COLONIAL CONTINUITIES

Human Rights, Terrorism, and Security Laws in India

RUTH BADER GINSBURG
Distinguished Lecture on Women and the Law
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THE FOLLOWING CANDIDATES HAVE BEEN ELECTED TO THE VARIOUS Association offices and committees for 2007-2008:

President
Barry M. Kamins

Vice Presidents
Mary C. Daly
Alexander D. Forger
Andrew A. Scherer

Treasurer
James L. Lipscomb

Secretary
Sheila S. Boston

Member of the Executive Committee
Class of 2011
Andrew Mandell
Deborah Masucci
Michael B. Mushlin
Benito Romano

Members of the Committee on Audit
Robert J. Anello
Laurie Berke-Weiss
Allan L. Gropper
Christopher L. Mann
Marsha E. Simms

THE NOMINATING COMMITTEE FOR 2007-2008 CONSISTS OF: PREETA D. Bansal, Robert B. Fiske, Jr., E. Leo Milonas (Chair), Sara Moss, Carlos G. Ortiz, Milton L. Williams, Jr., and Mary Marsh Zulack.
The Executive Committee has elected Peter M. Kougasian Chair and Rosalyn H. Richter Secretary for 2007-2008.

THE CITY BAR JUSTICE CENTER HELD ITS SECOND ANNUAL GALA ON April 18. The event honored Skadden, Arps, Slate, Meagher & Flom and Time Warner Inc. with the City Bar Justice Award for their leadership and dedication to public service.

Accepting on behalf of Skadden, Arps was Robert C. Sheehan, Executive Partner. Paul T. Cappuccio, Executive Vice President and General Counsel, accepted on behalf of Time Warner. Co-chairs for the evening were Rosemary T. Berkery, Executive Vice President and General Counsel of Merrill Lynch & Co. and Robert D. Joffe, Partner at Cravath, Swaine & Moore.

To help mark the event, hundreds of lights transformed the City Bar’s historic 1897 landmark building into a modern New York lounge.

The event raised more than $750,000 to support the wide range of programs and services of the City Bar Justice Center, the pro bono affiliate of the New York City Bar. By harnessing resources from the legal profession, the City Bar Justice Center annually provides direct legal representation, information and advocacy to nearly 30,000 individuals from all five boroughs.

THE NEW YORK CITY BAR’S ENHANCED DIVERSITY COMMITTEE PRESENTED the second annual Diversity Champion Award at an Award Ceremony, June 7, at the Association. The award recognizes the critical role individuals have played in initiating and sustaining change within their organizations and the overall New York legal community.

The award seeks to honor individuals who embody the New York City Bar’s Statement of Diversity Principles. Nominations are limited to attorneys, although it is not necessary that they be actively practicing law.

The honorees for 2007 are: Sharon Bowen, Vice Chair of the Latham & Watkins Diversity Committee; Laurie Robinson, founder and CEO of Corporate Counsel Women of Color and a practicing employment lawyer in CBS Broadcasting’s legal department; Zakiyyah Salim, Associate, Heller Ehrman LLP, and a member of the firmwide diversity and New York office hiring committees; and Hon. John Stackhouse, New York County Supreme Court Justice, and Co-Director of the Supreme Court Civil Division Anti-Bias Committee, charged with the court’s internal diversity efforts.
Susan Kohlmann, Co-Chair of the Enhance Diversity in the Profession Committee, presented the awards. The awards are sponsored by the City Bar’s Office for Diversity and the Committee to Enhance Diversity in the Profession, and the winners were selected by the Committee to Enhance Diversity in the Profession (Susan J. Kohlmann and Elpidio Villarreal, Co-Chairs).

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TWO OUTSTANDING LAW STUDENTS HAVE BEEN AWARDED THURGOOD Marshall Fellowships for the 2007-2008 academic year. The program provides two exceptional minority students from New York area law schools the opportunity to work with the Association to advance the goals of civil rights and equal justice. Fellowships have been awarded to Shuva Paul of CUNY School of Law and Johane Severin of Brooklyn Law School.

Mr. Paul will assist the Association’s Civil Rights Committee and Ms. Severin will work with the City Bar Justice Center.

The fellowships are funded by the Orison S. Marden Lecture Fund. Fellows were nominated by their schools and selected by the Association’s Committee on the Thurgood Marshall Fellowship Program (Ira M. Feinberg, Chair).

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THE ANNUAL PRESENTATION OF THE HENRY L. STIMSON MEDAL TO outstanding Assistant United States Attorneys in the Southern District and in the Eastern District of New York was held on June 12 at the Association. Hon. Gerard E. Lynch, United States District Judge for the Southern District of New York, made opening remarks, and Barry M. Kamins, President of the Association, presented the medals.

This year’s recipients are: Celeste L. Koeleveld (Criminal Division) and Sheila A. Gowan (Civil Division) of the Southern District, and Richard P. Donoghue (Criminal Division) and Scott A. Dunn (Civil Division) of the Eastern District.

The Stimson Medal, made possible by the firm of Pillsbury Winthrop Shaw Pittman LLP, honors Mr. Stimson, who served as United States Attorney for the Southern District from 1906-1909 during a career of distinguished public service.

The awards are sponsored by the Committee on the Stimson Medal.
THE ANNUAL MUNICIPAL AFFAIRS AWARDS, GIVEN IN RECOGNITION of outstanding achievement by attorneys in the New York City Law Department, were presented June 25 at the Association. Federal Judge Paul A. Crotty of the U.S. District Court presented the awards to the following outstanding Assistant Corporation Counsels: Ali Ayazi—Labor & Employment Law; Kim Conway—General Litigation; Tal Golomb—Legal Counsel; Nicole Ludwig—Torts, Bronx; and Michael Ruseskas—Family Court, Queens.

The awards are sponsored by the Committee on New York City Affairs (Peter Kiernan, Chair).

THE EIGHTEENTH ANNUAL LEGAL SERVICES AWARDS WERE PRESENTED TO honor attorneys and nonlawyers who provide outstanding civil legal assistance to New York’s poor. Hon. Robert Katzmann, United States Court of Appeals for the Second Circuit, presented the awards, June 6, at the Association.

This year’s recipients are: Emily Ruben, Attorney-in-Charge, Brooklyn Neighborhood Office, The Legal Aid Society; Elizabeth Shollenberger, Managing Attorney, Queens Legal Services; Nanette Schorr, Family and Education Law Units Director, Legal Services for New York City, Bronx; Michael Williams, Senior Staff Attorney, The Door’s Legal Services Center; and Robert Kalin, Senior Tenant Organizer, Housing Conservation Coordinators.

The awards are administered by the Special Committee on the Legal Services Awards, chaired by James H. R. Windels, and sponsored by the Committee on Pro Bono and Legal Services, chaired by Madeleine Schachter. The awards have been endowed by a generous contribution from the Horace W. Goldsmith Foundation.

THE ANNUAL KATHRYN A. MCDONALD AWARD FOR EXCELLENCE IN SERVICE to the Family Court was presented June 11, at the Association.

Hon. Judith S. Kaye, Chief Judge, New York State Court Of Appeals, presented this year’s award to: Benjamin Rosin, Rosin Steinhagen Mendel; and David Waldman, former Supervising Attorney, Juvenile Rights Division, The Legal Aid Society; currently, volunteer, Lawyers for Children.

The Kathryn A. McDonald Award is named in honor of the former

OF NOTE

and the Committee on Federal Courts (Molly S. Boast, Chair). Pillsbury Winthrop Shaw Pittman LLP co-sponsored the event.

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OF NOTE

Presiding Judge of the New York City Family Court, and is sponsored by the Association’s Committees on Children and the Law, Family Court and Family Law, and Juvenile Justice and its Council on Children.

NEW YORK CITY MAYOR MICHAEL BLOOMBERG GAVE THE KEYNOTE address at a gala luncheon celebrating the graduation of the inaugural class of the New York City Environmental Leadership Institute, May 17, at the Association. The program is a semester-long seminar for a select group of new environmental attorneys committed to leadership in the field, and is designed to inform, equip and inspire participants to take on key roles in the workplace to improve the quality of New York City’s environment and the health of its residents.

The Institute is a joint program of the New York City Bar Association, the New York State Bar Association, and the Environmental Law Institute.

THE FOLLOWING ARE THE NEWLY APPOINTED CHAIRS OF ASSOCIATION Committees for the 2007-08 year:

Bruce Shapiro (Aeronautics); Joseph Larson (Antitrust & Trade Regulation); Virginia Rutledge (Art Law); Sarah W. Fitts (Asian Affairs); Peter Barbur (Civil Rights); Judith Whiting (Corrections); Roger Stavis (Criminal Courts); Anne Feldman (Criminal Law); Joel Hecker (Copyright & Literary Property); Jerry Goldfeder (Election Law); Michael Frankel (Estate & Gift Taxation); Terry Myers (European Affairs); Wendy Schwartz (Federal Courts); Adam Hellegers (Housing and Urban Development); Jeffrey Osterman (Information Technology); Steve Kahaner (Inter-American Affairs); Robert Smith (International Commercial Disputes); David Bowker (International Law); Steven Hammond (International Legal Services Task Force); Margaret Stock (International Security Affairs); Alison Pearsall (International Trade); Jay Safer (Judicial Administration, Council on); Carey Dunne (Judiciary); Jodi Savage (Law Student Perspectives); Adrienne Mundy-Shephard (Co-Chair) (Lesbian, Gay, Bisexual & Transgender Rights); Lawrence Raful (Legal Education); Stewart Aaron (Litigation); William Viets (New York City Affairs); Eliot Green (Non-Profit Organizations); Marta Gross (Patents); Harvey Strickon (Professional Discipline); Janis Meyer (Recruitment & Retention of Lawyers); Mitchell Lowenthal (Securities Litigation); Wendy Bach (Social Welfare Law); Carolyn Joy Lee (State & Local Taxation); Michael Katz (Tort Litigation); and Brande Stellings (Women in the Profession).
Recent Committee Reports

Civil Rights
Letter to Congress urging the opposition of the proposed amendment to S.236 which would broaden Section 798(a) of Title 18 of the United States Code to impose criminal penalties on any public disclosure of classified information concerning efforts by the United States to identify, investigate, or prevent terrorist activity.

Letter to the New York City Council expressing concern over the amendment of Title 38 of the Official Compilation of Rules of the City of New York promulgated by the Police Department, which establishes regulations governing "parades." The letter argues the regulations are overbroad and would apply to many kinds of public gatherings that are in no way a "parade" and that pose no risk to public safety. The letter also argues that the City Council, not the New York Police Department, should be establishing the standards in this First Amendment protected area.

