acknowledgment, verification, and the taking of oaths where a law requires such in a paper transaction and the electronic signature of the person authorized to perform such act is attached to or logically associated with the signature or record.\textsuperscript{205} ESRA contains no parallel provision.

• UETA provides that it applies only to transactions, which occur after its effective date,\textsuperscript{206} leaving transactions occurring prior to its effective date to other law. ESRA contains no parallel provision.

• UETA delineates the time and place of the sending and receipt of electronic records.\textsuperscript{207} ESRA contains no parallel provision.

VI. POTENTIAL FEDERAL PREEMPTION OF ESRA BY E-SIGN

Since the E-Sign preemption provision may preempt ESRA, New York is left in an untenable position, uncertain as to which, if any, provisions of ESRA remain in effect, at least outside the relatively rare realm of transactions that are purely intrastate in nature. As discussed in Part III supra,

\begin{itemize}
\item \textsuperscript{202} U I  § 8(b).
\item \textsuperscript{203} U I  § 8(3)(2).
\item \textsuperscript{204} U I  § 12(3).
\item \textsuperscript{205} U I  § 11.
\item \textsuperscript{206} U I  § 4.
\item \textsuperscript{207} U I  § 15.
\end{itemize}
pursuant to E-Sign, which applies to transactions “in or affecting inter-
state or foreign commerce,” a state law can limit, modify, or supersede
E-Sign only if it is the uniform version of UETA, or if it “specifies the
alternative procedures or requirements for the use or acceptance (or both)
of electronic records or electronic signatures to establish the legal effect,
validity, or enforceability of contracts or other records.” Such alterna-
tive procedures or requirements must (i) be consistent with E-Sign, (ii)
may not “require, or accord greater legal status or effect to, the implemen-
tation or application of a specific technology or technical specification
for performing the functions of creating, storing, generating, receiving,
communicating, or authenticating electronic records or electronic signa-
tures,” and (iii) must specifically mention E-Sign if adopted after the enact-
ment of E-Sign. These specific limitations do not apply to laws or regula-
tions governing a state’s procurement activities or regulatory filings.

ESRA is clearly inconsistent with E-Sign in many fundamental re-
spects. It is not a uniform version of UETA, and therefore fails the first
prong of the E-Sign presumption analysis. Regarding the second prong of
the E-Sign presumption analysis, ESRA may be interpreted as technology-
specific with respect to the fundamental issue of what constitutes an elec-
tronic signature, and would thereby be inconsistent with E-Sign’s prohi-
bition on alternative state legislation favoring specific technologies. While
E-Sign allows for any type of electronic signature, ESRA appears only to
recognize a particular type of electronic signature, which meets its specific
technological criteria. Thus, a sender’s name typed at the end of his or
her e-mail message would constitute a valid electronic signature of the
sender under E-Sign, but would have no legal effect under ESRA. The ESRA
Regulations, as well as ESRA itself, appear, despite the ambiguities detailed
above, to not be limited to procurement matters or to regulatory filings.

209. Id. § 7002 (a)(1).
210. Id. § 7002(a)(2)(A).
211. Id.
212. Id. § 7002(b), § 7004(b)(4).
213. ESRA’s definition of electronic signature may arguably not be technology-specific on its
face. However, when read in conjunction with Section 540.4 of the ESRA Regulations, it is
clear that the only technology which is currently permissible utilizes digital signatures. N.Y.
Comp. Codes R. & Regs. tit. 9 § 540.4.
214. As recently revised, OFT’s Regulations implementing ESRA “are applicable to the use and
authentication of electronic signatures and the utilization of electronic records by or with
The scope of ESRA is also significantly different from that of E-Sign. It does not address consumer consent, it exempts real property transactions, it does not exempt laws relating to family law matters or matters governed by the Uniform Commercial Code and, although ESRA was enacted prior to the enactment of E-Sign, the ESRA Rules were not adopted in final form until after E-Sign was enacted and do not mention E-Sign. As a result, a strong possibility exists that both ESRA and the ESRA Rules are preempted in whole or in part by E-Sign with respect to transactions in or affecting interstate commerce. Importantly, the legal uncertainty as to whether ESRA is preempted will exist even if the OFT takes the position or obtains a legal opinion that ESRA is not preempted. As long as ESRA coexists with E-Sign, the issue of preemption will not be resolved in the minds of many until there is an authoritative decision by a court, which, with appeals, may take years.

Even if ESRA were not preempted, since ESRA does not contain a consumer protection provision, E-Sign’s consumer disclosure provisions might still apply with respect to transactions in or affecting interstate commerce. If an electronic transaction were in fact purely intra-state and ESRA were found to apply to the transaction under ordinary state choice of law principles, then arguably no special consumer electronic transaction requirements would have to be followed.

If a uniform version of UETA were adopted in New York, then E-Sign’s consumer protection provisions might still apply to transactions in or affecting interstate commerce, depending on how E-Sign’s preemption provision is read and whether Section 8(a) of UETA is or is not “consumer protection” in nature. New York would not be precluded from adopting its own consumer protection provisions, either in addition to ESRA or as part of an enactment of UETA, but to avoid federal preemption such provisions would need to be consistent with E-Sign. If New York adopts its own consumer protection provisions as part of an enactment of UETA, it is recommended that such consumer provisions be contained in separate legislation in order to limit preemption risk. The New York legislature could also adopt UETA with the text agreed to by NCCUSL and various consumer advocates deferring to E-Sign’s consumer provisions as discussed in Section III(5) above. The legislature will need to consider the risk of federal preemption with respect to each of these alternatives.

215. See supra, Part III(4).
Right now, in a state that has no electronic records and signatures legislation, E-Sign permits an electronic transaction where the parties just type their names as signatories on the end of a document, or where a person places an order by e-mail and types his or her name at the end of the message. No digital signature is required. This is also possible in a state that has adopted UETA. For instance, UETA allows the parties to agree on attribution procedures appropriate to a given circumstance. The comments to UETA make clear that the “context” can provide attribution. So, for example, in a case where the parties have chosen to close a transaction electronically, the parties may agree that the documents be completed without the need for a digital signature or encryption. The parties, in such a case, can decide on an alternative security procedure, or on no security procedure at all. If the parties desire greater certainty than a simple typed signature, both E-Sign and UETA allow parties to agree to any higher level of security and provide for electronic notarization. As long as there is confusion as to whether ESRA is preempted, parties entering into electronic transactions who have agreed to contract without digital signatures will either move their transactions to neighboring states, where no such uncertainty exists, or will remain in New York and assume the increased costs associated with ESRA, specifically the costs associated with the use of digital technology or with litigation arising from the legal uncertainty in New York.

The matter is further complicated by the fact that, due to the nature of electronic transactions, it is increasingly difficult, if not impossible, to determine whether a particular transaction takes place wholly within New York or affects interstate commerce, thus making a party’s task of complying with the correct statute even more taxing.

VII. CONCLUSIONS AND RECOMMENDATIONS

The rise of electronic commerce (“e-commerce”) is rapidly changing the global economy. The world seems much smaller today as time, distance and boundaries no longer present the barriers that they once did. The growth of e-commerce continues to have a significant effect on state and local communities. The primary effect on financial systems has been the increased mobility of capital and increased competition for financial resources. In the legal sphere, the inherently international nature of e-commerce means that legal structures supporting e-commerce will need to be increasingly harmonized.

The need for uniformity in e-commerce legislation among the fifty
states is especially evident when one considers that transactions over the internet are designed to accommodate parties in varying jurisdictions, both nationally and internationally. Moreover, a party to an electronic transaction may not know (and often has no easy means of verifying) the jurisdiction of its counterparty. Furthermore, jurisdictional questions regarding e-commerce transactions are complex, and thus far the law is unsettled. Consider, for example, a transaction in which a New York resident enters into an agreement with a California vendor, through a server located in Maryland, using his or her laptop in a Chicago hotel. The international ramifications are even more complex, but a necessary first step clearly is national harmony.

The effort undertaken by NCCUSL in approving UETA has resulted in a model law that, once adopted by the states, will bring a significant level of legal certainty to e-commerce throughout the United States. To date, UETA has proven to be one of the most popular statutes drafted by NCCUSL. In the two years since its approval in late July 1999, UETA has been adopted in thirty-seven states and the District of Columbia and has been introduced in nine more and in the U.S. Virgin Islands. Therefore, unless New York also enacts UETA, it seems likely to be out of step with the rest of the country.

As detailed in this Report, when compared with ESRA, UETA provides a more comprehensive framework within which electronic transactions may be undertaken. Unlike ESRA, UETA scrupulously excludes UCITA and most of the UCC from its scope. UETA's permitting electronic versions of negotiable notes and its non-applicability to checks are indications of the care with which the Drafting Committee thought through all the implications of converting various kinds of instruments and documents from paper to electronic form. UETA also allows the states adopting this model act to exclude other specifically identified state laws from its effect, and several states have taken advantage of this provision. At the same time, UETA goes much further than the New York statute in supplying default rules for electronic transactions in areas such as attribution, automated transactions, errors, time and place of receipt of communications, notarization, and electronic variation by contract. ESRA plainly falls short in these areas and does not seem adequate in providing sufficient legal support to electronic transactions.

UETA is also more comprehensive than E-Sign and, if adopted in New York, would have several advantages over E-Sign. UETA provides rules relating to attribution, correction of errors, contract formation in automated transactions and time and place of sending and receipt. E-Sign is either silent or more limited as to these rules when compared with UETA.
The possibility of federal preemption of ESRA is also a factor that should be carefully considered, as this may lead to the loss of control by New York State over its own law governing e-commerce. As discussed supra in Parts III, V and VI of this Report, an UETA-type statute would be spared from Federal preemption. In view of the numerous differences between the New York statute and UETA, however, ESRA does not qualify as an UETA-type law. Moreover, UETA appears clearer and more carefully drafted than ESRA, and some of UETA’s ambiguities have been clarified in the Reporter’s Official Comments. ESRA, in comparison, even when read together with the ESRA Regulations, remains unclear in important areas.

In order to reduce the widespread confusion in New York as to whether ESRA or E-Sign would apply in a given electronic transaction, the Committee recommends the modification or repeal of ESRA. Such action would eliminate the necessity of waiting for the Courts to determine whether and to what extent ESRA is preempted by E-Sign. The Committee believes that a more comprehensive statute which contemplates complex commercial transactions could create a level playing field between New York and other states, and could alleviate uncertainty regarding electronic signature and records laws here in New York.

Historically, New York has been the preeminent location for both electronic information and commerce. However, this historic dominance may be lost if the laws supporting these businesses do not improve upon, or at a minimum maintain, commercial standards as they are today. Both the globalization of the economy and New York’s unique position as the financial capital of the world require that electronic commerce in New York be facilitated through the adoption of clearly understood uniform laws rather than through a patchwork of varying state statutes. In order for New York to remain competitive in the expanding area of e-commerce its laws must keep step with those of the rest of the country, and it must take legislative action to alleviate the legal uncertainty which presently exists here in New York in the area of electronic transactions.

For the foregoing reasons, the Committee on Uniform State Laws of the Association of the Bar of the City of New York recommends:

1. That the UETA be enacted in New York State. UETA will provide a more comprehensive framework for electronic transactions than existing law does and will allow New York State to be in step with the rest of the states. In addition, the adoption of UETA in New York will eliminate uncertainty as to the extent of preemption of ESRA by E-Sign.

2. That with the adoption of UETA in New York, ESRA be reconciled with UETA by the New York State Legislature. This may be done either...
through the complete repeal of ESRA, or with the amendment of ESRA to have it apply only to electronic transactions undertaken by or with government entities. The latter alternative would be in line with Sections 17-19 of UETA, which contemplate that each state implement its own rules for government use of electronic signatures and records in adopting UETA.

3. That UETA be adopted in New York in its uniform version, without any non-uniform consumer provisions being included within its text. This Report does not make a recommendation as to the appropriateness of the consumer provisions in E-Sign. Nor does this Report determine, but merely points out the difficult preemption issues involved in determining, whether the consumer provisions in E-Sign would continue to remain in effect once a uniform version of UETA is adopted in New York. Whether New York in adopting a uniform UETA should also enact separate consumer legislation relating to electronic transactions and signatures is a question that the Association of the Bar of the City of New York has not yet considered and on which it takes no position at this time.

October 2001
The Committee on Uniform State Laws

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INTRODUCTION

Over the past twenty-five years, Congress has shown its dissatisfaction with a series of Supreme Court cases interpreting federal law by amending or reenacting the law in question to clarify the original legislative intent and overrule a contrary Court construction. This has been particularly true in the area of civil rights and employment discrimination. In 1978, Congress passed the Pregnancy Discrimination Act of 1978 to extend the protection of Title VII to pregnant employees in light of the Supreme Court decision in *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401 (1976), which held that Title VII of the 1964 Civil Rights Act did not cover employment discrimination based on pregnancy (see Pub. L. 95-555 (1978) codified as 42 U.S.C. §2000e(k)). In 1982, Congress broadened the Voting Rights Act to take account of a narrow Supreme Court decision in *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490 (1980), on whether purposeful discrimination must be shown before the Act can be invoked.