Civil Rights/International Human Rights/International Law/Military Affairs
Report Concerning Provision of the Military Commissions Act of 2006 Restricting Habeas Corpus Jurisdiction and Interfering with Judicial Enforcement of the Geneva Conventions. The report urges Congress to repeal Section 7 of the Military Commission Act of 2006 ("MCA") as it strips federal courts of their statutory jurisdiction to entertain habeas corpus petitions from non-U.S. citizens ("aliens") detained by the United States as "enemy combatants" and restore the statutory right of habeas corpus. The report also urges repeal of provisions of Sections 5 and 6 that bar persons from seeking judicial enforcement of rights guaranteed them by the Geneva Conventions, that seem to prevent courts from considering foreign or international courts' interpretations of the Conventions, and that might be read to expand the deference due the President's interpretations of the Conventions. Sections 5 and 6 cast doubt on the sincerity of the United States' commitment to the Conventions and undermine the protections the United States expects others to afford U.S. armed forces.

Criminal Justice Operations
Letter to the NYS Assembly Codes Committee urging consideration of the
Innocence Project’s model legislation, though imperfect, as a first step toward improving the preservation of biological evidence.

**Criminal Justice Operations/Criminal Law/Mental Health Law/Sex & Law**
The report expresses concern with the Sex Offender Management and Treatment Act (Assembly Bill A6162 and Senate Bill S3318), recently enacted in New York, which permits civil commitment of some sex offenders following completion of their prison sentences.

**Election Law**
A Proposed New York State Constitutional Amendment to Emancipate Redistricting from Partisan Gerrymanders: Partisanship Channeled for Fair Line Drawing. This report proposes a comprehensive amendment of the reapportionment and redistricting provisions of the New York State Constitution. The report urges that a constitutional amendment is necessary to mandate redistricting criteria, and to guarantee a process for decennial redistricting that will foster electoral competition and responsive government.

Under the proposed amendment a permanent districting commission would be created. The amendment would also list the criteria on which the Commission’s plan must be based. Though plans for both legislative and congressional districts would be wholly insulated from legislative review, a plan may be overturned by the state courts if it is clearly erroneous under the criteria of the amendment and would still be subject to review in federal courts.

**Family Court and Family Law**
Letter to Governor Spitzer applauding the Executive Budget proposals to increase open-ended funding for child welfare services and to increase funding for foster care children and families and urging continued support for child welfare programs and for the Family Court System.

**Futures and Derivatives Regulation**
Letter to the Office of the Comptroller of the Currency, Federal Reserve System, Federal Deposit Insurance Corporation and the Office of Thrift Supervision expressing support for the new risk-based capital adequacy framework jointly proposed by the above agencies.

**International Human Rights**
Letter to the President of the Senate of Nigeria opposing The Same Sex Marriage (Prohibition) Act currently pending before the National Assem-
bly. The Act would ban same sex marriage and criminalize participation in any same sex marriage ceremony as well as ban organizations that advocate for lesbian, gay, bisexual or transgender equality and criminalize such activity. The letter argues that the bill is discriminatory and contrary to Nigeria’s obligations under international law to ensure freedom of speech, association and assembly.

Judicial Administration, Council on
Comments on the Report and Recommendations of the New York State Bar Association’s Task Force on Electronic Filing of Court Documents. Though the comments express support for much of the report and recommendations, they find the report has a number of shortcomings and offer a number of revisions including implementing the filing by electronic means (FBEM) county-by-county rather than waiting for statewide implementation; installing FBEM in all Supreme, County and Surrogate courts; and allowing for only a 120-day grace period following installation for attorneys to become FBEM certified.

Labor and Employment Law
Letter to Governor Spitzer urging the administration to adopt safe harbor legislation that would absolve employers from negligent hiring claims in instances where they hire ex-offenders after receiving and reviewing a valid Certificate of Rehabilitation. The proposed legislation would help ex-offenders reintegrate into society by removing barriers to employment, while at the same time limiting the legal exposure for the employer.

Legal Issues Pertaining to Animals
Report supporting New York City Council bill Intro. No. 44 which would amend the New York City Administrative Code to prohibit the operation of a horse-drawn cab in any area of the Borough of Manhattan other than in the area inside or immediately adjacent to Central Park.

Report supporting A.4897 and S.3529 which would amend the Agriculture and Markets Law to penalize as a Class A misdemeanor the intentional killing or stunning of any fur-bearing animal by means of an electrical current. The report argues that while the fur industry uses several methods, including gassing, strangulation, and electrocution, to kill animals, the method of electrocution is especially painful and traumatic to the animal, and is an inherently cruel and inhumane method of killing animals.

Letter to Governor Spitzer expressing concern with proposed budget cuts
in two vital animal welfare laws, the Animal Population Program and the Pet Dealer Licensing Law.

Testimony before the New York City Department of Parks and Recreation supporting, with recommendations, the Parks Department’s proposed amendments to the Rules of the City of New York which will codify the current policy of permitting off-leash exercise and socialization for dogs in designated parks within the City between the limited hours of 9 PM until closing, and from opening until 9 AM (“Courtesy Hours”) and supporting, with recommendations, the Parks Department’s proposed amendments to the Rules of the City of New York regarding fenced dog runs.

Lesbian, Gay, Bisexual and Transgender Rights
Report supporting A.7438/S.4794-A, The Gender Expression Nondiscrimination Act, which would amend the executive law, the civil rights law and the education law, to prohibit discrimination based on gender identity or expression; and to amend the penal law and the criminal procedure law to add gender identity or expression to the list of offenses subject to treatment as hate crimes. The Act would thereby offer protection to transgender and gender variant people from discrimination, harassment, and assault to the same extent such protections are now provided to racial minorities and gay and lesbian people under New York law.

Town and Village Courts, Task Force
Report on Justice Court technology which recommends that proceedings in every case be recorded by court reporters using current technology or by digital recording in lieu of a court reporter present in the courtroom and that measures be taken immediately in order to begin the recording in courts which have no present system for recording or in which tape recorders are currently used. The report also recommends that: all justices and their court clerks be given access to a computer with accompanying uniform and appropriate software for case management, fiscal record keeping, and financial reporting; that justices each be given computer access for training, research, conferencing with other judges, and writing opinions and orders; and that consideration be given to the use of video conferencing for designated court proceedings to avoid delays when the lawyer cannot appear in person or the defendant cannot be transported from a county or local detention facility.

Copies of the above reports are available to members at the Association’s website, www.nycbar.org, by calling (212) 382-6624, or by e-mail, at gbrown@nycbar.org.
President’s Address

Annual Meeting
of the Association

Barry M. Kamins

This address was delivered at the Annual Meeting of the Association, held on May 15, 2007.

It is now my privilege to give the President’s report. It has been a very productive and exciting year for the Association and I have been so fortunate to work with an outstanding Executive Committee whose members have devoted countless hours to make this Association an outstanding voice in the legal community. Andy Scherer, our outgoing chair, was a marvelous leader and we owe him a great debt. A warm thank you to Cyrus Mehta who has served the Association as secretary for the past 4 years and to our outgoing Vice Presidents Carey Dunne, William Kuntz, and Loretta Lynch. And I must give a special thanks to Barbara Opotowsky, our Executive Director and Alan Rothstein, our General Counsel. I have said from the day I was elected that they are part of the DNA of this Association and no President could hope to function without their wonderful assistance and graciousness.

Let me briefly summarize some of the Association’s activities during the past year.

In doing so, I must commend the committee members of this Association for their tireless efforts and contributions to briefs, reports, letters
and position papers that have stated the various Association’s positions so eloquently. Forgive me if I omit anyone’s name but rest assured I appreciate all of the extraordinary work done by our 160 Committees.

The Association has played a significant role in the area of civil liberties, national security and the rule of law.

- We prevailed in the Hamdan case, with the U.S. Supreme Court accepting our argument that Guantanamo detainees are entitled to basic human rights and due process under Common Article 3 of the Geneva Convention.

- Unfortunately, the Supreme Court decision was based primarily on statutory rather than constitutional grounds, and Congress then passed the Military Commissions Act, which in large measure eviscerated the effect of the decision. We opposed that legislation and are now seeking repeal certain particularly unfortunate provisions. We also are tracking court challenges to the Act for appropriate amicus opportunities.

- We filed briefs in the three cases challenging the Administration’s warrantless surveillance program. The briefs focused on how warrantless surveillance chills communications between lawyer and client and thus undermines the attorney-client privilege.

- We are responding to the Administration’s “lawfare” attack – this is an effort of the Bush Administration to portray lawyers who represent detainees or who bring cases against government policies relating to the “war on terrorism” as intentionally or unwittingly aiding terrorists. The first major salvo was the statement of Deputy Assistant Secretary of Defense Cully Stimson, who raised this issue directly and suggested that corporate clients should pressure their lawyers to drop those cases. The resulting outcry led to the Stimson resignation.

- We also responded to the Justice Department’s effort to obtain a court order starkly limiting the ability of lawyers representing Guantanamo detainees to meet with, communicate with, and review information relevant to their clients. We wrote a letter protesting this action to Attorney General Gonzales; the letter was covered in widely in the media, nationally and internationally. We also submitted a brief in the DC Circuit to opposing the government’s proposal.
• This is really just the tip of the iceberg in the work we are doing regarding civil liberties, national security and the rule of law. I want to thank the committees that have been particularly active in this work over the past year: Civil Rights (chaired by Sid Rosdeitcher), International Law (chaired by Scott Horton), Military Affairs and Justice (chaired by Michael Mernin) and International Human Rights (chaired by Mark Shulman). In fact, Mark and Jim Silkenat, former chair of our Council on International Affairs, have edited a two volume collection of the Association’s work on these issues in the post-9/11 era that was recently published.

• Our Task Force on the Lawyers’ Role in Corporate Governance was appointed by my predecessor Betsy Plevan. Chaired by Tom Moreland, the Task Force issued its extensive report examining the role of counsel, both in-house and external, with respect to advising corporate clients regarding their conduct. The report also contains many recommendations, including best practices by firms and in-house counsel.

Judicial selection
• Task Force on Judicial Selection, chaired by Bob Joffe, developed recommendations for both long term and interim approaches to judicial selection, the latter relating to the Lopez Torres decision in the Second Circuit.

The Task Force reiterated the Association’s support for merit appointment of judges but said that, prior to passage of a constitutional amendment, the judicial convention system for selecting Supreme Court Justices should be restructured to make it more democratic (though the Task Force was not in favor of allowing party nominees for Supreme Court to get on the ballot through a petition process).

• The U.S. Supreme Court’s decision to grant certiorari in Lopez Torres will delay any resolution of the issue until after the Supreme Court decision, expected in 2008.

Courts
• We are continuing to urge an increase in salary for the State’s judges, and for federal judges as well. The State situation is particularly appalling, with no increase in 8 years. Their salaries
are falling further behind those of federal judges and the private sector, and not keeping up with the cost of living.

We have written to every Association member urging them to contact Albany leaders and representatives to press for a judicial pay raise. We must get this done.