Finally, in 1991, Congress passed a broad, new Civil Rights Act (see Civil Rights Act of 1991, Pub. L. 102-166, 102 Stat. 28 codified as amended in various sections of 42 U.S.C.), which specifically responded to no less than five Supreme Court cases decided in 1989, which severely restricted and limited workers’ rights under federal anti-discrimination laws, particularly Title VII of the 1964 Civil Rights Act (See Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775 (1989) (holding employer could avoid liability for intentional discrimination in “mixed motive” cases if same action would have been taken in absence of discriminatory motive; modified by Section 107 of the Civil Right Act which states in pertinent part, “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”); Martin v. Wilks, 490 U.S. 755, 109 S.Ct. 2180 (1989) (Section 108 changes the result in Martin by prohibiting challenges to consent decrees by individuals who had reasonable opportunity to object to whose interests were reasonably represented); Lorance v. AT & T Tech., Inc., 490 U.S. 900, 109 S.Ct. 2261 (1989) (holding that period for challenging an allegedly discriminatory seniority rule begins when rule is adopted; legislatively reversed by Section 112 which allows employees to challenge seniority rule “when . . . adopted, when an individual becomes subject to the seniority system or when a person aggrieved is injured by the application of the seniority system or provision of the system.”); Patterson v. McLean Credit Union, 491 U.S. 164, 109 S.Ct. 2363 (1989) (limiting the scope of 42 U.S.C. §1981; Section 101 reverses these limits by defining
"make and enforce contracts" as "the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."); and West Virginia University Hospital, Inc. v. Casey, 499 U.S. 83, 111 S.Ct. 1138 (1991) (denying recovery of expert fees as part of attorney’s fee award; result reversed by Section 113)). Led by Ted Kennedy in the Senate and Hamilton Fish Jr., in the House, Congress acted to change the effect of those decisions, as well as making other changes to federal law that strengthened the weapons available to workers against discrimination. Despite some partisan contention on the language of some of the provisions (which led to some last minute compromise language), President George Bush supported the changes. The new law recited in its preamble that the purpose of the Act was to “respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.” 137 Cong. Rec. H9505-01.

The current Congress is facing exactly the situation as its predecessors did in 1991, 1988, 1986, 1982 and 1976. The Supreme Court has given a narrow reading to various federal civil rights laws in a series of cases over the past two years, all by narrow five-to-four decisions. Once again, the decisions can be and should be overruled by an attentive Congress which cares about fairness in the operation of government and in the workplace.

A. THE SUPREME COURT CASES AT ISSUE

1. Kimel and Garrett

In two cases expanding the Court’s new approach to Federalism and extending Eleventh Amendment protection to States in federal court, the Supreme Court held that State employees cannot sue in federal court for violation of either the Age Discrimination in Employment Act (ADEA) (29 U.S.C. § 623 et seq.) or the Americans with Disabilities Act (42 U.S.C. §12101-12117). See Kimel v. Florida Board of Regents, 528 U.S. 62, 120 S.Ct. 631 (2000) and Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 121 S.Ct. 955 (2001). The effect of these decisions was to remove 4,827,000 State employees across the country (3.4% of the total work force) from the protection of the federal age law and the federal disabilities act, both of which explicitly applied to state employees. See 29 U.S.C. §630(b) and 42 U.S.C. §12101(b)(4). See Statistical Abstract of the United States, 2000, Table 525,
a. Extending 11th Amendment Protection to the States

These two cases were the fifth and sixth times since 1996 that the Supreme Court had found a federal law unconstitutional under the 11th Amendment, which prohibits federal courts from hearing claims against the States. The Court held in Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S.Ct. 1114 (1996) that Congress could not overrule the 11th Amendment immunity of the States by exercising its power under the Commerce Clause. Thus, a provision of the Indian Gaming Regulatory Act that allowed suits against state officials in federal court for refusing to negotiate a gambling compact with an Indian tribe was unconstitutional. Only if Congress expressed an unequivocal intent and explicitly relied upon the Fourteenth Amendment, or other amendments which were enacted after the 11th Amendment, could Congress escape the strictures of the Amendment.


Alden dealt with the Fair Labor Standards Act. In Alden, state probation officers first brought an action in federal court for overtime pay, relying on the Fair Labor Standards Act. While the case was pending, the Seminole Indian case was decided, holding that Congress cannot overturn 11th Amendment immunity pursuant to the Commerce Clause. The probation officers then refiled the case in state court, since the 11th Amendment by its terms does not apply to suits brought in state court. The Supreme Court in Alden said that whatever immunity a State would have in federal court, it must also have in its own state courts. Therefore, if a State establishes a sovereign immunity doctrine, it can apply that doctrine in response to any federal claim brought in the state courts.

In the other cases decided in 1999, the College Savings Bank cases, the Court declared invalid the Patent Remedy Act and the Trademark Remedy Act, both passed by Congress in 1992. Both laws provided for suits against the States in federal court, one for patent infringement and the other for trademark infringement. In deciding these cases, the Supreme Court utilized a two-part test for 11th Amendment immunity. First, did Congress make its intention to overrule State immunity clear? Second, was there Constitutional authority to do so? The Court held that while Congressional intent was clear, neither law was founded on proper Constitutional authority.
b. Restricting Congressional Power Under the 14th Amendment

In another case (decided in 1997), which bears directly on Congressional authority to overcome State immunity under the 11th Amendment, the Court held in City of Boerne v. Flores, 521 U.S. 507, 117 S.Ct. 2157 (1997), that Congress could not, by exercising its rights under Section 5 of the 14th Amendment, expand individual rights beyond the limits established by the Supreme Court in interpreting that Amendment. That decision cut back on earlier Supreme Court decisions that interpreted Section 5 as the equivalent of the “necessary and proper clause” in Article 1, Section 8. See Katzenbach v. Morgan, 384 U.S. 641, 650, 86 S.Ct. 1717, 1723 (1966): “By including Section 5, the draftsman sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause.”

In Boerne, the Supreme Court reviewed the Religious Freedom Restoration Act, which broadened religious freedom beyond the limits that the Supreme Court had defined, and established a remedy for violations of the newly defined freedom. The Supreme Court held that this was beyond the power of Congress. The Court held that it was its function to define the contours and extent of a constitutional right, and once that is done, Congress is then empowered to provide a congruent and proportional remedy to any violation of the defined right. “[T]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” City of Boerne, 521 U.S. at 520, 117 S.Ct. at 2164. Accordingly, the Court held that Congressional power under Section 5 is limited to preparing, creating, or establishing a proportionate remedy to a Constitutional violation already found by the Supreme Court.

c. The Holdings in Kimel and Garrett

The Kimel and Garrett cases built upon the new 11th Amendment and 14th Amendment jurisprudence of the earlier cases noted above. Justice O’Connor wrote the majority decision in Kimel. She stated that age discrimination by the States was not a pervasive or serious problem. Indeed, it was “perhaps inconsequential”:

Our examination of the ADEA’s legislative record confirms that Congress’ 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem. Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose
to the level of constitutional violation. The evidence compiled by petitioners to demonstrate such attention by Congress to age discrimination by the States falls well short of the mark. That evidence consists almost entirely of isolated sentences clipped from floor debates and legislative reports. Kimel, 528 U.S. at 89, 120 S.Ct. at 648-49.

Because Congress did not identify a pervasive problem of age discrimination by the States (as opposed to age discrimination in society generally), Congress could not invoke its Section 5 authority to overrule the States’ 11th Amendment immunity.

Age classifications, unlike governmental conduct based on race or gender, cannot be characterized as “so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.” . . . Older persons, again, unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a “history of purposeful unequal treatment.” . . . Old age also does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it. . . . Accordingly, as we recognized in Murgia, Bradley, and Gregory, age is not a suspect classification under the Equal Protection Clause. Kimel, 528 U.S. at 83, 120 S.Ct. at 645-46 (internal citations omitted).

As a result, “[s]tates may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest. The rationality commanded by the Equal Protection Clause does not require States to match age distinctions and the legitimate interests they serve with razorlike precision.” Kimel, 528 U.S. at 83, 120 S.Ct. at 646. It noted that “Under the Fourteenth Amendment, a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State’s legitimate interests. The Constitution does not preclude reliance on such generalizations. That age proves to be an inaccurate proxy in any individual case is irrelevant.” Kimel, 528 U.S. at 84, 120 S.Ct. at 646.

The Court concluded:

A review of the ADEA’s legislative record as a whole, then, reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discrimi-
nating against their employees on the basis of age. Although that lack of support is not determinative of the § 5 inquiry, . . . Congress’ failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field. In light of the indiscriminate scope of the Act’s substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States, we hold that the ADEA is not a valid exercise of Congress’ power under § 5 of the Fourteenth Amendment. The ADEA’s purported abrogation of the States’ sovereign immunity is accordingly invalid. Kimel, 528 U.S. at 91, 120 S.Ct. at 649-50 (internal citations omitted).

In the next Supreme Court Term, 2000-2001, the Court followed the reasoning of Kimel and granted States immunity from suits under the ADA. In Garrett, the Court noted (in another five to four decision) that Congress had not documented a “history and pattern” of discrimination by the States against the disabled.

Once we have determined the metes and bounds of the constitutional right in question, we examine whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled. Just as § 1 of the Fourteenth Amendment applies only to actions committed “under color of state law,” Congress’ § 5 authority is appropriately exercised only in response to state transgressions. . . . The legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled. Garrett, 531 U.S 356, 121 S.Ct. at 964-65 (internal citations omitted).

Even though Congress had assembled many instances of discrimination against the disabled by private companies and by local governments, there was no “pattern of unconstitutional discrimination on which § 5 legislation must be based.” Garrett, 121 S.Ct. at 965. The Court reaffirmed the basic holding of its 11th Amendment jurisprudence:

Congress is the final authority as to desirable public policy, but in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the
remedy imposed by Congress must be congruent and proportional to the targeted violation. Those requirements are not met here, and to uphold the Act's application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court... Section 5 does not so broadly enlarge congressional authority. Garrett, 121 S.Ct. at 968.

2. Morrison

In another case decided in the 1999 Term, United States v. Morrison, 120 S.Ct. 1740 (2000), the Court held that the civil remedies provisions of the Violence Against Women Act (VAWA), 42 U.S.C. § 13981 were unconstitutional. Those sections provided a federal civil remedy for the victims of gender-motivated violence, based on its findings that gender-motivated violence had a substantial effect on interstate activity. The Court found that the law exceeded Congressional power under the Commerce Clause, basing its decision on the same reasoning that the Court had adopted in United States v. Lopez, 514 U.S. 549 (1995). In Lopez, the Court held that The Gun Free School Zone Act, 18 U.S.C. § 922(q)(1)(A) was unconstitutional, since it did not regulate a commercial activity (possession of a weapon within a school zone) and therefore Congress lacked Commerce Clause authority to enact the law.

The Court noted in Morrison:

Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature. 120 S.Ct. at 1752.

It was not enough, in the Court’s view, that Congress had determined that there was such an effect. Congress had amassed enormous data showing that gender motivated violence was a pervasive and serious problem. Justice Souter noted in his dissent that Congress had found that: “Partial estimates show that violent crime against women costs this country at least 3 billion—not million, but billion—dollars a year,” citing, S.Rep. No. 101-545, at 33, quoted at 120 S.Ct. at 1762. He further noted that: “[E]stimates suggest that we spend $5 to $10 billion a year on health care, criminal justice, and other social costs of domestic violence.” S.Rep. No. 103-138, at 1 (citing Biden, Domestic Violence: A Crime, Not a Quar-
Justice Souter noted that the legislative record before Congress was even more detailed than the record before it when it passed the 1964 Civil Rights Act, prohibiting discrimination in public accommodations.

While Congress did not, to my knowledge, calculate aggregate dollar values for the nationwide effects of racial discrimination in 1964, in 1994 it did rely on evidence of the harms caused by domestic violence and sexual assault, citing annual costs of $3 billion in 1990, see S. Rep. 101-545, and $5 to $10 billion in 1993, see S.Rep. No. 103-138, at 41. Equally important, though, gender-based violence in the 1990's was shown to operate in a manner similar to racial discrimination in the 1960's in reducing the mobility of employees and their production and consumption of goods shipped in interstate commerce. Like racial discrimination, “[g]ender-based violence bars its most likely targets—women—from full participation in the national economy.”

120 S.Ct. at 1763.

Nevertheless, the Court determined that the Congressional findings were inadequate.

But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in Lopez, “ ‘Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.’ ” 514 U.S., at 557, n. 2, 115 S.Ct. 1624 (quoting Hodel, 452 U.S., at 311, 101 S.Ct. 2389 (REHNQUIST, J., concurring in judgment)). Rather, “[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.” Id.

The Court noted further:

In these cases, Congress' findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers. Congress found that gender-motivated violence affects interstate commerce...
“by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; ... by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.”


Accord, S.Rep. No. 103-138, at 54. Given these findings and petitioners’ arguments, the concern that we expressed in Lopez that Congress might use the Commerce Clause to completely obliterate the Constitution’s distinction between national and local authority seems well founded. See Lopez, supra, at 564, 115 S.Ct. 1624. The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States’ police power) to every attenuated effect upon interstate commerce. If accepted, petitioners’ reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part. Id. at 1752-53.

3. Sandoval

In April, 2001, the Supreme Court narrowed the reach of Title VI of the 1964 Civil Rights Act, which prohibits recipients of federal financial assistance from discriminating on the basis of race, color or national origin. See Alexander v. Sandoval, 121 S.Ct. 1511 (2001). The basic provisions of Title VI (Section 601) contain broad general language that no person shall, “on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity” funded by the federal government. 42 U.S.C. §2000d. Section 602 of Title VI authorizes federal agencies “to effectuate the provisions of [§ 601] ... by issuing rules, regulations, or orders of general applicability,” 42 U.S.C. § 2000d-1. In an exercise of this authority, the Department of Justice promulgated a regulation forbidding funding recipients to “utilize criteria or methods of administration
which have the effect of subjecting individuals to discrimination because of their race, color, or national origin ....” 28 CFR § 42.104(b)(2) (1999). Based on these provisions, a class action was brought against the State of Alabama, which had established an “English-only” requirement for all government operations, including taking a test to obtain a driver’s license. Persons complaining about the restriction then brought suit relying on the DOJ regulations.

The Court held that no action could be brought under the DOJ regulations at issue. It held that Title VI is violated only if a plaintiff proves that the funded party intentionally discriminated on the basis of race, contrary to the rule for other civil rights acts (such as Title VII), which required only a showing of a discriminatory impact to trigger enforcement of the law. The Court also held in the same case that both public and private recipients of federal financial aid who violate federal regulations prohibiting discrimination cannot be sued in federal court. Thus, the State of Alabama was not amenable to suit when it established an “English only” requirement for taking a driver’s license exam, even though federal regulations prohibited the practice. The only remedy, the Court held, was termination of federal funding to the State entity that violated the regulations (which can be accomplished after complicated procedural requirements by the federal funding agency).

The Court had issued a series of decisions over the years dealing with Title VI, holding that a private cause of action is created by Title VI and that to succeed in a case under the statute seeking only injunctive or declaratory relief, only disparate impact must be shown, not discriminatory intent. As Justice Stevens noted in dissent in Sandoval, “a clear majority of the Court [in Guardians Association v. Civil Rights Comm’n of New York City, 463 U.S. 582, 594-95, 103 S.Ct. 3221, 3228-29 (1983)] expressly stated that private parties may seek injunctive relief against governmental practices that have the effect of discriminating against racial and ethnic minorities.” Sandoval, 121 S.Ct. at 1526 (Stevens, J., dissenting). In addition, there was authority, both in the Title VI cases decided by the Court and in other cases dealing with the enforceability of governmental regulations, that private claims could be brought based on violation of the regulations. The Court rejected all of these propositions.

Justice Scalia, speaking for the five-person majority, dismissed out-of-hand the view that any disparate-impact claim can be brought under Title VI. “Second, it is similarly beyond dispute—and no party [before the Court] disagrees—that § 601 prohibits only intentional discrimination.” Sandoval, 121 S.Ct. at 1516. He noted that the holding of the Guardians
case was that in a suit for compensatory damages, a plaintiff must show intentional conduct to succeed. While five Justices in the Guardians’ case had acknowledged that regulations could be issued prohibiting conduct that had a discriminatory impact, only two Justices would have permitted a private suit for damages on that basis: “of those five, three expressly reserved the question of a direct private right of action to enforce the regulations, saying that ‘[w]hether a cause of action against private parties exists directly under the regulations . . . [is a] question[ ] not presented by this case.’” Sandoval, 121 S.Ct. at 1518 (quoting Guardians, 463 U.S. at 645, n. 18, 103 S.Ct. 3221 (Stevens, J., dissenting)). Now that the question was directly faced, the Court rejected the proposition. “It is clear now that the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits—and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations.” Sandoval, 121 S.Ct. at 1519 (citations omitted).

Examining the question of whether Congress intended to create a private cause of action on behalf of private persons by enacting Section 602 (which permitted agencies to issue regulations enforcing Section 601), the Court rejected the proposition. “Far from displaying congressional intent to create new rights, § 602 limits agencies to ‘effectuat[ing] rights’ already created by § 601. And the focus of § 602 is twice removed from the individuals who will ultimately benefit from Title VI’s protection. Statutes that focus on the person regulated rather than the individuals protected create ‘no implication of an intent to confer rights on a particular class of persons.’” Sandoval, 121 S.Ct. at 1521 (quoting California v. Sierra Club, 451 U.S. 287, 101 S.Ct. 1775 (1981)). Noting that there already existed a complicated scheme to end federal funding if a funded agency violated the regulations, the Court found no intent to add additional sanctions. “The question whether § 602’s remedial scheme can overbear other evidence of congressional intent is simply not presented, since we have found no evidence anywhere in the text to suggest that Congress intended to create a private right to enforce regulations promulgated under § 602.” Sandoval, 121 S.Ct. at 1523.

4. Buckhannon

On May 29, 2001, the Court decided that civil rights litigants who bring suit against the government (or an employer) cannot collect attorneys’ fees if the defendant voluntarily ceases the practice complained of or settles the claim before going to trial without a consent decree (Buckhannon
Board and Care Home, Inc. v. West Virginia Department of Health and Human Services, 121 S.Ct. 1835 (2001)). In 1976, Congress passed the Civil Rights Attorneys Fees Award Act to encourage lawyers to take civil rights cases as “private attorney generals.” Such cases “vindicate public policies of the highest order,” as Congress explained when it passed the law. The law specified that “prevailing parties” would have their legal fees paid by the losing party—generally a government that violated the plaintiffs’ constitutional rights. The law was enacted to “ensure that nonaffluent plaintiffs would have effective access to the Nation’s courts to enforce those civil rights laws,” as Justice Ginsburg explained in her dissent in Buckhannon.

In Buckhannon, the State of West Virginia had a rule that no person could be housed in an assisted living facility operated by the State health and human services agency unless they were capable of “self-preservation,” that is, capable of moving themselves unassisted “from situations involving imminent danger, such as fire.” W.Va. Code §§16-5H-1, 16-5H-2 (1998). For that reason, a facility housing a needy 102 year-old woman, Dorsey Pierce, who could not walk unaided to a fire escape, was held to be in violation of the law and was ordered to “cease operating.” In response, the facility and certain of its residents (including Mrs. Pierce, the 102 year-old woman) brought suit under the Fair Housing Act and the ADA (both of which provide for the award of attorneys’ fees to “prevailing parties”) to challenge the law and the closing order. While the case was pending and in direct response to the lawsuit, the West Virginia legislature amended the law to change the “self-preservation” rule and permit dependent patients to stay in this type of facility.

The plaintiffs then made an application for attorneys’ fees under the FHA and the ADA. The Fourth Circuit rejected the application, based on its rule that unless a case actually went to judgment and an enforceable decree was obtained from a court, fees could not be awarded. It rejected the “catalyst” theory, accepted by every other circuit. Under that theory, if a law suit was the “catalyst” or a motivating cause for a change in government policy, fees must be paid.

The Supreme Court rejected the “catalyst” theory in yet another five-to-four decision. It noted that an enforceable judgment or even a consent decree requires judicial oversight of the merits of the underlying claim. But Chief Justice Rehnquist noted that the same is not true for a private settlement.

We think, however, the “catalyst theory” falls on the other side of the line from these examples. It allows an award where there is no judicially sanctioned change in the legal relationship of
the parties. Even under a limited form of the “catalyst theory,” a plaintiff could recover attorney’s fees if it established that the “complaint had sufficient merit to withstand a motion to dismiss for lack of jurisdiction or failure to state a claim on which relief may be granted.” Brief for United States as Amicus Curiae 27. This is not the type of legal merit that our prior decisions, based upon plain language and congressional intent, have found necessary. Buckhannon, 121 S.Ct. at 1840.

The Court concluded:

We cannot agree that the term “prevailing party” authorizes federal courts to award attorney’s fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the “sought-after destination” without obtaining any judicial relief. Buckhannon, 121 S.Ct. at 1841 (original quotation marks and citations omitted in original).

B. THE NEED FOR AND SCOPE OF LEGISLATIVE CHANGE

1. Rectifying Kimel and Garrett through Legislation

There is no doubt that removing state employees from the protection of the federal ADEA and the ADA should be legislatively rectified. The Court defended its decision in Kimel by noting that “State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union,” 528 U.S. at 91, 120 S.Ct. at 650 (emphasis added). This means that some states do not have statutory protection against age discrimination for their own employees.

Even if it were true, as the Petitioner in Garrett insisted, that all the states had some kind of protection against disability discrimination in employment, including discrimination by state government,1 further legislative action by Congress would be necessary.

And even if the other states passed new laws covering any gaps in coverage, there would still be good reason to have a uniform federal law that protects all employees, private and public, from age and disability discrimination.

It is totally anomalous for federal employees to be covered by the ADEA and the ADA, for local government employees to be covered, for all private employees to be covered, but for 4.8 million state employees to be covered by state laws only.

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1. See Appendix to Petitioner’s Brief, 2000 WL 821035 (citing laws of all fifty states).

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exempt, based on some archaic vision of state sovereignty. Even if State
laws exist and can be invoked by state employees, those laws may define
protection in different ways. They may also provide protection for a different
class of persons than federal law. What is the definition of “disabled”
under state law? At what age can a person seek protection against dis-
crimination? What is the test for finding discrimination under state law?
What constitutes a bona fide occupational qualification under state law?
How is a prima facie case shown? Does state law provide for a reasonable
accommodation for a disabled employee? Simply to say that states have
some law for protecting against discrimination by reason of age or dis-
ability does not mean that they have an effective law. There is no reason
why state employees should have lesser or even different protection than
every other employee in the country.

More important, the remedies under state law are different and usu-
ally less effective than federal law. In New York, for example, claims against
the State must be generally be heard in the Court of Claims, although the
New York Court of Appeals held that claims under the State’s Human
Rights Law may be heard in other forums, see Koerner v. State of New York,
62 N.Y.2d 442 (1984). There is still some question whether the State has
waived its immunity from jury trials even if the case is brought in Su-
preme Court. Also, New York state law does not provide for double dam-
ages or exemplary or punitive damages from the State, which could be
obtained under federal law. See e.g., Walsh v. Covenant House, 244 A.D.2d
214 (1st Dept. 1997). Finally, New York state law and the laws of many
other states do not provide for the award of counsel fees to a successful
plaintiff, a highly important component of federal law protection.

Thus, it seems clear that some effort should be made to give state
employees the full scope of protection under the ADEA and the ADA.

The means of providing for Congressional relief is not simple. The
determinations made in Kimel and Garrett were based on the 11th Amend-
ment. Congress cannot by statute overrule a Constitutional determina-
tion. But it may have a basis for extending the ADEA and the ADA to
state employees by use of its spending power.

Under the Supreme Court decision in South Dakota v. Dole, 483, U.S.
203, 207-08, 107 S.Ct. 2793, 2796 (1987) (a seven-to-two decision written
by Chief Justice Rehnquist, in which Justice Scalia joined), Congress may
impose conditions on the States pursuant to its exercise of its spending
power. In that case, Congress conditioned the award of certain federal
highway funds on the State’s agreement to raise the drinking age of all
persons to 21 years. See 23 U.S.C. § 158: “The Secretary [of Transporta-

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tion] shall withhold 10 per centum of the amount required to be apportioned to any State [under Federal highway grants] . . . in which the purchase or public possession in such State of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.” The States were not compelled to make the change, but they could not obtain the federal money without passing the required legislation. The Supreme Court found no 10th Amendment problem or any other federalism concern. The Court held that Congress may condition receipt of federal funds upon state compliance with federal requirements if three conditions are met: (1) the condition must relate “to the federal interest in particular national projects or programs,” id.; (2) there is no other constitutional prohibition that independently bars the conditional grant of funds (such as the “unconstitutional condition” doctrine), id. at 208, 107 S.Ct. at 2796; (3) the financial inducement must not be “coercive,” id. at 211, 107 S.Ct. at 2798.

Thus, Congress could require the States to surrender their immunity under the 11th Amendment in order to obtain social security or medicaid or medicare funds, which are paid to the States to provide assistance to the age or disabled. See e.g., 42 U.S.C. § 301: “For the purpose of enabling each state . . . to furnish financial assistance to aged needy individuals, there is hereby appropriated for each fiscal year a sum sufficient to carry out the purpose of this subchapter. The sums made available . . . shall be used for making payments to States, which have submitted . . . State plans for old-age assistance.” Congress could add the same proviso to Section 301 as it did to the highway funds law, viz, “The Secretary [of Health and Human Services] shall withhold 10 per centum of the amount required to be apportioned [under Section 301] to any State which does not waive its immunity to suit for its employees under the ADEA or does not afford equivalent protection to its employees under its own state laws, including the right to jury trial, full damages equal to that afforded under federal law and the award of attorneys fees and costs.”

This condition would satisfy the requirements of the Dole case. Protection against age discrimination is directly related to old age assistance, since state employees discriminated against because of their age may then be forced to apply for old-age assistance. Thus, the condition “relates to the federal interest” in protecting the economic interests of older workers.

The same is true with respect to discrimination against the disabled. Congress has made available to the States hundreds of millions of dollars for the benefit of the disabled, see 42 U.S.C. § 1351 (assistance to the States for the aid of the disabled); 42 U.S.C. § 1381 (SSI payments for the aged, blind and disabled). A portion of those payments may be condi-
tioned on the States’ waiver of their 11th Amendment immunity or their enactment of new laws affording their employees equivalent protection under the ADA, following the model noted above.

If the States wish to continue to obtain federal funds under various social welfare provisions, they should have to accede to the anti-discrimination laws mentioned above, such as the ADEA and ADA.

Some effort has already been made to pass a new law to deal with the gap in legal protection created by Kimel. On May 22, 2001, Senators Jeffords, Kennedy and Feingold introduced S. 928, a bill to amend the ADEA “to require, as a condition of receipt or use of Federal financial assistance, that States waive immunity to suit for certain violations of that Act,” 147 Cong. Rec. S5441-01 *S5458 (May 22, 2001). The bill provides that State acceptance of Federal financial assistance in any program or activity of a State will constitute a waiver of the State’s 11th Amendment immunity, allowing a state employee within that program or activity to sue under the ADEA.