- The Committee on State Courts of Superior Jurisdiction, chaired by Andrea Masley, has prepared a model confidentiality agreement for use in state Supreme Court civil proceedings.

- I formed a Task Force on Town and Village Courts, chaired by former judge Phylis Bamberger, that is developing recommendations on how to improve those courts, and has already issued a report regarding technological aspects of those courts’ operations.

- We have joined other groups in urging that all judges in New York State be able to serve until the age of 76, as do Supreme Court Justices, by being recertificated every 2 years until 76.

When I was elected last year, I mentioned that I wanted to address, in some fashion, the collateral consequences of criminal convictions. I pledged to take steps to help individuals who are finding it difficult to re-enter society because of their prior convictions.

In November of 2006, the City Bar Justice Center launched its Reentry Project. Aiming to combat recidivism and help break the cycle of crime, the Reentry Project provides legal services to people who face collateral civil consequences due to their criminal records. Our Reentry Project assists clients in reviewing, understanding and correcting their criminal records, which are often rife with errors and can adversely affect a person’s ability to obtain employment and housing. During its initial 6 months, the Reentry Project successfully assisted many clients by correcting their criminal records and has been advising clients on how to properly answer questions regarding their criminal backgrounds on applications. The Project also successfully advocated on behalf of several clients who had been denied public housing due to their criminal histories, and these clients are now well on their way to moving out of shelters and into permanent, stable housing.

The Reentry Project has partnered with the law firm Milbank, Tweed, Hadley & McCloy LLP to provide criminal history reviews and correction services to persons with criminal records.
The Reentry Project has also recently partnered with the law firm Dechert LLP, who will be training a team of its attorneys to represent clients appealing denials of public housing because of a criminal history. The interest of these two firms in reentry work, and their commendable dedication to providing such pro bono legal services, will allow us to service a far greater number of clients and will greatly enhance the effectiveness of the Project.

- The Labor and Employment Law Committee (Debra Raskin, chair) has drafted legislation to provide employers who hire ex-offenders with a certificate of rehabilitation or good conduct, a safe harbor from subsequent lawsuits based on the employer’s hiring of an ex-offender.

- Four Association committees have recommended that State rules be changed to suspend, rather than terminate, Medicaid when an offender is incarcerated, so the person need not go through the lengthy and cumbersome re-application process when released from a correctional facility.

Parole
- We are speaking out about the need to restore fairness to the parole system. The current parole board is still following the policy set by former Governor Pataki (all of its commissioners), in exercising its discretion to refuse parole at such a high rate that it is in essence serving as a second sentencing body. Our Council on Criminal Justice (Dan Alonso, Chair) has recommended that parole board guidelines be modified so that appropriate weight be given to an individual’s rehabilitation and lack of risk to public safety in determining whether to grant parole.

International Human Rights
- Our International Human Rights Committee issued a report on its visit to India by the International Human Rights Committee.

- The committee examined anti-terror acts that were passed in India and in several of its provinces, identifying their civil liberties shortcomings and making recommendations for improvement in the law and in their enforcement.

- We continue to write to leaders around the world when we
learn that judges, lawyers and advocates in their country are not being treating in accordance with the rule of law. Recent letters have focused on Pakistan, Iran, Nigeria, Columbia, among other countries. Through our committees and the Vance Center for International Justice (chaired by Todd Crider), we have been submitting or encouraging submission of amicus briefs in human rights cases around Latin America.

**Legislative Issues**

- We are continuing to work on legislative issues, guided by our excellent Director of Communications and Public Affairs, Jayne Bigelsen.

- We were active in the legislative give-and-take on the recently enacted law that provides for civil commitment of sex offenders. The law is an improvement over earlier drafts of the legislation, but we still have serious concerns over the entire scheme, which will result in hundreds of offenders being detained long after their sentences have expired, through a process which may lack appropriate due process.

- We are still working to pass state legislation to punish those who engage in human trafficking, both as forced labor and for sexual servitude. The legislation must also provide services to help trafficking victims overcome their enormous burdens. This effort is being led by the Sex and Law Committee (Maria Cilenti, chair).

- Our efforts continue to establish same sex marriage in New York. We were disappointed with the Court of Appeals decision that same sex marriage is not constitutionally required. However, it can be established by legislation, and we will be working to see that that happens. This effort is being led by our Lesbian, Gay, Bisexual & Transgender Rights Committee, co-chaired by Lisa Badner and Allen Drexel.

**Awards**

- We awarded our first Diversity Champions Award to lawyers who have made a difference in stimulating the culture of diversity among legal employers and the profession as a whole. The inaugural winners were Daniel Donovan, Staten Island District Attorney, William Malpica of Mayer, Brown, Rowe and Maw, and Elizabeth Moore of Nixon Peabody. Our second award presentation will be held on June 7.
Lectures

One of the highlights of the year was our annual Ruth Bader Ginsburg Lecture, which this year featured women chief justices from four states, including our own Chief Judge Judith Kaye, who shared their experiences as woman lawyers, as judges and as the top judges in their state.

Finally our various committees in the area of ethics and professional responsibility have devoted a considerable amount of time over the past year to two significant subjects: 1) lawyer advertising rules; and 2) the proposed new rules of professional responsibility that are being considered by the State Bar Association.
Remarks
Portrait Unveiling:
Bettina B. Plevan

Barry M. Kamins

Following the Annual Meeting on May 15, 2007, a portrait of former Association President Bettina B. Plevan was unveiled. Ms. Plevan, the Association’s 63rd President, served from 2004-2006.

We have a very pleasant function to perform this evening—the biennial rite of unveiling the portrait of the immediate Past President. Tonight, we are here to unveil the portrait of Betsy Plevan who was an outstanding President of the Association from 2004 to 2006. Under Betsy’s leadership, the Association played a significant role in insuring that civil liberties were not sacrificed during the war on terrorism. During her tenure, the Association’s Office for Diversity was created. It developed a set of best practices for firms and conducted a benchmarking survey of law firms that has made the Association a model for other bar associations.

Betsy appointed two major task forces, one on corporate governance and one on judicial selection. Their reports were issued this year and have added significantly to the dialogue on those important subjects. Finally, under Betsy’s leadership, the Association played a significant role in the legal community in its response to Hurricane Katrina.
It is also part of the tradition we are celebrating tonight that the managing partner of the honoree’s firm present the portrait to the Association, and Allen Fagin has graciously agreed to participate in tonight’s ceremony. Before I turn the proceedings over to him, I just wanted to say a word about his firm. In recent years, attorneys from Proskauer Rose have played a major role in this bar association and many other bar associations in the New York area. This tremendous level of activity reflects the firm’s commitment to public service and to the legal profession, and for that, Proskauer Rose must be congratulated.

And now, it is my pleasure to introduce Allen Fagin.
Remarks

Portrait Unveiling: Bettina B. Plevan

Allen Fagin

It is my distinct honor tonight to pay tribute to a dear friend and a wonderful partner. Betsy joined Proskauer in 1974, and I have had the privilege of working with her for my entire legal career. I think all of us who have known Betsy as a colleague recognize her uniqueness—the extraordinary way that she practices law; her consummate skill in leading great institutions; and her passion for what endows our personal lives, and our professional lives, with meaning and purpose. I have often tried to figure out what that magic formula is that makes Betsy who she is—and after 30 years of watching Betsy reach one milestone after another, here’s the closest I can come: I think Betsy has led her life based on a fundamental belief: I can do it all; and all that I do, I will do with excellence, devotion and grace.

Some years back, Betsy published an essay in the Fordham Law Review entitled “Personal Reflections on Glass Ceilings and Open Doors”. If you never read it, you should. Betsy reflected in that essay on her first days at Proskauer more than three decades ago. She recalled thinking at the time that she wasn’t just launching one career, but three: her career as a lawyer, her career as a leader of the organized bar, and her career as a mother.

Most of us would be proud to succeed in any one of those careers. Not Betsy. Pointing to one of her early mentors, a professor at Wellesley,
her alma mater, who was brilliant, accomplished and had raised three children, Betsy walked into Proskauer with a powerful conviction that it was possible for her to “have it all.”

Succeeding in one world or even two would be tough enough, but in all three worlds: profession, community, and family—was certainly an audacious goal.

But Betsy accomplished every goal she set, and exceeded every expectation she set for herself. Her clients, her colleagues, her friends, her family—so many of whom are gathered here tonight—have been fortunate and proud to witness a tripartite career of extraordinary accomplishment—and, knowing Betsy, the promise of even greater things to come.

Betsy’s service to our profession, including her devotion to this great institution, brings a special pride to those of us at Proskauer. In many ways, Proskauer and the New York City Bar have grown up together.

Proskauer and the City Bar were both born in the 1870’s. For more than 130 years, the two institutions have enjoyed a mutually rewarding relationship.

Betsy’s service to the City Bar continues a long tradition for us, a tradition which has seen two other City Bar presidents from Proskauer in the last two decades: Bob Kaufman, one of the city’s most influential health care lawyers, and Michael Cardozo, who for many years headed our litigation department, and is now enjoying life as New York City’s Corporation Counsel.

Bob Kaufman tells me there is an exception to the City Bar’s rule that only one person from any given firm can serve on a City Bar committee: The exception is that a Committee chair can choose a committee secretary from his or her own firm. So Bob, when he chaired the Civil Rights Committee, named Michael Cardozo as secretary and Michael, in turn, when he became Chairman of the Superior Courts Committee, named Betsy as Committee Secretary. Thus was born a long and distinguished career of service to the City Bar. To this day, Betsy refers to herself as Bob’s “granddaughter.”

Barbara Paul Robinson called the City Bar “the conscience of New York.” It is so true.

The City Bar, by playing a leading role in encouraging its 23,000 members—and by example all of this city’s lawyers—to aspire to the highest possible standards of ethical conduct, inclusiveness, and professionalism, serves a tremendously important role in the legal community. And, during her term as President, Betsy put her unique imprint on the direction and focus of the City Bar; in particular, by expanding the City Bar’s
role in encouraging diversity and promoting pro bono legal service. These two areas of endeavor stand as cornerstones of Betsy’s presidency, and will remain part of the richness of her legacy.

Betsy launched the City Bar’s annual Diversity Benchmarking Report to assist firms in comparing their diversity efforts to those of their peer firms—a mechanism that spurs all of us to do better in this important area. I can tell you from personal experience that metrics matter; that benchmarking matters; that peer conduct matters and is, in many respects, the most efficacious motivational tool. Under Betsy’s leadership the City Bar also adopted a “Statement of Pro Bono Principles,” an extraordinary initiative that encourages lawyers to devote substantial time to meeting the needs of those who otherwise would not be able to afford counsel, by shifting the conversation about pro bono from lofty ideals and pronouncements, to concrete and meaningful action. Betsy spearheaded the effort to convince firms to sign this statement as a pledge, and her leadership led to 32 signatories, including many of the city’s leading law firms representing thousands of lawyers. I am proud to say that Proskauer is a signatory to the Statement of Pro Bono Principles, and that the commitments contained within that statement have become the springboard for a far broader and more robust pro bono program than we have ever had.