There is some question whether the mere acceptance of federal funds can constitute a waiver of such immunity. The 8th Circuit held in Jim C. v. Arkansas Department of Education, 235 F.3d 1079 (8th Cir. 2000)(en banc) that the State’s acceptance of funds under the Rehabilitation Act was in and by itself a waiver of the State’s 11th Amendment immunity even without any further action by Congress. “We hold that Section 504 [of the Rehabilitation Act] is a valid exercise of Congress’s spending power, and that Arkansas waived its immunity with respect to Section 504 by accepting federal funds.” 235 F.3d at 1080. But the 11th Circuit came to the opposite conclusion in the remand in the Garrett case. See Garrett v. University of Alabama at Birmingham, 2001 WL 930562 (11th Cir. August 16, 2001).

In addition, there is some question whether state acceptance of law enforcement funds by its state police would automatically constitute a waiver of 11th Amendment immunity for suits under the ADEA or ADA, since there is little relation between age discrimination and law enforcement and it is at least arguable that the condition does not relate “to the federal interest in the particular national projects or programs,” as required by the Dole decision. We believe that a more explicit connection between the federal funds and the ADEA and ADA waiver is required.

2. Extending Protection to Battered Women in Light of Morrison

The same reasoning could be applied to insure that the States afford equivalent protection to battered women as the federal government did under the VAWA. The Morrison case was not an 11th Amendment case,
but a Commerce Clause case. Thus, there is no possibility of the States waiving any immunity that they possess. The solution is again to condition certain federal payments to the States on their creation of effective remedies in their own courts for gender-motivated violence.

Many federal laws provide for financial assistance to the States for aid to families and children. See e.g., 42 U.S.C. § 601 (aid to dependent children); 42 U.S.C. § 629 (aid to promote safe and stable families; $305,000,000 appropriated for fiscal year 2001). There is no doubt that gender-motivated violence against women is a costly and destabilizing cause of family disintegration. Thus, creating an effective remedy is directly related to federal payments to the States for family assistance. Once again, Congress could condition federal assistance on the States' creation of effective remedies that could reduce such violence. “The Secretary [of Health and Human Services] shall withhold 10 per centum of the amount required to be apportioned [under Section 601 and 629 of Title 42] to any State which does not create and afford protection against gender-motivated violence equivalent to that found in the Violence Against Women Act, 42 U.S.C. § 13981 et seq.”

3. Extending Title VI Protection in Light of Sandoval

There are two aspects of Sandoval that must be dealt with in new legislation. The first is the holding that no violation of the statute occurs unless there is a showing of discriminatory intent. This is contrary to the rule under Title VII of the 1964 Civil Rights Act, which was part of the same statutory scheme that produced Title VI. See Griggs v. Duke Pwr. Co., 401 U.S. 424, 91 S.Ct. 849 (1971). It seems anomalous to have one section of a law require a showing of discriminatory intent while another requires only a showing of discriminatory effect. In addition, Title VIII of the 1968 Civil Rights Act also requires only a showing of discriminatory impact. See Huntington Branch NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir. 1988) aff'd 488 U.S. 15 (1989). A federal statute dealing with the award of federal funds to private and public entities should not provide less protection than the other civil rights statutes providing for suit against private entities and public authority.

In addition, as noted above, five Justices had previously assumed that the statute was violated when discriminatory effect was shown if the plaintiff was seeking injunctive relief. See discussion above in Guardians. Congress should return to that understanding and indeed extend the rule to suit for compensatory damages as well, in accordance with the law under Title VII and Title VIII.
The other statutory change that must be made is to provide for private causes of action for violation of the regulations issued under Title VI. Justice Stevens explained in his dissent that this was the original understanding of the effect of the law:

Pursuant to powers expressly delegated by that Act, the federal agencies and departments responsible for awarding and administering federal contracts immediately adopted regulations prohibiting federal contractees from adopting policies that have the “effect” of discriminating on those bases. At the time of the promulgation of these regulations, prevailing principles of statutory construction assumed that Congress intended a private right of action whenever such a cause of action was necessary to protect individual rights granted by valid federal law. Relying both on this presumption and on independent analysis of Title VI, this Court has repeatedly and consistently affirmed the right of private individuals to bring civil suits to enforce rights guaranteed by Title VI. A fair reading of those cases, and coherent implementation of the statutory scheme, requires the same result under Title VI’s implementing regulations. Sandoval, 121 S.Ct. at 1523-24.

This was the understanding of most of the lower federal courts before the Sandoval decision. Justice Stevens noted in his dissent that “[j]ust about every Court of Appeals has either explicitly or implicitly held that a private right of action exists to enforce all of the regulations issued pursuant to Title VI, including the disparate-impact regulations,” citing many cases to that effect. See Sandoval, 121 S.Ct. at 1524, n. 1

Furthermore, the distinction made by the majority in the Sandoval decision makes no sense. The clear import of Section 601 was that discrimination by federal grantees was forbidden, with the specific area and type of discrimination to be determined by the different funding agencies, pursuant to regulations issued by each agency. Justice Stevens noted: “The plain meaning of the text reveals Congress' intent to provide the relevant agencies with sufficient authority to transform the statute's broad aspiration into social reality.” Sandoval, 121 S.Ct. at 1530. There was no dichotomy or conflict between the two sections, requiring them to have different legal effect. Justice Stevens explains:

The majority’s statutory analysis does violence to both the text and the structure of Title VI. Section 601 does not stand in isolation, but rather as part of an integrated remedial scheme.
Section 602 exists for the sole purpose of forwarding the anti-discrimination ideals laid out in § 601. The majority’s persistent belief that the two sections somehow forward different agendas finds no support in the statute. Nor does Title VI anywhere suggest, let alone state, that for the purpose of determining their legal effect, the “rules, regulations, [and] orders of general applicability” adopted by the agencies are to be bifurcated by the judiciary into two categories based on how closely the courts believe the regulations track the text of § 601. Sandoval, 121 S.Ct. at 1529.

The Sandoval rule can be easily corrected by legislation, since the decision simply interpreted the language of a federal law, which can be changed. Congress could amend Title VI by providing that “any person aggrieved by the violation of any regulations issued pursuant to this Act may bring a civil action in an appropriate federal court for injunctive relief and damages. Such actions may include suits challenging any discriminatory practice or policy which will be deemed unlawful if it has a disparate impact upon persons protected by this title.”

4. Extending the Attorneys’ Fees Award Act in Light of Buckhannon

There is no doubt that the attorneys’ fee provisions of the civil rights laws were a significant addition to the protection of individual rights. Without that provision, there was little incentive for lawyers to take cases attacking discriminatory practices by private companies or public authority. Most suits brought by those protected by the laws were not attractive to private counsel, since they would not produce large fees commensurate with the effort to fight large corporations or governmental bodies. Justice Ginsburg explained the background to the attorneys’ fees award act in her dissent in the case:

Congress enacted § 1988. to ensure that nonaffluent plaintiffs would have “effective access” to the Nation’s courts to enforce civil rights laws. Id., at 1. Buckhannon, 121 S.Ct. at 1857 (some internal citations omitted).

Every Circuit except the Fourth had held that the principles behind the attorneys’ fee statute require that plaintiffs be awarded their fees as long as they obtained relief through voluntary action by the defendant, whether or not the court entered an enforceable court order.

Under the catalyst rule that held sway until today, plaintiffs who obtained the relief they sought through suit on genuine claims ordinarily qualified as “prevailing parties” so that courts had discretion to award them their costs and fees. Persons with limited resources were not impelled to “wage total law” in order to assure that their counsel fees would be paid. They could accept relief, in money or of another kind, voluntarily proffered by a defendant who sought to avoid a recorded decree. And they could rely on a judge then to determine, in her equitable discretion, whether counsel fees were warranted and, if so, in what amount. Buckhannon, 121 S.Ct. at 1857.

The majority opinion was concerned that a defendant might agree to change its policies for fear that it might be held liable for high attorneys fees if it finally lost the case. But it is rare for private companies or public institutions to be so fearful of litigation from the typical civil rights plaintiffs. Indeed, the danger is the opposite. The effect of the Buckhannon decision was that a government body could tenaciously litigate a case until the last minute, then throw in the towel and evade the requirement of paying attorneys’ fees. This rule will certainly discourage lawyers from taking even meritorious cases if they cannot be assured of being paid when the case is over.

Justice Ginsburg pointed out other effects of the Court’s decision:

In opposition to the argument that defendants will resist change in order to stave off an award of fees, one could urge that the catalyst rule may lead defendants promptly to comply with the law’s requirements: the longer the litigation, the larger the fees. Indeed, one who knows noncompliance will be expensive might be encouraged to conform his conduct to the legal requirements before litigation is threatened. . . . No doubt, a mootness dismissal is unlikely when recurrence of the contro-
versy is under the defendant's control. But, as earlier observed, . . . , why should this Court's fee-shifting rulings drive a plain-
tiff prepared to accept adequate relief, though out-of-court and unrecorded, to litigate on and on? And if the catalyst rule leads defendants to negotiate not only settlement terms but also al-
lied counsel fees, is that not a consummation to applaud, not deplore? Buckhannon, 121 S.Ct. at 1858.

The Buckhannon case can be changed simply by Congress' amending the civil rights attorneys' fee law and other statutory fee provisions to provide that a person is considered a prevailing party entitled to fees if three conditions are met: (1) the plaintiff obtained at least some of the benefit sought in the case; (2) the suit brought by the plaintiff was color-
able, not insubstantial, and had a "substantial basis in fact and law;" and (3) the lawsuit "was a substantial factor" in the remedial action taken by the government. That was the rule generally applied by the lower courts before the Supreme Court decision.

C. STATE LAW CHANGES

We also note that the States can take independent action to protect their own employees from discrimination, particularly to afford protec-
tion against age and disability discrimination. They can do this in two ways: (1) explicitly waiving their 11th Amendment immunity so that they can be sued in federal court for violations of federal anti-discrimination laws, such as the ADEA and the ADA; (2) amending their own anti-dis-
crimination laws by affording equivalent relief to their employees as is provided for by federal law.

1. Waiver of 11th Amendment immunity:

   There is no doubt that a State can waive its 11th Amendment immu-
nity. The Supreme Court has interpreted various state law provisions as providing for such waiver. Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 115 S.Ct. 394 (1994). However, the Court has emphasized than any such waiver must be very explicit in its terms. A State will be deemed to have waived its immunity "only where [such waiver is] stated by the most express language or by such overwhelming implication from the test as [will] leave no room for any other reasonable construction." Edelman v. Jordan, 415 U.S. 651, 673, 94 S.Ct. 1347, 1361 (1974).

   One of the problems in waiving a State's 11th Amendment immunity is that in some States, sovereign immunity protection is contained in the State constitution. Thus, both Alabama and Arkansas have constitutional

This type of protection cannot be eliminated by a statute passed by the State legislature. Thus, it is doubtful that Alabama or Arkansas could easily waive its 11th Amendment immunity simply by enacting a law to that effect. Constitutional change would be necessary.

Soon after the Supreme Court’s decision in *Kimel*, three states (California, Rhode Island and Maine) proposed to waive their 11th Amendment immunity in cases involving federal anti-discrimination laws. California’s proposal permits the state to be sued in federal court “by persons seeking to enforce rights or obtain remedies afforded by the following federal laws and their implementing regulations.” Included in the list is the Fair Labor Standards Act (the law involved in *Alden*), Title VII, the ADEA, the ADA, the Family Medical Leave Act (held unconstitutional under the 11th Amendment in lower federal court cases, see *Laro v. New Hampshire*, 259 F.3d 1 (1st Cir. 2001)). Cal. S.B. 1196 (2001). The waiver extends to any “public agency” defined as “the state, its agencies, officers and employees, and its official subdivisions. . . .”

The Rhode Island proposal is somewhat narrower, limiting the waiver to suits by state employees “and any other proper persons.” Since the title of the bill is “consent to suit by state employees under certain federal laws,” it is likely that “other proper persons” are persons related to the state employees. The waiver would generally cover the same list of laws as California. The waiver would be effective only when Congress has indicated its desire that the States be subject to federal law. Waiver will be afforded when the “United States has indicated its intent that the statutes be applicable to the states.”

The Rhode Island bill also adds a provision that the waiver is in “addition to any waivers of immunity or consents to be sued previously established by statute or judicial interpretation.” This would prevent any negative implication against waiver of immunity to be drawn from the exclusion of other federal laws from the scope of the current proposal.

The Maine bill is the most restrictive, limiting waiver only to suits by “employees, former employees and prospective employees.” It also would limit waiver to the ADEA, the ADA, the FLSA, Title VII and federal law relating to suits for injury or death of a seaman.

State waivers should be careful not to limit the class of plaintiffs to whom the waiver applies. And a waiver should cover a broad range of federal anti-discrimination laws, including those whose validity may now
be in doubt, such as the Family Medical Leave Act, and should not create any negative implication that sovereign immunity is restricted in other contexts. As yet, no State has passed any waiver of immunity to deal with the Kimel and Garrett cases.

2. Broadening the Protection of State Anti-Discrimination Laws

Finally, the States should take steps to broaden the protection of their own laws against discrimination. This would include insuring that a State's own laws provide identical relief to state employees to that afforded by federal law. Thus, there should be provision for jury trials, punitive or double damages and attorneys' fees. It is impossible to accept the proposition that state employees are second-class citizens subject to watered-down protection against discrimination.