The City Bar has not been the only recipient of Betsy’s devotion to the public good.

The New York Lawyers for the Public Interest recently honored Betsy with its “Law & Society Award” for her leadership in efforts to expand access to justice for under-represented people; the Federal Bar Council presented her with the 2007 Whitney North Seymour Award; and last year Betsy was honored by the Fund for Modern Courts with the John Jay McCloy Memorial Award for her efforts in lobbying for legislation to improve the administration of justice in New York.

Like Betsy, I am (or at least was) an employment lawyer, arriving at Proskauer just a few years after she did. So I’ve had the opportunity to observe, and occasionally participate in, Betsy’s remarkable career as an employment lawyer.

Betsy has a reputation as a fierce and loyal advocate. At Proskauer, her meticulous preparation, her legal acumen, her innate strategic sense and her devotion to her clients is legendary.

She is known as a formidable adversary; I don’t know many employment litigators who have tried as many cases to verdict as Betsy has. And, as important, Betsy is also known as a fair adversary, whose integrity is beyond reproach, and who is admired and respected by the plaintiffs’
bar, even when they complain that her success has cut into their income.

Betsy’s talents as a lawyer have been widely recognized. She is at the top of virtually every list of the best employment lawyers, and she has received numerous honors, awards and recognitions: Named by New York Magazine as one of the 100 Best Lawyers in New York; ranked by the National Law Journal and by Chambers USA as one of the best employment litigators in the country. A recipient of the New York State Bar Association’s Award for Attorney Professionalism. A fellow of the College of Labor and Employment Lawyers, the American College of Trial Lawyers and the American Academy of Appellate Lawyers ... and on and on.

In preparing for my remarks tonight, I ran Betsy through Lexis—her name appears on over 150 reported federal court decisions—over 30 in the various Circuit Courts of Appeal. What a truly remarkable career.

But the greatest testament to Betsy’s professional standing—in my view the highest compliment that can be paid to any lawyer – is her selection by other lawyers as their counsel. Betsy is routinely turned to by many of the top law firms in New York to handle their most sensitive and difficult employment law matters. This work, which largely goes unseen and unheralded, reflects many of the qualities that make Betsy such a great lawyer: skill, tact, loyalty and absolute discretion.

Betsy’s professional life has many other sides. She has been a firm leader at Proskauer for many years, both in the formal sense, serving as a member of our Executive Committee, our Advisory Committee and as head of our client service initiatives and perhaps even more importantly, in a quieter, under-the-radar sense as a mentor to many of our younger lawyers.

Betsy is always ready to help. Those who know her best know that Betsy always says “we” before “I” and “you.” I can recall an occasion early in my career when I needed help on a case that was about to be tried. I asked Betsy if she would try the case with me, and Betsy, who had more than she could handle on her own plate, unhesitatingly agreed. I was hardly unique.

Many lawyers who are now partners in our Labor & Employment Department tell stories of how Betsy was the first one to give them significant responsibility for important matters as associates and assisted in their growth and development in a myriad of other ways.

Betsy’s devotion to Proskauer even extended, in her earlier years, to service as the perpetually enthusiastic, if dubiously gifted, catcher on our Labor Department’s softball team. As the current co-chair of our Labor Department, Howard Ganz, is fond of recalling, the scouting line on Betsy as a ballplayer read: no bat, no glove, all heart.
Betsy respects and rewards hard work because she herself is one of the hardest working lawyers I know. During her tenure as City Bar president, Betsy, with the full blessing of our Firm, could have cut back substantially on her active practice of law. But that wasn’t Betsy. As my colleagues know, I’m typically in the office in the early hours of the morning; that’s when I would see Betsy. Betsy would then head over here for much of the day, and at the end of the day she would cross Times Square and return to the office, where she would devote herself to client work late into the night.

When Betsy joined Proskauer, our firm had one partner who was a woman. When she made partner in 1980, she became one of six partners at our Firm who were women. In the years since, we have all witnessed profound changes in the profession, and in the role of women within the profession, in no small part thanks to Betsy’s example.

Betsy is passionate about seeing women succeed in the practice of law. However difficult it was to balance, to juggle, the extraordinarily complicated demands of the practice and the equally difficult demands of family responsibilities, Betsy found a way. Not doing it all was, for her, an unacceptable result.

In her essay in the Fordham Law Review, Betsy wrote the following about women of her generation:

I believe that many of us pursued a career in the law knowing that it would be difficult, and that being just as good as men would probably not be enough to succeed. But we wanted to try anyway. As a group, therefore, I suspect we were more driven than the average lawyer, male or female. We were also psychologically prepared to work harder than the average lawyer in order to achieve our career goals.

In her first summer at Proskauer, Betsy, who was pregnant at the time, was working on a major litigation, representing the National Basketball Association. When one of the partners on the case scheduled three depositions over three days in Texas, Betsy unhesitatingly lugged her suitcase and a litigation bag from Houston to San Antonio to Dallas and never once complained.

As a young mother, in the days before law firms discovered child care leave, and part-time work schedules; in the days before work life balance became the subject of Management Committee meetings and firm retreats, Betsy was known to bring her then infant son Billy into the office in the evening or on weekends, and he would sleep, or romp around the 19th
floor of 300 Park Avenue, as she finished her work for the day. Betsy didn’t achieve all that she did because anyone made it easy; but because she would never let “being hard” stand in her way.

I’m sure tonight’s honor has special meaning for Betsy’s family. They, more than any of us, know the real meaning of Betsy’s devotion: Betsy’s mother, Tina Barasch; Betsy’s son Billy, her daughter-in-law, Sara, her delightful grandson, Ariel, whose pictures Betsy will, with just a modest amount of coaxing, be willing to share; Betsy’s son Jeffrey, and of course, Ken.

Betsy has always credited her partnership with Ken, who co-chairs the Intellectual Property practice at Skadden, with making it possible for her to succeed in her multiple careers, by sharing parenting responsibilities, and by supporting Betsy in all she has accomplished. It is a truly unique partnership—a wonderful family, two outstanding legal careers, and an incredible commitment to their clients, their firms, their profession and their family.

In thinking about this wonderful occasion, the unveiling of a portrait in honor of a great individual, I tried to see what others have said about the meaning of portraits. I came across the work of the Roman philosopher, Pliny the Elder, who said that the art of creating portraits was born of the need to conquer absence.

Betsy no longer serves as president of the New York City Bar, an absence that cannot help but be felt.

But the portrait we will unveil this evening—this symbol of Betsy’s leadership and dedication to this wonderful institution and to the profession—will hang in perpetuity in this room, it will conquer absence, and serve as a constant reminder to generations of lawyers that greatness is just a struggle away.

And someday someone will look up at that portrait and ask: “Who is that?”

And the answer will be: That’s Betsy Plevan ... she did it all, and all she did, she did with excellence, devotion and grace.
Remarks

Portrait Unveiling:
Bettina B. Plevan

Bettina B. Plevan

Thank you Allen for your very generous remarks and for all of your friendship and support. I am delighted to have the opportunity to thank both you and the entire firm for the support you have provided to me in my public service endeavors and especially while I was President of this Association, including of course providing the remote access computer hook-up to my fourth floor office here that made the coordination and juggling fairly seamless.

I know that others who have stood here before me have expressed very well the feelings I have now about this rather humbling and yet exhilarating feeling of having a portrait placed on the wall in this landmark building, together with those of many great leaders not only of this Association but of this country during this past century and before.

The thought of unveiling one’s portrait is also a bit eerie in an emotional way that I can’t quite describe. As one friend put it—can you just imagine your grandson coming here with his children decades from now to show off the portrait of his grandmother—currently known as Magey for reasons I won’t bore you with. But of course I can’t really quite imagine an event like that—and yet it is likely to occur. I am pleased that my grandson, his parents, his uncle, his great uncle, his grandfather and one of his four great grandmothers could all be here to share this evening with me—along with many close friends.
I am going to spare you even a summary of my departing remarks at last year's Annual Meeting, although it is tempting to reminisce. As all my predecessors have said, the privilege of being President of this unbelievable Association is without a doubt the best professional/personal experience any lawyer could have. I feel I received back much more than I gave because the work is so exciting and our fabulous staff (led by Barbara Opotowsky and Alan Rothstein) made it so easy for me. I thank all of the staff as well as the Executive Committee Chairs and members who I had the pleasure of working with.

I want to take just a few more minutes to thank Laurel Beck, the talented artist who helped bring me to life on the canvas in such a wonderful way. Laurel is an accomplished portrait artist who has painted many, many government officials and academic leaders; I was privileged that she was willing to devote her time and energy to creating my portrait. I think she was pleased for once to be able to paint a woman and I was delighted to have a woman paint me. Laurel worked very hard to make me look as I do here. I hope you will all join me in thanking her for her efforts. We are both pleased that there will now be another woman in these rooms and hope that there will be many more of us here in the future.

Thanks to all of you who are present here for joining me in this really exciting and once in a lifetime experience.
Ruth Bader Ginsburg Distinguished Lecture on Women and the Law

A Conversation With Four Chief Justices

A distinguished panel of chief justices delivered the annual Justice Ruth Bader Ginsburg Distinguished Lecture on Women and the Law, March 13 at the Association.

This year’s event, moderated by Lynn Hecht Schafran, Director, National Judicial Education Program, featured a panel discussion by several of the female chief justices of state courts around the country, and a formal introduction from Hon. Ruth Bader Ginsburg, Justice of the Supreme Court of the United States. Panelists included Hon. Shirley S. Abrahamson, Chief Justice, Supreme Court of Wisconsin; Hon. Christine M. Durham, Chief Justice, Supreme Court of Utah; Hon. Judith S. Kaye, Chief Judge of the State of New York; and Hon. Margaret H. Marshall, Chief Justice, Supreme Judicial Court of Massachusetts.

Good evening. I am Barry Kamins, President of the New York City Bar Association, and it is my pleasure to welcome you to the sixth annual Justice Ruth Bader Ginsburg Distinguished Lecture on Women and the Law. I would like to take this opportunity to thank our distinguished panel: the Honorable Judith S. Kaye, the Honorable Shirley Abrahamson, the Honorable Christine Durham and the Honorable Margaret Marshall. How about a round of applause? It is truly an honor to have all of them here this evening. The Association established this lecture in Justice Ginsburg’s name to celebrate her groundbreaking contributions to the advancement of women’s rights and her achievements as a lawyer, a law professor and a judge.

I want to take a moment to thank Joan Krey, who chairs our Ginsburg Lecture Committee. Joan conceived the idea for this lecture and has been
the driving force behind this and all five previous lectures. Many thanks also to Martha Harris for her efforts in making this lecture a success. I would also like to thank Justice Ginsburg as well for allowing us to create this distinguished lectureship in her name. Justice Ginsburg, we appreciate your continued close involvement with the lecture, and we are honored by your presence here tonight.