August 2001
The Committee on Civil Rights

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** Took no part in the preparation or consideration of the report.
Conditions of Confinement
on the Use of Stun Shields
by the New York City
Department of Correction

The Committee on Corrections

I. STUN TECHNOLOGY

Prison and police agencies use an array of electro-shock devices to control people through the application of disabling electric current. The technology includes stun guns (devices that apply high voltage electrical pulses), stun batons (a variant of stun guns, which allow users “to maintain more distance from your attacker”1), Tasers (air guns that launch barb-tipped flexible wires to administer shocks from a distance), stun belts (worn by subjects in, for example, courtroom settings, capable of being activated remotely) and stun shields (fashioned like police riot shields, but with electrodes that allow users to apply electric shock).2


2. Stun devices “require little physical contact between the operation and the recipient of the shock.” One author noted that “one of the device’s major selling points is that provides guards with psychological dominance over prisoners because those prisoners can seldom be sure who is administering the shock or when or for what offense it might be delivered.” Therefore, the officer “need not look into the eyes of the victim.” William F. Schulz, Cruel and Unusual Punishment, The New York Review of Books, April 24, 1997, http://web.syr.edu/~tckerr/cruel.html (last visited January 16, 2001).
Stun devices rely on high voltage. Air Tasers are rated at 50,000 volts. Stun guns and batons typically use from 80,000 to 500,000 volts. An online vendor sells a 5,000-volt stun gun, “the flagship of the Stun Master line of quality stun guns.” Its website adds, “[a]ffectionately referred to as the ‘Stun Monster,’ this stun gun needs to be seen to be believed.”

Stun devices are intended to subdue people. According to one vendor, “high voltage pulses are applied to a person’s muscles causing them to be vigorously exercised,” resulting in “instant fatigue, weakness and loss of balance,” along with lethargy and disorientation for several minutes. Another vendor offers this description of the science involved: the device “dumps its energy into the muscles at a high pulse frequency that makes the muscles work very rapidly, but not efficiently.” This “depletes blood sugar by converting it to lactic acid all in just seconds,” making it difficult for the subject to move or function. “At the same time, the tiny neurological impulses that travel throughout the body to direct muscle movement are interrupted,” causing disorientation and loss of balance and leaving the subject “in a passive and confused condition for several minutes.”

The New York City Department of Correction (“DOC”) uses electric technology to control inmates in its Central Punitive Segregation Unit (“CPSU”; colloquially, the “Bing”) at Rikers Island. The DOC Instructor's Guide for use of the stun shield identifies its “physical effects” as “send-
ing electricity through [the body] until the subject loses muscular control and can be controlled by staff.”9 The Guide also identifies non-recommended targets of the body as those upon which the use of the shield may cause serious injury:

The shock or arc may cause injury to the eyes; [the testicle and scrotum] area is extremely sensitive. The shock may cause intense pain and lead to serious injury; mere application of the shield to the spine may cause injury and as such should be avoided; Applying the shield and amperage against an open wound may cause intense and unnecessary pain to the subject because an open wound lacks skin which would act as a shock absorber for the exposed nerve endings.10

The Guide cautions correction staff to avoid allowing the shield to make contact with a woman’s breasts or the stomach of a pregnant prisoner.11

The Department’s adoption of stun technology was prompted by its interest in finding ways of reducing the likelihood of violent confrontation in the jails. Since stun shields can subdue an inmate who is behaving aggressively with minimal contact between the officer and the inmate, the likelihood of one or both becoming injured is significantly less than when an officer must use direct physical force in restraining the inmate. A demonstration of the activation of the shield, with its accompanying electrical sparking, may persuade the recalcitrant inmate to comply even without the need for direct application or other use of physical force. Former Commissioner Bernard B. Kerik, who was instrumental in the Department’s acquisition of the shields in 1998, declared in 1999 that the devices had “really prevented a lot of injuries.”12 Indeed, the Department was particularly motivated to reduce injuries and violent incidents in its facilities at that time. The City of New York had recently settled a class action suit brought to challenge use of force in the CPSU, which had been a frequent site of use of force incidents.13 As part of that settle-

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10. Id at 21-22.
11. Id
ment, the City stipulated to the adoption of a new “use of force” policy designed to minimize physical confrontations between inmates and correction staff and limit the degree of force used to restrain inmates.¹⁴

Not surprisingly, vendors contend that stun technology is safe. According to one vendor, “[M]edical studies have shown TASER technology leaves no long term injury. After several minutes, a suspect stunned with an AIR TASER recovers without any known long term effects.”¹⁵ Another claims that “there is no significant effect on the heart and other organs.”¹⁶

Other sources, as well as the experience of use, suggest that stun weapons cause loss of muscular control, pain and potentially serious injury.¹⁷ Stun guns have been found to be “inherently dangerous” weapons under the Federal Aviation Act of 1958. United States v. Wallace, 800 F.2d 1509 (9th Cir. 1986). According to the Second Circuit Court of Appeals, under the United States Sentencing Guidelines, Sections 1B1.1, comment (n.1), 2D1.1(b)(1), 18 U.S.C.A.App. (1990), stun guns are “dangerous weapons”:

“Dangerous weapon” is defined as “an instrument capable of inflicting death or serious bodily injury.” “Serious bodily injury” is defined as “injury involving extreme physical pain or the impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention.” . . . The incapacitation caused by a stun gun constitutes sufficient “impairment” . . . .

United States v. Agron, 921 F.2d 25, 26 (2d Cir. 1990) (alteration in original) (citations omitted). The devices have been treated as “dangerous weapons” under the statutes and regulations governing use of United States Postal Service property, 18 U.S.C.A. Section 930 (1990) and 39 C.F.R.

¹⁴. Id. at *3.
¹⁷. Amnesty International describes the effects of stun weapons, including shields, as follows: “Depending on the application and the individual, immediate effects include severe pain, loss of muscle control, nauseous feelings, convulsions, fainting, and involuntary defecation and urination. Longer-term effects from electric shock torture can reportedly include muscle stiffness, impotence, damage to teeth, scarring of skin, hair loss, as well as post-traumatic stress disorder, severe depression, chronic anxiety, memory loss and sleep disturbance. In cases where there are physical signs of electric shock torture such as skin reddening and scarring, these usually fade within some weeks.” Amnesty International, Arming the Torturers: Electro-Shock Torture and the Spread of Stun Technology, 2-3 (March 4, 1997, AI Index: ACT 40/01/97).

Anecdotal evidence and commentary about the use of stun shields is sparse.\(^\text{18}\) In December 1995, a corrections employee of the Texas Department of Criminal Justice received two 45,000-volt stun shield shocks as part of a required training exercise. Shortly after the second shock, he collapsed and died. The judge who conducted an inquiry reported that the autopsy showed the cause of death as cardiac dysrhythmia due to coronary blockage following the shock.\(^\text{19}\)

Stun shield abuse has been claimed at the Jackson County Correctional Facility in Florida between August 1997 and July 1998. The institution held INS detainees because INS facilities were full. The INS transferred all 34 detainees from this jail in July 1998. Several detainees gave descriptions of being attacked with a stun shield:

> Officers came at me with an object about 3 feet high and about 1½ feet wide, it's got wavy lines running through it, it's like a shield. And they pushed that against my body and when they hit me with that I felt nothing but electricity running through my body. It made an electrical noise. They hit me with this twice, the first time they hit me with this I buckled, the second time I fell to the floor. I was hollering up a storm, screaming for help but nobody helped me.

...  

> We saw them shock the [Haitian] detainee on his body with an electric shield, also with an electric gun . . . The gun has sticks by which the electricity was released . . . The Haitian detainee was shocked about three times. While being shocked, the Haitian detainee was handcuffed, his hands to his legs, laying on his side on the floor.

> They told me to lay down on the concrete slab, it's a bed made out of concrete. There are four rings at each corner . . . They told me to lay on my stomach and when I asked what for, [an officer] pushed me down and put the shield on me and electrocuted me. I couldn't move my muscles. They handcuffed my

\(^{18}\) A large number of incidents involving problems with other stun devices have been reported and are discussed infra.

hands to the rings and then they put shackles on my feet and put handcuffs around the shackles on my feet to insert them in the rings. They hit me with the shield one time and left it on. I thought I was being killed. Then they left me for about 17 hours. When I told them I need to urinate they told me “when you were a child did you never piss on yourself.” And that’s what I had to do.20

There is substantial anecdotal material showing problems with the use of other stun technology. Reports of the apparent misuse of stun technology are widespread. Perhaps the most publicized incident happened in Long Beach, California, in June 1998. A municipal court judge decided that a defendant, who had been required to wear a stun belt, was “being disruptive at the defense table. The judge issued an order to a court officer, and, by remote control, [Ronnie] Hawkins was zapped with 50,000 volts of electricity from a stun belt that guards had placed around his waist before he entered the courtroom.”21 Hawkins sued, and on January 25, 1999, a federal judge issued a preliminary injunction against the use of stun belts in Los Angeles County courts.22 The court found that the use of stun belts, especially where a defendant had chosen to represent himself, would have a “chilling effect” because the defendant “might be afraid to object to a judge’s ruling for fear of being shocked.” In response, Dennis Kaufman, the president of Stun-Tech, Inc., a large manufacturer of stun belts, said that “any use of a stun belt to punish a defendant would be inappropriate [because] the belt was intended only to stop escapes and assaults.” He said that: “The belt is not to be used for punishment. If it is, consequently it is clearly a violation of civil rights as well as a violation of what the belt was designed for.”23

This incident drew national attention to the fact that local laws permit the use of stun belts “by corrections systems in 20 states, by local law enforcement officers in 30 states and by Government agencies including the Federal Bureau of Prisons.” In addition, stun belts and stun shields are “actually used rather than merely authorized” in “more than 130 jurisdictions across the country,” according to Amnesty International. As
of 1999, only Massachusetts, Michigan and New Jersey explicitly prohibited the belt.  

Notwithstanding vendor claims that stun technology is benign, injuries due to stun technology are not uncommon. One study reported at least three deaths from cardiac arrest among 218 patients brought to a Los Angeles emergency clinic between 1980 and 1985 after being shot by police with Taser guns. The cause of death in these cases was heart failure caused by a sharp increase in the toxicity of the drug phencyclidine (PCP) which the patients had ingested. In July 1996, a 29-year-old woman died of cardiac arrest after being shot with a Taser by Pomona, California police.  

An inmate at the Kenton County Jail in Kentucky died under circumstances that indicate he may have been shocked just before his death. On January 29, 1999 a 48-year-old mentally ill inmate died after a confrontation with guards who were attempting to remove him from an isolation cell to take him to a hospital for a psychiatric evaluation. The original report of one of the officers involved (discovered after it had been thrown away) indicated that the inmate had been “tazed” with a stun gun during the attempted “cell extraction.” The reports of the incident are contradictory—several officers claimed that an inactivated shield was used—and prison officials claimed that the inmate died because he was overweight and had a heart condition.  

In July 2000, an inmate at the Wallens Ridge State Prison in Virginia died “five days after being shocked repeatedly with a stun gun and then strapped to a bed.” During the incident, the inmate was “shocked ‘more than once’ during a struggle with guard’s at the prison’s infirmary.”

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24. Id.
25. Arming the Torturers, supra note 17, at 21.
26. Id. at 13.
28. Id.
30. Hammack, supra note 29.
inmate was put in five-point restraints and left in a medical cell where he was later found unconscious. He died five days later. The device used was an Ultron II, “a hand-held stun gun capable of delivering 50,000 volts.” In May 2001, an autopsy report concluded that the inmate died of cardiac arrhythmia from stress while restrained after stunning. An earlier review by the Virginia Department of Corrections found that the stun gun had nothing to do with the inmate’s death. Following the autopsy report, however, Virginia prison officials declared a state-wide moratorium on the use of the Ultron II. The director of the State Department of Corrections, Ron Angelone, told the Virginia Crime Commission that at Red Onion (another supermax facility in Virginia), “guards used [stun] devices 95 times last year” and had deployed them 35 times,” through early July 2000.

Another fatal incident involving stun technology occurred in Florida and resulted in the arrest of four prison guards. In July 1999, death row inmate Frank Valdes was fatally beaten when he “resisted being moved to a new cell” at Florida State Prison. “As many as nine prison guards, armed with chemical agents and stun shields, clashed with him in an area reserved for the meanest Death Row inmates, then known as the ‘X-Wing.’ An autopsy revealed Valdes’ ribs were broken, his testicles were swollen and he had boot marks on his body.” The officers claimed that after Valdes had kicked and punched them, they subdued him with chemical sprays, an electrified shield and their fists. Seven months later, four veteran corrections officers were charged with his murder.