Through our committees and our Office for Diversity, the City Bar has worked hard and continues to work hard to eliminate gender bias in our laws, our courts and our profession. Through our efforts, we are building on the foundation of great pioneers such as Justice Ginsburg, without whose groundbreaking contributions to the advancement of women’s rights, we would surely be worse off today.

Justice Ruth Bader Ginsburg has long been a strong voice for justice, gender equity and civil rights. From the beginning she has worked to eliminate gender bias in our laws and in our courts. After finishing top among the women in her class at Cornell College, she went to Harvard Law School where she was one of only nine women in her class. She transferred to Columbia Law School, from which she graduated in the Class of 1959. After facing difficulty finding a job upon law school graduation, in 1963 she became only the second woman to join the faculty at Rutgers University School of Law. Some of my most enjoyable moments at Rutgers Law School were spent listening to Justice Ginsburg, then Professor Ginsburg, explain conflicts of laws. I am sure she does not remember me, but I can assure you that I do remember her and the influence she had on my colleagues at school. At Columbia Law School she became the Director of the Women’s Rights Project of the ACLU. While with the Women’s Rights Project, Justice Ginsburg participated in cases, many before the United States Supreme Court, which paved the way for new and better opportunities for women.

It is now my distinct honor to invite Justice Ginsburg to the podium.

JUSTICE RUTH BADER GINSBURG

At this time of year, as the Court gears up for its final sitting rounds, my spirits need a little lifting, and there is no occasion that could serve that purpose better than this annual gathering. My thanks to the Association of the Bar of the City of New York for continuing this special evening and to two people who have been mainstays of the lecture: Barbara Opotowsky, Executive Director of the Association, and Lynn Hecht Schafran, first my student, then co-worker and friend. I am reminded
when I consider these annual lectures of a radio program popular in my youth. It was called “Can You Top This.” Each year Barbara and Lynn come up with a super program to engage our minds and renew our energies and hopes for the future.

I am feeling blue about being the lone woman on the U.S. Supreme Court bench. But Barbara and Lynn rightly remind us to look beyond the Marble Palace that is my workplace, and to take account of the positions women now occupy in numbers, not as one-at-a-time curiosities, on federal and state benches. Currently, 17—soon to be 18—women are at the helm of state judiciaries as Chief Judge or Chief Justice. Tonight’s four panelists are frontrunners in that regard. I should not intrude deeply on their time, so my introductions will be as brief as their c.v.’s are long and impressive. In alphabetical order:

Shirley Abrahamson, longest tenured of any of us. First appointed to the Wisconsin Supreme Court in 1976, she became Chief Justice of the Wisconsin court system in 1996. Up for election every ten years, Shirley won handily in 1979, 1989, and 1999, and she assured me tonight that she will run in 2009. In her earlier life, she practiced law in Madison and was a tenured member of the University of Wisconsin law faculty. Shirley continues to teach all over the United States and around the globe. She has lectured on the art of judging and on sound judicial administration in diverse places on seven continents. Though Madison, Wisconsin, has been her home for more than four decades, she grew up—as I did—in this great city. She earned her bachelor’s degree from NYU, and today, among her many extracurricular activities, she serves on the Board of NYU Law School’s Institute of Judicial Administration.

Christine Durham was appointed to the Utah Supreme Court in 1982 after serving as a trial judge for four years. She became Chief Justice in 2002. Chris was a founding member of the National Association of Women Judges. She is a former president of that organization and has been awarded its highest honor. She serves on many blue-ribbon boards, commissions, and committees, including one that I volunteered for unsuccessfully many times in the 1980s, the U.S. Judicial Conference Advisory Committee on Rules of Civil Procedure. If you want to know the secret of successfully combining work and family life, consult Chris Durham and her husband George. Parents of four, Chris Durham and her husband had their first child just two weeks before she entered law school, and their second child, during her third year of law school. She has been a leader in diverse educational endeavors from grade school to graduate school, and in programs to educate judges. Perhaps that interest stems from her own experi-
ence as a newcomer to the trial bench in 1978. Offered no training, she was simply handed a borrowed robe and a case file and told: “Go be a judge.” I had the pleasure of serving with Chris and with Shirley Abrahamson on the ALI Council. Both Shirley and Chris continue to bring to Council meetings and projects their bright minds, keen insights, common sense, and sound judgment.

Judith S. Kaye, to the good fortune of our profession, gave up her college dreams of becoming a banner headline news reporter when the best job she could land was society page reporter for a Hudson City, New Jersey newspaper. Her second chosen career had more upward mobility. Appointed to New York’s highest court, the Court of Appeals, in 1983, she became the State’s Chief Judge ten years later. Judith took over a large, less than orderly, system very much in need of reform. Through patient persistence, she has succeeded measurably in making New York’s judiciary more user-friendly, in the face of daunting odds. Most recently, as reported by The New York Times, she is launching a pilot Collaborative Family Law Center in this City, designed to lower the cost, delay, and contentiousness of divorce proceedings. Before her appointment to the bench, Judith was one of the few women to achieve success as a commercial trial lawyer and in becoming a partner in one of the City’s large law firms. Judith and Shirley Abrahamson have much in common in addition to their New York State origins. Both are past presidents of the National Conference of Chief Justices and past chairs of the National Center for State Courts. They are also members of the American Academy of Arts and Sciences and the American Philosophical Society, and recipients of numerous high awards and honorary degrees. Judith, I think, ranks ahead of all of us—Chris will tell me if this is true—in one notable capacity. She is the proud grandparent of six grandchildren. One of the lessons in life she shares with others: It is hard to be a parent; it is easier to be a grandparent.

Margaret Marshall, Chief Justice of the Supreme Judicial Court of Massachusetts, presides over the oldest top court in the country. First convened in 1693, the SJC is in fact the oldest continually running tribunal in the Western Hemisphere. Chief Justice Marshall was not born a Boston Brahman. She came of age in South Africa and earned her first degree from Witwatersrand (Wits) University in Johannesburg in 1966. Margaret’s leadership talent was evident in her endeavors for, and her eventual election as president of, the National Union of South African Students. Because of her anti-apartheid activities, South Africa was not a place in which she could live comfortably and free. Fellow activists raised money to send her to our shores, and somewhere between her studies at Harvard
College and Yale Law School, she decided to stay. She became a partner in a Boston firm in record time, and in 1991, served as President of the Boston Bar Association. That same year she left law firm practice to become Vice President and General Counsel of Harvard University. Appointed an Associate Justice of the Supreme Judicial Court in 1996, she was named Chief Justice three years later.

My dear and sorely missed colleague Sandra Day O’Connor once said: “For both men and women, the first step in getting power is to become visible to others and then to put on an impressive show. As women achieve power, the barriers will fall. As society sees what women can do, as women see what women can do, there will be more women out there doing things, and we will all be better off for it.” The four Chiefs with us tonight fit that description to a Tee. They have all achieved positions of extraordinary prominence and have put on a most impressive show. For their service to their Courts, their States, and our Nation, please join me in saying to them: “Brava and Encore.”

LYNN HECHT SCHAFRAN

My name is Lynn Hecht Schafran, Director, National Judicial Education Program, a project of Legal Momentum in cooperation with the National Association of Women Judges, and I have the great pleasure of being the moderator for this evening’s program. The program is very informal. There are no prepared remarks. I have prepared some questions which I am going to ask our panelists. The reality is that we could probably spend the whole hour on the first question, but we are going to ask everybody to be brief so that we can go through a few questions and after about an hour move on to questions from you. This entire program is being filmed by C-SPAN, so it’s very important that when you want to ask questions, you go to the microphones.

So welcome again and let me move on to our first question.

QUESTIONS

Lynn Hecht Schafran: My first question concerns some history about each of these women that I don’t know and am interested in. I’ve known them all for a very long time, and I don’t know the answer to this question. It’s about history, it’s about trailblazing and it’s about how women are perceived today.

The history of Justice O’Connor’s 1981 appointment is that Presi-
dent Jimmy Carter had appointed a record number of women to the federal bench. When he came to the presidency, there had been all of eight women on the federal bench in the history of the United States. When he left, there were forty-three women on the federal Courts of Appeal and District Courts. Among President Carter’s women appointments to the federal bench was Columbia Law School Professor Ruth Bader Ginsburg, whom he appointed to the U.S. Court of Appeals for the District of Columbia Circuit in 1980. President Reagan, needing to respond in some way to this, made a campaign promise that if he was elected, he would, if the opportunity arose, appoint a woman to the Supreme Court. When the opportunity arose, organizations like the National Association of Women Judges pressed him to make good on that promise.

Now when Justice O’Connor was appointed, the country’s focus was on her being the first woman on the Supreme Court. But Justice O’Connor has said repeatedly that her focus was that she not be the last. In later years she said, “If I stumbled badly in doing the job, I think it would have made life more difficult for women, and that was a great concern of mine and still is.” As you’ve heard, three of our panelists were the first women on their State Supreme Courts, Chief Justice Marshall was the second, and all four were the first women to be Chiefs of their State Courts. So my question for each of you is, “What were the circumstances that made the governors in your respective states decide to make a little history of their own and appoint the first woman to the State Supreme Court and the first woman Chief?” When that happened, did you consider yourself a trailblazer, and, if so, what did that mean then, and what does it mean now that there are other women on each of your Courts? And, finally, have we at last reached the point where the actions or the competence of one woman no longer represent the actions or competence of all so that no woman who moves into a leadership position may have the same worry that Justice O’Connor did that she will be the last. I’m going to ask our panelists to respond in the order in which they went on their Courts. Justice Ginsburg gave you that order, but it’s Chief Justice Abrahamson in 1976, Chief Justice Durham in 1982, Chief Judge Kaye in 1983 and Chief Justice Marshall in 1996.

**JUDGES’ ANSWERS**

**Chief Justice Abrahamson:** I’m fairly confident that one reason I was appointed was that in 1976, the women’s movement was quite prominent, and there was an interest in women moving into the legislative,
executive and judicial branches. I do not know why the Governor appointed me, and I have never asked him. I merely said: “Thank you, Governor.” I used to joke that when the opening in the Wisconsin Supreme Court occurred, Governor Patrick Lucey and his aides sat around and discussed the qualifications for a justice. One of the aides said: “You know, judges always complain they are overworked and underpaid.” And the Governor said: “Overworked and underpaid, overworked and underpaid. Sounds like woman’s work.” The Governor instructed—so the story goes—the Governor instructed the aides to make an alphabetical list of all the eligible women lawyers, which in 1976 was a quite short list. I was on the top of the list and the Governor appointed me. I think my story has a ring of truth. When you look at Massachusetts, the first woman to serve on that high Court was Ruth Abrams. When you look at the California Supreme Court, the first woman was Rose Elizabeth Bird.