A Justice Department investigation found that the civil rights of an inmate in the Kenton County Jail in Kentucky were violated after he alleged that guards “had used excessive force in a confrontation with him in April 1998, including by electro-shocking him more than a dozen times with a stun gun, including after he had been shackled.” A juvenile in the jail alleged that in December 1998 he was beaten, kicked, verbally

31. Id.
33. Hammack, supra note 29.
34. Phil Long and Steve Bousquet, Guards Charged with Murder: Inmate’s Beating on Death Row Leads to 4 Arrests, Miami Herald, February 3, 2000, http://www.herald.com/content/archive/news/valdez/docs/035155.htm. If the allegations are true, the case suggests that the use of the shield can render an inmate defenseless to subsequent excessive use of force.
abused and shot twice with a stun gun after he refused to move from an isolation cell. In March 1999, another Kenton inmate filed a lawsuit alleging that he was shocked with a stun gun while hogtied in a cell. The inmate reported that he was yelling for help because he was in pain and having trouble breathing and officers repeatedly stunned him to make him stop yelling. 36

There are other reports of the use of stun technology in prisons. For example, in 1996 in Muncy Prison, Pennsylvania guards used a stun shield to control a woman who had become distraught after a warrant had been read for her execution. 37

Accidental shocks have also been reported. In 1993, “Edward Valdez walked out of [a] San Diego courtroom into the hallway where jurors were standing around waiting. Suddenly he screamed and crashed to the floor. ‘He was out for about a minute,’ said the prosecutor. ‘It was very effective.’” 38 The defendant’s collapse was caused by the accidental discharge of a stun belt that he had “chosen to wear under his clothing rather than appear in handcuffs and chains before the jury.” 39

It appears that stun technology is often used for punishment. A study by the Justice Department at the Daviess County Detention Center in Owensboro, Kentucky, found that the jail staff “misuse[d] and abuse[d] weapons such as pepper spray, stun shields, and stun guns, resorting to them early and often, for both management and punishment.” This report cited an incident in which a stun gun was used to awaken an inmate who had “passed out.” The report also found that stun guns (and pepper spray) were used routinely to “control uncooperative youth and break up fights.” 40

II. STUN SHIELD USE IN NEW YORK CITY

Any inmate in DOC custody who is found, after a hearing—presided over by a captain assigned to a DOC-wide unit rather than an officer at the facility where the allegedly offending conduct occurred—to have committed an infraction, as defined in the Inmate Rule Book, may be sent to

36. Id. (As of 1999, the results of a Justice Department investigation were still pending.)
37. Id
38. Schulz, supra note 2.
39. Id
the CPSU. Infractions include, among others, assaulting staff or other inmates (with or without weapons), starting fires, destroying City property, disobeying a direct order, and verbally abusing staff.

The DOC has acquired ninety 50,000-volt stun shields. The DOC uses the stun shield for “cell extractions” at the CPSU. A cell extraction involves the use of force to remove a recalcitrant inmate from a cell. Cell extractions occur for a variety of reasons, including when an inmate refuses to come out of the cell (e.g., for a court appearance or when inmates are mandated to be out of their cells), when an inmate refuses to cooperate with a search, when an inmate starts a fire or otherwise destroys property within the cell, when institutional staff believe that an inmate has contraband in the cell, when an inmate refuses to return sanitary supplies, and, significantly, when an inmate refuses to allow the cell-door food slot to be closed. The DOC used the shield seventy-four times in the year and a half following its initial deployment.

DOC guidelines for the use of the stun shield permit its use in a number of enumerated situations. The relevant DOC Directive authorizes use in the following situations:

1. To defend oneself or another employee, inmate or visitor from a physical attack or from an imminent physical attack.
2. To prevent the commission of a crime, including escapes.
3. To effect an arrest when resistance is encountered.
4. To enforce Department/facility rules and Court Orders.
5. To prevent serious damage to property.
6. To prevent an inmate from inflicting self-harm.
7. To effect a cell extraction during any search operation when an inmate refuses to be escorted out of the area.

41. Drew, supra note 12.

42. Inmates in the CPSUs are fed on trays delivered by correction officers through horizontal slots in the cell door. DOC practice requires food slots to be closed to reduce the risk that inmates will throw feces, urine, or other noxious substances at officers. Sometimes, an inmate who wishes to have a superior officer come to the cell location, for real or perceived grievances, will place an arm through the door, making it impossible to close. A newspaper story reported that officers will permit no more than one cell food slot to be open: “The mantra for maintaining control in the Bing is ‘Two slots, everything stops.’” Jennifer Gonneman, Roaming Rikers, Village Voice, December 19, 2000, http://www.villagevoice.com/issues/0050/gonneman.shtml (last visited July 9, 2001).

43. Drew, supra note 12.

The Directive authorizes staff to use the shield for up to six seconds, with “[d]esired effects” of “possible unconsciousness” as well as “[f]ull takedown” and “state of immobilization.” Under the Directive, the shield may not be applied more than twice. 45

The Directive declares that the following acts are “strictly prohibited”:

1. Stunning an inmate to discipline him/her for any reason.
2. Stunning an inmate when grasping the inmate to guide him/her, or a push, would achieve the desired result.
3. Stunning an inmate after he/she has ceased to offer resistance.
4. Stunning an inmate restrained by a mechanical device, except as a last resort where there is no practical alternative available to prevent serious physical injury to staff, visitors or inmates. 46

The Directive warns staff to avoid contact with an inmate’s head, but “should the shield inadvertently be pressed against the head, electronic use shall be immediately discontinued by releasing the trigger and repositioning the shield at a different angle.” The Directive cautions staff not to use the shield “in conjunction with or after chemical agents have been dispersed [because it] emits sparks which could, under the right circumstances, cause ignition of the chemical agent.” The Directive also prohibits the use of the shield when it might come into contact with water. 47

The Directive prescribes that in “all anticipated situations and where circumstances allow,” medical staff will be asked before use whether the inmate has any medical contraindications. If so, the shield may not be employed unless a supervisor determines that use is “reasonable to prevent death, serious injury or a serious threat to the safety or security of the facility.” 48 Correctional Health Services, the arm of the New York City Health and Hospitals Corporation with authority over prison health, lists pregnancy, asthma, hypertension, cardiac disease, the presence of a pacemaker, seizure disorders, and diabetes as medical contraindications. 49 Any

45. Id. at ¶ IV(F).
46. Id. at ¶ III(D).
47. Id. at ¶ IV(B), (E), (F).
48. Id. at ¶ IV(C).
49. New York City Health and Hospitals Corporation, Correction Health Services, Policy and Procedure, Medical Constraints for the Use of the Stun Shield and Chemical Agents, June 29, 1997, Attachment “A.” See also Memorandum of Audrey Compton, M.D., Acting Executive Director, Correctional Health Services, July 2, 1997: The purpose of the policy and procedure “is to protect our patients.”
inmate on whom the shield is used “shall immediately be brought for medical attention.” The Directive also prescribes that use of force with the shield be recorded with a hand-held video camera “under all circumstances.”

The correction consultants monitoring the use of force by DOC staff in the CPSU have made the following findings and observations with respect to the use of the shield in the CPSU to the United States District Court overseeing compliance with the court order following the settlement of Sheppard v. Phoenix:

- The consultants noted that most applications of force in the CPSU involve an inmate’s refusal to close the food slot “as a means of protest.”
- Many cell extractions in the CPSU, which are precipitated by an inmate’s refusal to close his food slot to protest the failure to provide mandated services, could be avoided by appropriate supervisory intervention.
- Correction staff used both pepper spray and the stun shield on several prisoners, in violation of their own Directive; in one case a captain lost one compensation day as punishment, but in the other case there was no finding of wrongdoing or discipline imposed. 2d Report at 5, 12. In the incident in which no wrongdoing was found, the inmate was in handcuffs, on the ground, when he was struck with pepper spray and the stun shield.
- Correction staff used the stun shield on a non-resisting inmate who can be seen on a videotape laying motionless on the cell floor, surrounded by five officers, when the captain directs

51. Id., ¶ I (E).
52. The consultants are experienced corrections professionals. One, Norman Carlson, for many years was Director of the Federal Bureau of Prisons.
56. Id. at 20.
staff to apply the shield to him, apparently to induce him to move his arm behind his back for cuffing. No wrongdoing was found.\textsuperscript{57}

- Correction staff used the stun shield to extract an inmate. When he was seen by medical personnel after the extraction, they noted that “patient found lying face down on a stretcher unconscious. Blood from mouth and bruise to right temporal area. Patient was awakened after twelve minutes. Also, tenderness and swelling to right third finger, decreased range of motion, headaches, dizziness and abrasion to right elbow.”\textsuperscript{58}

- The consultants identified two instances in which DOC officers used both the stun shield and a chemical agent (Oleoresin Capsicum/Pepper Formula, or “pepper spray”), in violation of the policy regarding chemical agents.\textsuperscript{59}

- The stun shield was used during the course of a cell extraction. Other than the officer who handled the shield, no other member of the team, including the supervising captain, reported the use, nor did anyone indicate whether medical personnel previously had been queried to determine if the inmate had any medical contraindications.\textsuperscript{60}

Members of the committee reviewed DOC videotapes of several cell extractions using the stun shield. In addition to some issues of the kinds addressed by the consultants, the committee noted at least one instance in which the required videotaping showed nothing of critical moments of the process because the videotaping officer, apparently volitionally, placed himself at an angle where the inmate could not be seen. In another videotape reviewed by the committee, the required post-use medical examination of the inmate, conducted at the institutional clinic, consisted of nothing more than a physician asking the inmate how he was. There was no physical examination nor checking of vital signs; there was no further discussion.

Under DOC procedures, a cell extraction is a “use of force” ("UOF"),
therefore a reportable incident. The DOC Investigation Division, an internal DOC unit, reviews instances of UOF. It is unclear whether, and if so to what extent, its findings have affected the use of the stun shield by the DOC.

III. THE LAW

Incarceration creates a tension between the need to control and secure and accommodation for individual rights. The dilemma is especially sensitive in correctional systems such as in New York City, where the majority of the inmate population are pre-trial detainees who have not yet been convicted of the crimes for which they are incarcerated. See generally Bell v. Wolfish, 441 U.S. 520, 536-41, 99 S.Ct. 1861, 60 L. Ed. 2d 447 (1979). As the following analysis demonstrates, stun shield use, like other applications of force, may create liability for the staff who administer it, their supervisors, and potentially the municipality.

A. The Eighth Amendment


The Eighth Amendment test involves both subjective and objective elements. Wilson v. Seiter, 501 U.S. 294, 298-99, 111 S.Ct. 2321, 115 L.Ed. 2d 271 (1991). A defendant must be shown to have had the requisite level of culpability, that is, to have engaged in actions characterized by “wantonness.” Id. To prove the use of excessive force in violation of the Eighth Amendment, a prisoner must establish that the force was used “maliciously and sadistically” for the purpose of inflicting pain, rather than in a “good

61. The DOC inmate census on May 29, 2001 was 14,612, 97.8% of currently open and available capacity. The average daily population for the first two months of 2001 was 14,533, with the following characteristics:

<table>
<thead>
<tr>
<th>Description</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-trial detainees</td>
<td>10,357</td>
<td>(71%)</td>
</tr>
<tr>
<td>State prisoners (including, among others,</td>
<td></td>
<td></td>
</tr>
<tr>
<td>sentenced to felony terms of more than a year and</td>
<td>1,663</td>
<td>(11%)</td>
</tr>
<tr>
<td>awaiting transfer to state prisons)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>City sentenced prisoners</td>
<td>2,514</td>
<td>(17%)</td>
</tr>
</tbody>
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faith effort to maintain or restore discipline.” Hudson v. McMillian, 503 U.S. 1, 4-5, 7, 112 S.Ct. 995, 117 L.Ed. 2d 156 (1992); see also Davidson v. Flynn, 32 F.3d 27, 30 (2d Cir. 1994) (“The key inquiry under Hudson and its precedents is whether the alleged conduct involved ‘unnecessary and wanton infliction of pain,’” quoting Hudson, 503 U.S. at 8). The objective component of the Eighth Amendment test turns upon whether the challenged conduct violates “contemporary standards of decency,” and “[w]hen prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated.” Hudson, 503 U.S. at 9.

The determination of whether a prison guard has crossed the constitutional line when force is used must focus on such factors as the need for the application of force, the relationship between the need for the application of force and the amount of force used, the threat reasonably perceived by prison officials, any efforts made to temper the severity of the forcible response and the extent of injury inflicted. Whitley, 475 U.S. at 321. Under the Hudson standard, a prisoner need not have sustained a “serious” or “significant” injury to establish an Eighth Amendment claim, Hudson, 503 U.S. at 7-9, provided that the force used was more than de minimis, or involved force that is “repugnant to the conscience of mankind.” Id. at 9-10.

Justice Blackmun’s concurrence in Hudson underscored the necessity to reject a “significant injury” test (“e.g. injury that requires medical attention or leaves permanent marks,” 503 U.S. at 13) in prison use of force cases, where the instruments of force (“various kinds of state-sponsored torture and abuse,” id.) are often chosen precisely to avoid leaving telltale injuries:

[The constitutional prohibition of “cruel and unusual punishments” then might not constrain prison officials from lashing prisoners with leather straps, whipping them with rubber hoses, beating them with naked fists, shocking them with electric currents, asphyxiating them short of death, intentionally exposing them to undue heat or cold, or forcibly injecting them with psychosis-inducing drugs. These techniques, commonly thought to be practiced only outside this Nation’s borders, are hardly unknown within this Nation’s prisons. See, e.g., Campbell v. Grammar, 889 F.2d 797, 802 (8th Cir. 1989) (uses of high-powered fire hoses); Jackson v. Bishop, 404 F.2d 571, 574-5 (8th Cir. 1968) (use of the “Tucker telephone,” a hand-held cranked device that generated electric shocks to sensitive body parts, and flogging with leather strap).

503 U.S. at 14.
While the Eighth Amendment’s protection does not apply “until after conviction and sentence,” Graham v. Connor, 490 U.S. 386, 392, n.6, 109 S.Ct. 1865, 104 L.Ed. 2d 443 (1989), pre-trial detainees are protected from excessive force amounting to punishment by the Due Process Clause of the Fourteenth Amendment. Id. at 395 n.10; Bell v. Wolfish, 441 U.S. at 535 (1979); Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973). Nevertheless, the Hudson analysis has been applied to excessive force claims brought under the Fourteenth Amendment. United States v. Walsh, 194 F.3d 37 (2d Cir. 1999).62 Riley v. Dorton, 115 F.3d 1159 (4th Cir. 1997), Valencia v. Wiggins, 981 F.2d 1440, 1446 (5th Cir. 1993).