I don’t think that I or any of the other women were appointed as tokens. I follow the Ruth Bader Ginsburg and Patricia Wald example: They are, and we are, beacons lighting the way for others to come; and they have come. And if there is a woman who would not do well—I mean I don’t know if there is such woman—but if she existed and she didn’t do well, she would not ruin it for the rest of us. I think, and hope, we have reached that stage. I hope I have answered the multiple parts of your question.

**Lynn Hecht Schafran:** Yes, you did. Thank you. Moving in alphabetical order.

**Chief Justice Durham:** I once heard Justice O’Connor speaking to a group of women lawyers in which someone asked her how do you get to be on the United States Supreme Court, and I believe she quoted Potter Stewart, although I am not certain of the attribution, saying, “It’s like lightning; you have to be in the right place at the right time.” And that’s true. I think all of our selection systems are different. I come from a state which has a so-called merit selection, where the Governor picks from a group of individuals who have been screened by a merit selection committee. When the Governor interviewed for my position on the trial court, I was the first woman in my State to go on the general jurisdiction trial bench in 1978. One of the things that mattered to him—he was a moderate Democrat; believe it or not, we’ve had Democrats; we’ve had 20 years of Democrats in Utah; of course that was 20 years ago—one of the things that I know impressed him was the fact that he had a daughter-in-law
who had gone to Wellesley College, and I’m a graduate of Wellesley College (I have some classmates here in the gathering tonight), and that made a difference to him. My activities made a difference to him as well as my educational pursuits, and many of my activities were pretty feminist in nature. I had lobbied for ratification of the Equal Rights Amendment, first in North Carolina after I graduated from Duke Law School and then in Utah when I moved there. You can tell how good an advocate I was by the fact that the Amendment was not ratified in either North Carolina or Utah. The Governor appointed me to the trial bench, and I knew that I was very much on trial in many respects as the first woman. I was very young, but my gender was such an issue with the press that nobody mentioned my age, which in my view was a good thing. But I knew I was on trial. I worked very, very hard. I was the first one there in the morning and the last one out at night. I really felt that I was holding a standard for anyone who would come along after me.

And four years later when the Governor decided to appoint me to a vacancy on the State Supreme Court, he called me and said: “Are you ready to make history with me again?” So our Governor in that era had a very real sense of the fact that this was a history-making moment in our State. I do think - and once again, although I was still young even to be on the State Supreme Court - it was my gender that received most of the attention. And I do think that I was perceived very much as someone who was out in front, and I had the strong sense, accurate or not, that my success or failure would have a bearing on the chances of other people coming behind me. It took a long time for me to have an opportunity to serve as Chief Justice of my Court. I once had a colleague who wanted the job at the same time I wanted the job who said to me, “Utah is not ready for a woman Chief yet.” He is retired from the Court now and I’m Chief. So some of this process is just outliving them all!

Like Shirley, I really believe that in my State, and I’ve noticed nationally through my activities with the Conference of Chief Justices and other organizations, that we have reached a stage where it’s no longer make or break, that women are accepted in positions of leadership in the state courts quite readily. There are still some states which have not yet had a woman as their Chief Justice, but I don’t think it’s going to be a big deal for them to have that experience. So, to that extent I no longer feel quite the same focus on my gender. I must also say that for the last three years and for the first time in my nearly 28-year judicial career, I have a female colleague on my Court; and that has been an enormous pleasure to me. It’s great fun.
Lynn Hecht Schafran: Thank you.

Chief Judge Kaye: Well, I’m so pleased that between the year 1976 when Shirley went on the Court and 1982 when Christine went on the Court, the alphabet devolved down to “K”—from A to K. But I think I feel a kinship in many respects and probably my arrival on the Court is very similar to theirs. A climate had been created in this State—in the State of New York—that made it not only desirable but really, really important that a woman for the first time in the history of the Court of Appeals, which is our highest court, be appointed to the Court. And at that time Mario Cuomo was a candidate for the Governor of the State of New York, and it was one of his campaign promises that if he were elected governor, he would seek to appoint a woman to the Court. It was my very good fortune that I was the woman. And isn’t it great, as I’m listening to Shirley and Christine, that we do have such longevity on the Court? That we not only have arrived there, but we stayed there.

In 1993, I had been a member of the Court of Appeals for ten years when it became necessary to appoint a new Chief Judge, and again I was fortunate to be appointed Chief Judge of the Court of Appeals, which carries with it as well the title “Chief Judge of the State of New York.” I was just renominated and reconfirmed, my 14-year term as Chief having ended, and Governor Spitzer selected me again. And I had cause to go back, since I am preparing some remarks for my swearing in on Monday, and I noticed that when I was sworn in, I was the quote of the day in the New York Times for the one and only time. And I think mostly I am happy that I haven’t been the quote of the day since then. And what I said on September 12, 1983 was, “I take my gender with me wherever I go.” I do, I do. I agree with both who have spoken before me that I don’t think we are at the end of the world if we have a decision that everybody disagrees with, but I take my gender with me wherever I go and I think it’s applauded.

Today, we have four women on the Court of Appeals of the State of New York. Imagine that, from zero women to four of seven are women. Governor Spitzer, when he was in our courtroom the other day, noted that this line about Albany—the legislative and executive branches of government being run by three men in a room—wouldn’t do a bit of good at the Court of Appeals. They’d be outvoted because there are four women. It’s been for me nearly 24 years and I must say pretty terrific years, made better, made terrific, made great by my three women colleagues and by the wonderful friends who have become judges in other jurisdic-
tions. I think that is extremely supportive for all of us. So, yes, I do take my gender with me wherever I go. Margie?

Chief Justice Marshall: I came to this country in 1968. I did not know a single lawyer. I never thought that I would be a lawyer, and I certainly never imagined that I would be a judge. The circumstances of both being a Justice, and sitting on the oldest court in this country, were not even on my horizon at the time. I came, as Justice Ginsburg mentioned, from South Africa with its terrible history of racial oppression and degradation. I find myself a Justice on the first court in the world that declared slavery inconsistent with the fundamental guarantees of our Declaration of Rights, the Declaration with which the Massachusetts Constitution begins. Why was I appointed to this position? Judith talked about a climate of change for women. Almost a hundred years before I became a Justice, Leila Robinson filed a petition with the Supreme Judicial Court asking to be admitted to the Bar. The then seven Justices—all men—refused her admission. Standing on Robinson's shoulders, as Judith suggested, are remarkable women who refused to accept the reality as it was presented to them. These are women who, when they could not find the employment to which they were entitled when they graduated from law school, went on to become Justices of the United States Supreme Court. In short, the climate of discrimination had begun to change by the time I became a lawyer in Massachusetts.

There were many reasons for this. Women had sued major law firms because they were not admitted to partnership. Other women took enormous risks of saying they wanted to have a reduced workload so they could attend to their families. It is the case, I think for all of us, that some women ahead of us broke through an existing barrier to the advancement of women in the law. In my case, it was Justice Ruth Abrams, whom Shirley Abrahamson has mentioned. Now, Judith is somewhat of an exception, for if you look at the women “firsts” on Supreme Courts, they tend to be rather short. (laughter) In my view, these women were knocking their heads against a concrete ceiling. I just had an easy glass ceiling to break through.

The last part of Lynn's question, I suppose, to me is the most interesting: to what extent are we still “standouts?” Like Christine Durham, I agree to some extent that we are not standouts. But I also know that while there are still relatively few women in positions of responsibility, authority and power—that each of us in some ways still continues to feel every day our obligation to make it easier for the women (and men) who
follow us. When I speak at any group with the message “families come first,” that strikes a chord. It should not strike a chord because, for men and women, all of us know that families come first. I think we haven’t said that quite loudly enough.

Within the Conference of Chief Justices, it is easier for me to be able to call Christine, to call Judith, or to call Shirley, and say, “How do I deal with this?” I do so knowing that I will get marvelous advice from each of them. I am delighted to be the “baby” Justice on this panel: I have wonderful role models to follow.

Lynn Hecht Schafran: I thank you all, and my next question picks up on the theme that Chief Judge Kaye sounded, about taking her gender with her. Looking back again to Justice O’Connor’s appointment, her comment at the time about the impact of women on the Court was: “I think the important thing about my appointment is not that I will decide cases as a woman but that I am a woman who will get to decide cases.” But she has also said that each of us brings to our job, whatever it is, our lifetime of experience and values. For example, she has written about her own experience growing up in the Southwest on a ranch. She has written about how meaningful it was to her to hear Chief Justice Marshall talk about his experiences as a lawyer fighting segregation in the deep South. Justice O’Connor was openly thrilled when Justice Ginsburg joined her as the second woman Associate Justice, and openly critical when President Bush failed to appoint a woman to succeed her, leaving Justice Ginsburg, as she has said, as the only woman on the nine-member Court.

So here are three aspects of the diversity issue: first, the role model aspect, what my friend on the Nebraska Supreme Court, Lindsey Miller Lerman, calls: “If you can see it, you can be it.” The second is, how does life experience inform decision-making, and the third is, how representative of the population is the institution? My compound question again to our panelists is: Do you think it is important to have a bench that reflects the population? And if so why? And how have your own life experiences as women, and from your individual backgrounds, informed your decision-making and your dialogue with your court colleagues? So let’s begin to my far left with Chief Justice Durham.

Chief Justice Durham: I was afraid you were going to start with me because that’s a really difficult question. A number of years ago, the Institute for Court Management attempted to do a study of women on state supreme courts to assess whether they decided cases differently. They looked
at our constitutional criminal cases, they looked at family law cases, and they looked at some statutory interpretation and some common law decisions. At that time the sample was very small. As I recall, the study took place in the very early 80s, and their conclusion was that the only area they could detect a difference in terms of the vote on cases and the outcomes of cases was in cases where women’s rights in some direct way were implicated. The female judges seem to have more engagement and empathy with those claims. They couldn’t detect any other influences across the board. I really wish that they would repeat that study now that there are so many more women on the bench. I can think of very few decisions that I have made over the course of a long judicial history in which I can identify the ways in which my gender had an impact on my vote. So many things go into the judicial process, and all of us, men and women on the bench, share a common educational process which produced us as lawyers and ultimately as judges and has an enormous, I think, leveling influence on the way we do our work. At the same time, I can think of a few cases which involved—again, claims that to some degree are unique to the condition of women in American society—claims involving domestic violence. One case in particular I recall from a number of years ago had to do with a tort claim for wrongful pregnancy. I was the only person in the conference at the time who had actually produced children and had taken primary responsibility for raising them. I remember quite vividly the discussion in court of the issue of whether a child born to a marriage could ever be in any sense a detriment—that is, to his or her parents—economically or otherwise. I had a slightly different perspective on that than my male colleagues, which I think was impacted by my life experiences. So, I don’t want to say that it never happens, but at the same time, I think there are so many other influences on the judicial process. I know there are increasing opportunities for empirical research which make all of us judges a little nervous, but nonetheless, it is very enlightening to see what the results are. I am hesitant to say that I can identify areas in which my gender influences my vote, but I know that, like Judith Kaye, I carry my gender with me everywhere I go, and my perceptions of the world are to a significant extent influenced by the experiences I’ve had as a member of the female gender, so I’ll leave it at that and let others offer views.