Under the Hudson standard, serious or even deadly force would not violate the Constitution if the force were necessary and the officers who applied it did not intend to cause needless harm. Whitley v. Albers, 475 U.S. 312, 322-26 (use of shotgun in riot situation); Williams v. Kelley, 624 F.2d 695, 698 (5th cir. 1980) (officers not liable for accidentally strangling prisoner while trying to subdue him); Hayes v. Wimberly, 625 F.Supp. 967, 969-70 (E.D. Ark. 1986) (officers not liable for using baton and gas to subdue prisoner armed with broken light bulb). But even when there is some need for force, the use of excessive force violates the Constitution. Martinez v. Rosado, 614 F.2d 829, 830-32 (2d Cir. 1980) (prisoner’s refusal of orders did not justify assault by officers; “We certainly cannot conclude that [the prisoner’s refusal to obey an order and surrender keys] alone would justify a physical assault absent some evidence of physical resistance or some other indication that the degree of force utilized by the officer was proper under the circumstances.”); Hickey v. Reeder, 12 F.3d 754, 758-59 (8th Cir. 1993) (shooting prisoner with stun gun because he refused to clean cell violated Eighth Amendment); Lewis v. Downs, 774 F.2d 711, 714-15 (6th Cir. 1985) (some force justified but striking and kicking handcuffed prisoner was not).

Courts have considered Eighth Amendment challenges to prison of-

62 Before the Court of Appeals’ decision in Walsh, District Courts in this Circuit continued to apply the four-pronged test articulated by Judge Friendly in Johnson v. Glick in cases involving the application of force to pre-trial detainees: (1) the need for the application of force; (2) the relationship between the need and the amount of force used; (3) the extent of injury inflicted; and (4) whether force was applied in good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of inflicting harm.” Johnson, 481 F. 2d at 1033; see, e.g., Rahman v. Philip, 92 Civ. 5349, 1995 WL 679251 at *4 (S.D.N.Y. Nov. 15, 1995) (Stein, J.). Some version of this standard has also been applied by other courts in cases involving detainees. White v. Roper, 901 F.2d 1501, 1507 (9th Cir. 1990); United States v. Cobb, 905 F.2d 784, 787 (4th Cir. 1990).
ficers' utilization of dangerous weapons, including stun guns, shields, Tasers and fire hoses. The use of these weapons has consistently been found not to be a per se constitutional violation but justified when prisoners, by resisting an order, have presented a serious threat to prison security or have physically threatened prison employees. See, e.g., Spain v. Procurier, 600 F.2d 189, 196 (9th Cir. 1979) (tear gas reasonably necessary technique to extract prisoner from cell); Michenfelder v. Sumner, 860 F.2d 328, 335 (9th Cir. 1988) (Taser “used to enforce compliance with a search that had a reasonable security purpose, not as punishment”); Jasper v. Thalacker, 999 F.2d 353 (8th Cir. 1993) (stun gun used permissibly on an inmate who had threatened and lunged at a guard); Caldwell v. Moore, 968 F.2d 595, 602 (6th Cir. 1992) (plaintiff was subdued with a straitjacket and stun gun after having kicked the door of his cell and shouted for hours; “It is not unreasonable for the jail officials to conclude that the use of a stun gun is less dangerous for all involved than a hand to hand confrontation.”); Rubins v. Roetker, 737 F. Supp. 1140 (D. Colo. 1990) (no constitutional violation when plaintiff was subdued with a stun gun after having resisted handcuffing and engaged in disruptive conduct); Collins v. Scott, 961 F. Supp. 1009 (E.D. Tex. 1997) (no constitutional violation when officers used stun shield when plaintiff refused to submit to strip search since the shield was the least restrictive means of maintaining control of the prisoner); Dennis v. Thurman, 959 F. Supp. 1253 (C. D. Cal. 1997) (no constitutional violation when plaintiff suffered broken leg from gas gun firing wooden blocks during cell extraction).

On the other hand, non-lethal weaponry, such as stun guns, Tasers, high-pressure hoses, gas and batons, “though legitimate forms of control in certain circumstances, become instruments of brutality when used indiscriminately against a defenseless prisoner. . . .[A prisoner’s abusive language] assuredly did not justify subjecting him to steady blasts of water from two high-pressure hoses or beating him savagely around the head and body with billy clubs.” Slakan v. Porter, 737 F.2d 368, 372 (4th Cir. 1984); see also Hickey v. Reeder, 12 F.3d 754, 757 (8th Cir. 1993) (use of force on inmate who refused to sweep his cell unconstitutional: “This is exactly the sort of torment without marks with which the Supreme Court was concerned in [Hudson] and which, if inflicted without legitimate reason, supports the Eighth Amendment’s objective component.”); United States v. Tines, 70 F.3d 891 (6th Cir. 1995) (affirming criminal convictions of jail guards for beating and stunning prisoners as punishment for stealing another prisoner’s shoes); Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995) (Eighth Amendment violation found in staff use of force at
Pelican Bay Security Housing Unit based on record of staff beatings, use of “fetal restraints,” use of firearms and use of batons, gas and Taser guns unnecessarily and sometimes recklessly in cell extractions where there was no imminent security risk.\textsuperscript{63}

B. Misuse of stun technology may create civil liability for correctional administrators


Section 1983 provides a private cause of action against any person who, acting under color of state law, causes another person to be subjected to the deprivation of rights under the Constitution or federal law. Section 1983 “contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right.” Farmer v. Brennan, 511 U.S. 825, 841, 114 S.Ct. 1970, 128 L.Ed. 2d 811 (1994) (quoting Daniels v. Williams, 474 U.S. 327, 330, 106 S.Ct. 662, 88 L.Ed. 2d 662 ([1986]). Liability under Section 1983 can only be imposed, however, on those persons who actually cause a deprivation of rights, and “personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983.” Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994).

2. Liability of Correction Supervisors

Supervisors may be liable under Section 1983 for their own actions

\textsuperscript{63} Challenges to the use of “pain compliance techniques” by police officers as violative of the Fourth Amendment have produced similarly mixed results. The Fourth Amendment prohibition against unreasonable seizures permits law enforcement officers to use only such force to effect an arrest as is “objectively reasonable” under the circumstances. Graham v. Connor, 490 U.S. 386, 397, 109 S.Ct. 1694, 104 L.Ed. 2d 443 (1989). Under Graham, the reasonableness determination requires “a careful balancing of the ‘nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing government interests at stake.” Graham v. Connor, 490 U.S. 386, 397, 109 S.Ct. 1694, 104 L.Ed. 2d 443 (1989) (quoting Tennessee v. Garner, 471 U.S. 1, 8, 105 S.Ct. 1694, 85 L.Ed. 2d 1 (1985)). In these cases, the type and amount of force used must be weighed against such factors as the severity of the crime at issue, whether the suspect posed an immediate threat to the officer or others’ safety, and whether the suspect was actively resisting or about to flee. Headwaters Forest Defense v. County of Humboldt, 211 F.3d 1121, 1133 (9th Cir. 2000). The Court of Appeals in Headwaters reversed the District Court’s finding that as a matter of law rubbing pepper spray into the eyes of trespassing nonviolent protesters, and spraying others in the eyes from a distance of one foot, was not excessive. But see Passino v. State, 669 N.Y.S.2d 793, 175 Misc. 2d 733 (N.Y. Ct. Cl. 1998) (use of pepper spray to induce cooperation of belligerent drunk driving arrestee reasonable); Singleton v. City of Newburgh, 1 F. Supp. 2d 306 (S.D.N.Y. 1998) (severity of crime and threat of swallowing contraband sufficient to justify use of pepper spray).
and, under certain circumstances, for the actions of their subordinates. Blyden v. Mancusi, 186 F.3d 252, 264 (2d Cir. 1999). A supervisor's personal involvement may be established by proof of the supervisor's direct involvement in the incident or by failing to avert the wrong after learning of the previous violations through report or appeal. In use of force cases, supervisory liability is most frequently premised on proof that the supervisor "created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue . . . . [A supervisor] may be personally liable if he was grossly negligent in managing subordinates who caused the unlawful condition or event. Wright v. Smith, 21 F.3d at 501.

Jail and prison supervisors can be liable for their "deliberate indifference" to violence by subordinate correction staff. Blyden, 186 F.3d at 265; Madrid v. Gomez, 889 F. Supp. 1146, 1249 (finding liability based on supervisors' "abdicking their duty to supervise and monitor the use of force and deliberately permitting a pattern of excessive force to develop and persist"); Vaughan v. Ricketts, 859 F.2d 736, 741 (9th Cir. 1988) ("administrators' indifference to brutal behavior by guards towards inmates [is] sufficient to state Eighth Amendment claim."64). But "a prison official cannot be found liable under the Eighth Amendment . . . unless the official knows of and disregards an excessive risk to inmate health or safety." Farmer, 511 U.S. at 837.

Thus, a prisoner alleging in a § 1983 action that supervisors caused the violation of his constitutional rights need not plead or prove that these supervisors acted maliciously or sadistically, as he must in any ac-

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64. The "deliberate indifference" required to establish Eighth Amendment liability of a prison official is analytically distinct from the "deliberate indifference" necessary to hold a municipality liable for a constitutional violation. While Farmer v. Brennan requires that an official can be liable only if he had actual knowledge of the danger to plaintiff and failed to act, the Supreme Court held in Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed. 2d 412 (1989), that the government entity can be found liable on proof that policy-making officials failed to take affirmative actions to cure a problem when the conditions or practices objectively violated the Eighth Amendment: "It may happen that . . . the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need." Canton, 489 U.S. at 390. See Farmer, 511 U.S. at 840 ("Canton's objective standard, however, is not an appropriate test for determining the liability of prison officials under the Eighth Amendment as interpreted in our cases."); see also Ricciuti v. New York City Transit Authority, 941 F.2d 119, 123 (2d Cir. 1991) (municipal policy of deliberate indifference may be shown by "evidence that the municipality had notice of but repeatedly failed to make any meaningful investigation into charges that police officers had used excessive force"); Gentile v. County of Suffolk, 926 F.2d 142, 152-53 (2d Cir. 1991) (county liable based on policy of failure to discipline police officers).
tion against the guards who actually applied force, but that the supervisors manifested “deliberate indifference” to his personal safety. Supervisory deliberate indifference, both in individual damage cases and class action injunctive proceedings, is often premised on proof of a pattern of staff’s use of excessive force, supported by evidence that administrators, who had knowledge of the pattern, failed to implement adequate use of force controls, such as meaningful and effective investigative and staff disciplinary operations. Madrid v. Gomez, 889 F. Supp. at 1247-78, n.196; Fisher v. Koehler, 692 F. Supp. 1519, 1551 (S.D.N.Y. 1998), aff’d, 902 F.2d 2 (2d Cir. 1990) (New York City Department of Correction liable on a supervisory deliberate indifference theory).

Prison supervisors who become aware of the danger to a prisoner from records and reports and other evidence, but nevertheless fail to take adequate steps to protect the prisoner from injury, can be held liable. “Knowledge of a substantial risk of serious harm” may be established on proof that “the risk was obvious.” Farmer, 511 U.S. at 825. If prison officials turn a blind eye towards evidence of a pattern of brutality and cover up, or assert that they cannot “establish” what others—including injured prisoners—told them existed, they are nevertheless liable for the constitutional violation. See Vance v. Peters, 97 F.3d 987, 992-93 (7th Cir. 1996); Boyd v. Knox, 47 F.3d 966, 968 (8th Cir. 1995); Jones v. City of Chicago, 856 F.2d 985, 992-93 (7th Cir. 1988). Correction officials cannot “escape liability if the evidence showed that [they] merely refused to verify underlying facts that [they] strongly suspected to be true, or declined to confirm inferences of risk that [they] strongly suspected to exist.” Farmer, 511 U.S. at 843, n.8; see also Madrid, 889 F. Supp. at 1247; Coleman v. Wilson, 912 F. Supp. 1282, 1316-17 (E.D. Cal. 1995) (“Moreover, after five years of litigating, the claimed lack of awareness is not plausible”) (citations omitted); McGill v. Duckworth, 944 F.2d 344, 351 (7th Cir. 1991) (“Going out of your way to avoid acquiring unwelcome knowledge is a species of intent”). Supervisory officials’ failure to implement adequate systems in staff training, investigation and discipline to control and regulate staff use of force, despite their knowledge that such systems were necessary to ensure that staff force was controlled, is evidence of their deliberate indifference. Fisher, 692 F. Supp. at 1564, Madrid, 889 F. Supp. at 1251, Ruiz v. Estelle, 503 F. Supp. 1265, 1302 (S.D. Tex 1980) (prison officials encourage staff to indulge in excessive physical violence by rarely investigating reports of violence and failing to take disciplinary action), aff’d in part, 679 F.2d 1115 (5th Cir. 1982), amended in part, vacated in part on other grounds, 688 F.2d 266 (5th Cir. 1982); Estelle v. Johnson, 37 F. Supp. 2d 855, 940 (S.D. Tex.)
1999) (denying motion to terminate judgment in Ruiz v. Estelle) ("The extent to which excessive force is used in TDCJ, combined with the inability or failure of the prison system to control use of force incidents, reflects what can only be described as an affirmative management strategy to permit the use of excessive force for both punishment and deterrence. It is clear that while IAD goes through the motions of filing paperwork on cases, it seldom finds officer misconduct. The result is to send a clear message to staff that excessive force will be tolerated.").