Lynn Hecht Schafran: Chief Justice Abrahamson.

Chief Justice Abrahamson: Diversity on the bench is very, very important. It’s very important for those who come to court. They should
see a court composed of judges and staff who look like the people in the country. The court is not us against them; it’s all of us in this judicial system together. People looking at the bench should feel comfortable in the court thinking that everyone has an equal shot to be on the other side of the bench. Diversity is also very important for those who are on the bench and the court staff. We come to the courthouse with different life experiences and our total life’s experiences go into decision-making, just as Chris Durham said. For 17 years I sat as the sole woman on the Court. We have had four women on our 7-member court; we now with three women, four men. On August 1, 2007 we will again have four women on the bench. If we women vote together it’s because all the men voted together. You will find it’s very rare that there is a male-female split. I can think of only one case where that happened. A trial court ordered a man not to have any more children because he had a large number and he wasn’t supporting any of them. The issue before our Court, broadly speaking, was whether the order was within the trial court’s power. The three women said, “No.” The four men said, “Yes.” The media commented on the gender division. We may have divided on gender lines in a different case but it didn’t cause comment either within or outside the court. We each bring our own backgrounds, legal education and legal and life experiences. I’m a daughter of immigrant parents—an Eastern European family. My parents came to the United States with less than a high school education. They ran a neighborhood grocery store in New York City. My father had a heart attack when he was in his 40s, and he would have left my mother with two young girls to support. His heart attack was sort of a wake-up call for the entire family. The girls better get an education so that they can support themselves and their families if they had to. The emphasis in my family was on education. I went to P.S. 132 in Washington Heights, Hunter College High School and then New York University. People ask me what brought me to Wisconsin, and I respond, “I got married.” My husband got a job as a professor in the Zoology Department at the University of Wisconsin, Madison, Wisconsin and so I, like most women in the 50s and 60s, followed my husband.

Chief Justice Durham: That’s how I got to Utah too.

Chief Justice Abrahamson: That move turned out very well for both of us. Been in the great State of Wisconsin ever since. I bring with me to the bench that I’m a wife of a non-lawyer, a mother of a lawyer, a mother-in-law of a lawyer, a grandparent, a practitioner in the law and a teacher
of law. An easterner educated in New York City and the Midwest, transplanted to the Midwest. All of that comes with me on the bench. What you want on the bench—a multiple-judge bench anyway—are people with different backgrounds. Each of us sees the world and the law somewhat differently, although we all have gone to law school and are well versed in the law. You bring different insights to each case. The court can reach a consensus or not. From the dialogue and agreement or disagreement come better decisions. Diversity of all sorts, I think, is very important on a multi-judge court.

**Lynn Hecht Schafran:** Thank you. Chief Judge Kaye.

**Chief Judge Kaye:** Absolutely affirm, affirm, affirm, everything both Shirley and Christine have said. My mind was racing when Shirley mentioned voting patterns, and I was thinking that in my nearly 24 years on our Court, I think the one time we split along gender lines, when we were only three women, was whether you could have fees on fees in stockholder derivative litigation. I have been nursing that grievance for many years. If we had another woman on the Court, the law would be otherwise in the State of New York. I think undoubtedly what Shirley and Christine have both said so eloquently is true, and I cannot tell you the number of times that I have emphasized, just wherever people will listen, the importance of diversity in our courts, and I mean it with every fiber in my being. And Shirley is right. It matters to people coming into the Court that they see the spectrum of society, that our courts represent justice. After all, we bear the title “the justice system.” But I think, and I agree, that it goes beyond a perception and that, indeed, the life experiences that each of us brings, and each of us could make a list such as Shirley’s, I’m happy to join in hers because it is a good lesson in what we can each add to the strength of the decision-making process. The geographical balance is important. All of the different skills and experiences we bring to the decision-making process are enormously important. And let me tell you it’s so hard sitting on the State’s highest court, where you have only the responsibility to reach the right decision, so much harder than it is for a lawyer who is bound to represent a client zealously within the bounds of the law. But Lynn, I hope you will also ask about how diversity factors into our role as Chief Judge and Chief Justice, because there, I think the national dialogue in the judicial branch has changed greatly over the past decade or so, when by coincidence we have had so many women Chief Justices where we have a responsibility beyond deci-
sion-making, where we are responsible for the operation and administration of the entire judicial branch and where policymaking is very much within our purview, unlike the decision-making process where we are bound by the law.

Lynn Hecht Schafran: I promise we are getting there.

Chief Justice Marshall: I have had very much the same experience: it is hard to point to a particular case and say that gender made a difference. I do think one’s life experience makes a difference. My gender is important to me. But the experience that I had growing up in South Africa is equally important. It was painful for me to observe that the Supreme Judicial Court had had only one woman in its long history when Governor Weld nominated me to be the second woman on the Court. But there had never been an African-American on the Court. The Justice who followed me on to the Court is my wonderful colleague Justice Roderick Ireland, a graduate of Columbia Law School. He is the first, and to date the only, African-American to serve on our seven-person Court. Does it make a difference? Of course it makes a difference, but it also makes a difference that my colleague Judith Cowin was a prosecutor for so many years. It makes a difference that one of my colleagues has had enormous experience in zoning and land-use matters. A Justice brings to judging all of one’s life experience. Like each of my colleagues here this evening, I remember what it was like to walk into every courtroom in Massachusetts, and see hanging on the walls pictures only of men. One last observation: I may be the Justice here with the largest number of grandchildren; I have seven, six of whom are girls, all aged 14 to 16 years. They find it most amusing that I am called “Chief.” The fact that I am a judge is neither here nor there. But they love to call me “Chief.”

Lynn Hecht Schafran: Well, once again Chief Judge Kaye provides us with a wonderful segue, so here is my next question. As Chief Justice of a state supreme court, you don’t only decide cases, you have enormous administrative responsibilities as the head of a court system with ever more complex demands and never enough money, and the country looks to you as a leader in the justice system nationally. Now I know that each of you has initiated numerous innovative projects in both contexts, so this next question may feel a little bit like I am asking you to choose among your children, or even your grandchildren, but since time is short, I am going to ask only for one example of each. One top issue that you focused
on for your own state court system and why you chose it, and one issue that you have taken on nationally and why you chose that. And Chief Judge Kaye, since you wanted that question, let's start with you.

Chief Judge Kaye: Oh, goodness. Well, first I have to say Margie mentioned enjoying being called “Chief.” My favorite moniker that I got from a prisoner was “Mother of Justice.” “Dear Mother of Justice.” But now, one initiative in the State of New York that was thrust on me when I first became Chief Judge back in 1993 was to do something—please do something—about domestic violence. It was thrust on me by two murder-suicides in the State of New York, one in Kings County, one in Westchester County, and I was implored by the advocates and by a great many people to quickly bring myself up to snuff on issues of domestic violence and, boy, did I ever learn. And I feel pretty proud and extraordinarily grateful to all of the people who taught me, extremely proud of the response of the New York State Court system to domestic violence and the integrated domestic violence courts. And I said that was a lesson that I learned the hard way, not nearly as hard as the people who lost their lives, and there are so many of them. On national issues, Lynn, I guess I would have to point to jury reform, and maybe that began in my lawyer life when I thought that we could only do better in the State of New York. But it was honed in my Chief Judge life because I saw that there was so much we could do. In the State of New York, we call 650,000 people a year into our courts to serve as jurors, and I saw an opportunity, not only to make the justice system here work better, but also to garner some points in the column of public trust and confidence and we all greatly need to do that. I am very pleased that became a raging issue for Chief Judges and Justices all across the United States, with Arizona and New York clearly in the leadership, and Arizona now has a female Chief Justice too. I would cite those as my two—my one local and one national issue.


Chief Justice Durham: This is a fascinating question, Lynn, because I think we all expressed the view that our gender probably hasn’t had an enormous impact on the way we decide cases. But when I think in terms of the issues we care about in reforming the justice system in this country, perhaps our gender does have more of an impact. I think it would probably be inappropriate to go without noting that it was women coming to the bench at all, not necessarily as Chief Justices, but women coming to
the bench and organizing themselves into the National Organization of Women Judges, which quickly connected with Lynn Hecht Schafran’s project on Judicial Education for Men and Women in the Court, part of NOW, that began to identify issues like gender bias in the courts—and by that I mean the bias affecting not just women judges, but women as litigants, women as jurors, women as witnesses, and women as attorneys—and has gone on to focus on a huge array of issues, including domestic violence and women in prisons. Lynn could help me out with the list here. I’d also like to tell one other story. I have been a member of the ALI Council for a number of years. We used to have these annual dinners with wonderful speakers talking about areas of law reform. One year the Council invited Judith Kaye to talk about community courts and problem-solving courts. The ALI is a very venerable institution devoted to progressivism in American law, but that was the first time I had ever heard the subject of families and children discussed in ALI circles. The ALI has since gone on to do a project on family dissolution. Women on the bench and women in positions of leadership on the bench have had an enormous impact on the agenda of reform for the courts in the United States. And, if you look at the Conference of Chief Justices, I think it’s far more than a coincidence, as Judith Kaye has suggested, that the Chief Justices have emerged as a major policy spokes-entity for the American judiciary and the timing of the emergence of so many women as Chief Justices. When I came into the CCJ, I think I was the 24th woman. We have since dropped a few but we’ll build back up again. It’s during that period that issues of tremendous substance, such as jury reform, domestic violence, and judicial education have come to the forefront of court reform in this country. Now, to answer the question, one of the projects I’d like to mention is an outgrowth of an issue that was brought to the Chief Justices Conference by a wonderful former Chief Justice in Minnesota, Kathleen Blatz, who has since retired from the bench, but she started building on the work of the Pew Foundation’s Commission on Children In Foster Care in the United States, and she brought to the Chief Justices the notion that we should follow the recommendations of the Pew Commission. She recommended that the Chief in every state go home to her state and organize a high-level, policymaking entity that could address the problems of children in foster care in that state. I took that recommendation home and put together what we call the Initiative on Utah Children in Foster Care (“IOU”) - which is a wonderful acronym I owe to my wonderful Administrative Assistant. We have representatives from the Governor’s office, the heads of all the State agencies, the faith-based communities, the community
providers, and the business communities. We brought leaders from throughout the community around a single table to deal with the issues involving children whose lives have been disrupted by neglect and abuse and by the State’s having to take custody of them. That’s having a profound effect. And, at last word, Judith hosted a wonderful summit just last week here in New York, bringing together all of the teams working together on that effort from around the country, and I believe we had 37 states.