3. Prison Litigation in New York City

The Sheppard case was settled with the entry of a judgment on consent which was acknowledged by the defendants to be “necessary to correct violations of the federal rights of the plaintiff class.” (Stipulation of Settlement, July 10, 1998). Sheppard led to federal and state criminal prosecutions of correction officers and supervisors, and documented a pattern of correction officer misconduct and cover-up in the unit. As noted above, two consultants, jointly retained by the parties—former Director of the Federal Bureau of Prisons Norman A. Carlson and Steve J. Martin—have been advising the court supervising compliance with the Sheppard order for the past three years, monitoring and reporting on questionable use of force incidents, including some involving the stun shield.65

4. The Prison Litigation Reform Act
In 1996, Congress passed and the President signed the Prison Litigation Reform Act of 1995 ("PLRA").66 The PLRA provides: "No Federal civil
action may be brought by a prisoner confined in a jail, prison or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.” 42 U.S.C. § 1997e(e).

The provision has been construed as applicable only to damage claims, and as so construed, its constitutionality has been upheld. Zehner v. Trigg, 133 F.3d 459, 461-3 (7th Cir. 1997); accord, Harris v. Garner, 190 F.3d 1279, 1288-89 (11th Cir. 1999), reinstated in pertinent part, 216 F.3d 970, 972, 985 (11th Cir. 2000) (en banc); Davis v. District of Columbia, 158 F.3d 1342, 1347 (D.C. Cir. 1998).

Some courts have held that in an Eighth Amendment case, physical injury “must be more than de minimis but need not be significant” (the same standard as the objective element of an Eighth Amendment use of force case) to meet the test of § 1997e(e). Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997); Cole v. Artuz, 2000 WL 760749 *4 and n.2 (S.D.N.Y. June 12, 2000) (holding that claim of painful untreated back injury, aggravated by contraindicated work assignment, met § 1997e(e) test); Luong v. Hatt, 979 F. Supp. 481 (N.D. Tex. 1997) (dismissing claim that guards failed to protect prisoner where there was no evidence of lasting disability or severe pain; cuts, scratches, lacerations and bruises insufficient to satisfy § 1997e(e) test).

The Second Circuit has adopted a more expansive definition of de minimis injury in these cases, and has held a that a claim involving physical impact or intrusion is actionable if the allegations state an Eighth Amendment claim, independent of any evidence of physical harm. Liner v. Goord, 196 F.3d 132, 135 (2d Cir. 1999) (holding that “alleged sexual assaults,” described as “intrusive body searches,” “qualify as physical injuries as a matter of common sense” and “would constitute more than de minimis injury.”). The District Court in Williams v. Goord, 111 F. Supp. 2d 280, 291 n.4 (S.D.N.Y. 2000) applied a particularly broad notion of physical injury, holding that an allegation of deprivation of exercise for 28 days was sufficient to plead physical injury because extended deprivation of exercise is potentially injurious to physical health. In Waters v. Andrews, 2000 WL 1611126 at *7 (W.D.N.Y. Oct. 16, 2000), the District Court cited the dictionary’s definition of “injury” as “an act that damages, harms, or hurts: an unjust or undeserved infliction of suffering or harm: wrong” to justify its conclusion that a reasonable jury could find that the statute was satisfied by exposure to noxious odors, including those of human wastes, and “dreadful” conditions of confinement (including inability to keep clean while menstruating, denial of clothing except for a paper gown, and exposure to “prurient ogling by male prison staff and construction workers”).

CORRECTIONS
IV. CONCLUSIONS AND RECOMMENDATIONS

A. We recognize that the DOC has an interest in assuring the safe and orderly operation of its facilities. We take no position on whether use of the shield should be prohibited absolutely. We believe, however, that significant modifications of stun shield use, and related procedures, appear appropriate and necessary.

B. We believe that the DOC should re-evaluate its position regarding cell extractions with a view to determining their necessity and immediacy in circumstances in which they now are undertaken routinely. Cell extractions consume staff resources and risk serious injury to staff as well as inmates, obviously and appropriately of major concern to administrators. Delay often defuses tension and sometimes, waiting a brief period makes an inmate tractable.\(^67\) An hour’s wait often harms no one and may resolve the problem.\(^68\)

It is hard to understand how an inmate’s refusal to close a food slot poses an immediate threat to the orderly operation of the institution. It is, however, an act of defiance in a tense environment that demands obedience and does not tolerate disrespect of authority. Change in jail culture is extraordinarily difficult and we harbor no illusions about its prospect. We urge, however, that in light of the potential for injury, as well as the diversion of manpower, DOC place less emphasis on compliance by inmates who are isolated in single cells and who pose no serious risks to others.

Even when appropriate security concerns require compliance, common sense suggests the use of steps short of electro-shock to achieve results. Committee members saw a videotape of the use of a stun shield to compel an inmate to close a food slot, which he had kept open by putting his arm through it. Several times before the cell extraction, he withdrew his arm to the interior of his cell. Repeatedly, staff members had the opportunity simply to close the door. They did not, suggesting that issues of control and authority, if not a street culture of machismo, outweighed common logic.

C. In accordance with the Sheppard consultants’ observations and as common sense suggests, the presence of an experienced supervisor in the CPSU often will ameliorate a difficult and potentially violent confronta-

\(^{67}\) DOC Directive no. 5006, ¶ V, requires that “[a]bsent circumstances requiring immediate physical intervention,” alternative methods to the use of force must be exhausted.

\(^{68}\) The Sheppard consultants noted a case of three cell extractions on one inmate within two hours. 2d Report at 20. Although the report does not identify the reason for the multiple extractions, common sense suggests that the process may have been unnecessary.
Senior supervisors should be the rule in the CPSU. The Sheppard v. Phoenix consultants noted:

We have observed on a number of occasions where experienced supervisors and officers took time to listen to the inmates' concerns and resolve them satisfactorily. When they succeeded, the incident was resolved without force being necessary. Other staff do not have the motivation or interpersonal communications skills needed to deal with these issues.

1st Report at 27.

Every decision to use the stun shield should be made by a senior high-ranking officer.

We are troubled by issues surrounding medical pre-clearance. Institutional records that reflect the absence of a disqualifying condition (for example, a predisposition to cardiac arrhythmia) may indicate that the inmate is unaware of the condition or has not communicated it adequately to the medical staff upon arrival at the facility, a reasonable proposition given the environment and circumstances that logically accompany admission to jail. The safest course may be to bar shield use on any inmate whose medical records do not state affirmatively that no disqualifying condition exists. But again, that entry may be as good as the information furnished by the inmate. While we see no easy solution to this issue, we believe it is vital for medical staff in any institution in which the shield may be used to be exceptionally diligent to identify inmates to whom shield use might pose special risks.

Separately, senior DOC officials should assure that line-level staff using the stun shield follow the procedure for videotape recording of each use, as well as full medical examination of each inmate to whom the shield has been applied. Videotapes provide no assistance when critical portions are blocked; cursory medical "examinations" that consist of nothing more than asking the inmate how he feels similarly do nothing to address the reasons for the requirements.

D. There should be fuller medical exploration of the risks of stun shield use. The documents furnished to us suggest that there has been little internal analysis by DOC medical personnel or New York City Correctional Health Services. It is unclear whether DOC officials rely upon manufacturer's medical claims for their comfort in using the stun shield. At minimum, a competent outside medical opinion should be sought, and recommended guidelines for use should take into account the practi-
cal reality that institutional medical records may not reflect adequately that stun shield use is contraindicated for some inmates.

E. The DOC should employ sufficient staff to enable it to conduct rigorous internal investigations of all use of force incidents, including those involving the stun shield. Investigations should include comprehensive identification, as far as possible, of all inmate and staff participants and witnesses; interviews of inmate participants and witnesses; interviews of staff participants and witnesses; full review of all relevant documents, including staff written reports and medical reports; a review of the relevant videotapes; explicit findings as to the sequence of each application of force that was used; and resolution, when possible, of disputed matters, with reference to particular evidence in the investigative file, including videotapes, statements of staff and inmates.

The DOC should conduct regular, periodic analyses of the utilization of the stun shield in order to assess, among other issues, the frequency with which the shield is being used, its effectiveness, any injuries sustained by inmates and staff as a result of its use, and whether the shield is accomplishing the purposes for which it was intended.

F. Stun shield use, as well as other sensitive situations, also should be subject to independent oversight. We recognize that the DOC operates under supervision by several outside agencies, including the State Commission on Correction and the City Board of Correction. With the anticipated narrowing of the responsibilities of the Sheppard consultants, another agency, such as the Board of Correction, should take the lead role in reviewing use of the stun shield, including the reporting of shield use.

We recognize that such oversight runs counter, as do so many other aspects of the exposure of prison activities, to the adage that the walls serve equally to keep the public out and the inmates in. We recognize also that correctional administrators traditionally strive to avoid external scrutiny. Yet in this instance, we believe that special attention from the Board of Correction will improve the environment in the CPSU and, in the process, make correction officers’ jobs easier.

August 2001
The Committee on Corrections

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# New Members

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<tr>
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### Nonresident

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### Suburban

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### NEW MEMBERS

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<td>122 Ayers Ct.</td>
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<td>Bruce L. Heller</td>
<td>269 Columbus Ave.</td>
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**THE RECORD**

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<tr>
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<td>Carol Ann Zanoni</td>
<td>Durkin &amp; Boglia</td>
<td>Ridgefield Park NJ</td>
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### LAW SCHOOL STUDENT

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<tr>
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<tr>
<td>Judith C. Aarons</td>
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<td>Kate E. Andrias</td>
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<td>Kirsten K. Brodsky</td>
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<td>Marc J. Calcagno</td>
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<tr>
<td>Catherine M. Campbell</td>
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<tr>
<td>Nicholas Capuano</td>
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<tr>
<td>Itiva Chopra</td>
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<tr>
<td>Erum Afgan Choudhry</td>
<td>Cornell University Law School</td>
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<tr>
<td>Szuen Co</td>
<td>Columbia University School of Law</td>
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<tr>
<td>Eileen Conneely</td>
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<tr>
<td>John E. Courtney</td>
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<tr>
<td>David M. Curcio</td>
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<tr>
<td>Simon Daillie</td>
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<td>Michael A. Davis</td>
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<td>Qubilah A. Davis</td>
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<td>Joanne Dougliht</td>
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<td>Masaharu Hayahi</td>
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<td>Scott Martin Jacobs</td>
<td>Albany Law School</td>
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Shahid J. Jamil
Mahbubul H. Joarder
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Natasha Ruth Johnson-Lashley
William L. Kirley
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Hyeri Lee
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Alison M. Rende
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Jennifer E. Romano
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Dawinder S. Sidhu
Remi Silverman
Archana Sivaclasan
Margaret T. Starczyk
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Naveen Thakur
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Caitlyn A. Venskus
Ernesto J. Vigoreaux
Stephanie A. Walters
Robin Jo Weber

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City University of New York School
Columbia University School of Law
Benjamin N. Cardozo School of Law
Fordham University School of Law
Hofstra University School of Law
Boston College Law School
Touro College-Jacob D. Fuchsberg
Columbia University School of Law
Touro College-Jacob D. Fuchsberg
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Brooklyn Law School
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Pace University School of Law
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Brooklyn Law School
New York Law School

University of Florida College of Law
Columbia University School of Law
Pace University School of Law
Pace University School of Law
New York Law School
Harvard University Law School
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George Washington University Law
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Rutgers University School of Law
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University of California-Hastin
Pace University School of Law
Seton Hall University School of Law
Albany Law School
Hofstra University School of Law

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<tr>
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<tr>
<td>Elizabeth M. Wheeler</td>
<td>City University of New York School</td>
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<tr>
<td>Traci M. Wheelwright</td>
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<td>Britta M. Wright</td>
<td>University of Oklahoma College</td>
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<td>Laleh Zoughi</td>
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### LAW SCHOOL STUDENTS CONVERTING TO RECENT GRADUATE MEMBERSHIP

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<tr>
<th>Name</th>
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<tbody>
<tr>
<td>David Cargille</td>
<td>Pennie &amp; Edmunds</td>
<td>New York, NY</td>
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<tr>
<td>Daniel R. Diepholz</td>
<td>270 N. Canon Dr.</td>
<td>Beverly Hills, CA</td>
</tr>
<tr>
<td>Frances L. Felice</td>
<td>Stroock &amp; Stroock &amp; Lavan</td>
<td>New York, NY</td>
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<tr>
<td>Desiree C. Giles</td>
<td>Paul Hastings Janofsky and Walker</td>
<td>New York, NY</td>
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<tr>
<td>Mark D. Hunter</td>
<td>Kings County DA's Office</td>
<td>Brooklyn, NY</td>
</tr>
<tr>
<td>Junko Ishibashi</td>
<td>340 E 90th Street</td>
<td>New York, NY</td>
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<tr>
<td>Chris Pennisi</td>
<td>Hopgood Calimafde Kalili &amp; Judowe</td>
<td>New York, NY</td>
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<tr>
<td>Melissa Rosenthal</td>
<td>333 E 43rd Street</td>
<td>New York, NY</td>
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<tr>
<td>Beth Seligman</td>
<td>47-22 55th Street</td>
<td>Woodside, NY</td>
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<tr>
<td>Joseph J. Won</td>
<td>25 Pierrepont Street</td>
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