Chief Judge Kaye: We had 46.

Chief Justice Durham: Forty-six states. I heard that there were only 37 state teams signed up. Judith got on the phone and then it was 46. But I really do attribute that to the kinds of concerns that leaders, and it’s not that there aren’t male Chief Justices equally concerned about those issues, but I don’t think it’s a mere coincidence that so many women were in positions of power when issues like that got on the table. Another issue from my State that I wanted to mention was an outgrowth of our effort at jury reform. We were concerned about the degree to which jurors who come to court usually end up with very positive impressions of the justice system in contrast to the negative views of people who don’t come to court. In our State, our work on jury reform led to an outreach effort into the community to foster public trust and confidence by educating the public about what courts do. We are, in our state judiciary, a part of a coalition for civic character and service learning that focuses on getting education about the justice system and other forms of civic engagement into the public education system and the broader community.


Chief Justice Marshall: The Massachusetts Constitution provides that there should be an impartial interpretation of the laws and administration of justice. When I first became Chief Justice, I traveled across the Commonwealth listening to members of the Bar, and litigants, and community members, about their experiences in our courthouses. It quickly became apparent that substantive justice received high marks. But the administration of justice did not. Cases were too slow; litigation cost too much. What I focused on to begin with, was not glamorous. It was making sure that transcripts are prepared on time, making sure that for all criminal and all civil cases there are time standards for dispositional events, and that we set goals to improve the time standards every year. This is
difficult institutional work, bringing about change in a very complex organization. That work is ongoing. I think we are the only State that has adopted the major metrics for expedition and timeliness in the disposition of cases of the National Center for State Courts for all of our courts. And we have had improvements every year as measured in various ways. As I said, these are not glamorous objectives but they make a huge impact on people who seek justice in our courts.

The second important initiative, and I know that all of my colleagues join with me on this, concerns self-represented litigants. In many of our courts and in particular in our family courts and our housing courts, courts that have the greatest impact on families, over 80% of the litigants are not represented by counsel. In this country we all have a constitutional right to appear in court without a lawyer. But we must make it possible for people who are not represented by counsel to receive justice. We must help the judges and the probation officers and the clerks, everyone in the judicial system who must respond to self-represented litigants. Each of the Chief Justices here, I think, has undertaken major initiatives to help those litigants who come to court without counsel. We do so to make this a system of justice that works for everybody, whether or not they are represented by lawyers.

Lynn Hecht Schafran: Chief Justice Abrahamson?

Chief Justice Abrahamson: Well, I agree with everything that has been said. We are doing all of these things in Wisconsin. One of the advantages of the Conference of Chief Justices is that we talk about creative programs and each of us feels free to borrow a program from a sister state.


Chief Justice Abrahamson: “Steal,” that’s right. None of the materials are copyrighted; they are on the state court’s website. Each of us borrows, adapts and improves on the other’s program and then the home state gets back an upgraded version. I’ll add one more program on a statewide level that we have concentrated on in Wisconsin. A Midwest state like Wisconsin is not generally thought of as a state of immigrants—except in the 19th century—when the state had large migrations of Scandinavians and Germans. In recent years a large number of people from southeast Asia and Africa have come to Wisconsin, as well as Europeans. Many do not speak English well enough to understand court proceed-
tings. It is not justice if you come to court and you cannot understand what is happening to you. With state and federal funding the Wisconsin court system has developed a system of certifying interpreters, so that we have impartial, neutral interpreters who can translate witnesses and litigants. In any year in Wisconsin dozens of languages may be used in our court system. Perhaps I feel strongly about this issue because of my immigrant background. Also I remember that over fifty years ago, my uncle came to visit us in New York City. He was from South America but was originally from Poland. He left Poland just steps ahead of the Nazis who forced him to flee. As a result of being Eastern European, he spoke Polish, Russian and German. He spent some time in Italy so he spoke Italian and then went to South America so he spoke Spanish. While he was coming up to New York City to visit us for the first time, he stopped in Miami, rented a car and got a traffic ticket. He was brought into court and didn’t understand any English. And so they reviewed all the languages that he spoke and no one in court spoke any of them. He was now faced with a dilemma—he spoke Yiddish but was reluctant to reveal this language for fear of anti-Semitism. What was the greater risk—anti-Semitism or not understanding anything that was happening? He decided to say he spoke Yiddish. Well, the Judge spoke Yiddish, the court clerk spoke Yiddish, the reporter spoke Yiddish—so it was old home week in the Miami courthouse. He was given a warning and advice about driving in Miami and then went on his merry way. As he would tell the story, his last line was always: “Only in America!” And I have remembered that tale well. In America everyone who comes to court should be able to understand what is happening to them. Accordingly in Wisconsin, we have concentrated on interpreters along with everything else that everyone has said.

That story also reminds me that our judicial system is based on equal justice under law for all people. Judges are to decide cases on the basis of the facts and law, not on the basis of whim, bias, public opinion, or the dictates of the executive or legislative branches or special interest groups. The judges are to engage in fair, impartial, neutral, non-partisan decision making.

On the national level, I have been active in incorporating tribal courts in the National Conference of Chief Justices. We have several Indian tribes in Wisconsin, as does New York and Utah. Indian tribes have their own court system on the reservations, and the tribal courts have concurrent jurisdiction with state trial courts. What you don't want are conflicting judgments and conflicting decisions. The Wisconsin trial courts have developed protocols with Indian tribal courts to have conversations among
the courts to avoid conflicting decisions. We are working at the national level with the Conference of Chief Justices on relationships between state courts and tribal courts. The state court and tribal court judges in Wisconsin are very proud of our progress at the state and national levels.

Lynn Hecht Schafran: I have a lot more questions, but I am going to ask only one last question because I think that people in the audience probably have a lot of questions, and I want to have time for them.

As more and more women have become leaders in every American sector, in educational institutions, in the business world, in non-profits, in politics, and obviously in the law, there’s been a lot of discussion and research about whether women have a different leadership style than men and whether it’s getting any easier for women to be at the top than it has in the past. So my last question for this part of the evening, again a compound question, I do apologize, is: What has been the greatest reward of being a woman leader? What has been greatest challenge of being a woman leader? And if you had one thing to tell a new woman leader, whether Chase Rogers as the incoming Chief Justice of Connecticut, or Drew Gilpin Faust as the new President of Harvard, what would that be? Let me start at that end with Chief Justice Marshall.

Chief Justice Marshall: The greatest reward for me has been to see so many women move into positions of leadership and power. But there is still progress to be made. I look at Massachusetts: we have never had a woman Governor. Today we have the first woman ever elected as Attorney General, Martha Coakley. I was trying to think, Judith, I don’t think New York has ever had a woman Governor.

Shirley, I do not know if Wisconsin has had a woman Governor. Having women in positions of leadership makes an enormous difference. And all three branches of government should reflect the diversity of our people.

The challenge, I think, is a simple one. We are not quite accustomed to hearing women speak from positions of power. Our competence is no longer challenged. Justice O’Connor and Justice Ginsburg and Justice Abrams of my court, women of their generation all had to demonstrate their competence. We no longer face that challenge. But I sometimes observe that people react differently when they listen to a woman who is speaking from a position of power. We may be challenged or criticized more frequently or more harshly because of that.

If I gave one piece of advice to the new president of Harvard, or to a
new chief justice or new governor, it is this: “Don’t take any criticism personally. It is not personal. Keep to your own basic values, surround yourself with very smart and wise advisors and listen, listen really hard.” I want to say to the young women and young men in the audience: Do not let people define your careers, your goals, your aspirations, your dreams, your desires for you. To find real satisfaction, real fulfillment, you must define yourself. As soon as you take the criticisms personally, and begin to change direction because of that, I think you will find your world constricting.

Lynn Hecht Schafran: Chief Judge Kaye.

Chief Judge Kaye: Well, I think I will accept everything that Margie has advanced as my personal answer to your question as well. I think she has said it so well, and I imagine each of us would do the same as we have done with all of your questions. I will do what Shirley did and try to add something a little bit different and maybe this goes in the reward/challenge column, that surely a great reward for a person of my years in the profession—and they’ve been very good years in the profession—a great reward has been to see so many women advance into positions of authority and to do what they do so very well. But the slash part and the challenge, where I just have not seen significant reform, is in accommodating family—and this goes, I must say, both for women and non-women. I don’t think what I’m saying really is a women’s issue any more, maybe a women’s issue to reach the high office, to be the dean, to be the president, whatever, but this is something that very fundamentally affects the lives of men and women that I think we all have to attend to. I am looking out at Susan Kohlmann in the audience because 20 years ago I did a study of women in big firms, and I was so privileged to enjoy the best of large law firm practice myself before I went on the bench. I called the piece I ultimately wrote: “The Progress of Women in Firms,” but I was really being quite sarcastic. And I have to tell you that 20 years later, I don’t see a sufficient change; I really do not see a sufficient change. So I think the challenge very much remains for all of us to find ways to achieve a fundamental change that accommodates our personal challenges, and I hope all of us can work together on that. On advice, I guess I would tell others it is okay to be ambitious. I think it’s important to be ambitious—that lightning strikes only if you are there in a place where it can hit you. The miracle can occur only if you put yourself in a place and have an expectation, in fact, that the miracle will occur. And be persistent, be
persistent. Do not be put off or shy or unduly self-critical, but believe
that you can be successful and you will be successful. If you don’t believe
it, hey, nobody else will either.


Chief Justice Abrahamson: Well, I agree with Margie and Judith. Rather
than repeat what they have said, I shall add a different kind of reward.
One of my rewards is when fathers and mothers bring their young sons
and daughters into court and introduce them—the children—to me and
especially the other women on the bench. Their message to the children
is clear: Regardless of gender or race or ethnic background, you can do
what you want to do in our great State, and you too can be, if you want
to be, a lawyer and a judge. That’s a wonderful message to be able to give
to young people. And so I find that extremely rewarding. All of us have
had the challenge of having both a family and a career. You have to make
tradeoffs, and you have to have the support of your family. As to my
advice to new Chief Justices and the President of Harvard, “Relax; have a
good time.” It’s okay to have fun. And I think that one of the things that
all these Chiefs do is they bring in all the staff and colleagues they have
and talk with and listen to them, get diverse opinions and views about
the issue at hand. After you get all the facts and advice that you can, then
you have to use your best judgment and do what you think is right. You
take full responsibility for all the errors and you thank and give credit for
all the successes to all the people who surrounded and helped you make
the decision. I think those are marks of successful and good leadership. If
things go badly, declare victory and move ahead.

Lynn Hecht Schafran: And last, but not least, Chief Justice Durham.

Chief Justice Durham: I agree with everything that’s been said. I think
perhaps the most significant reward that I have experienced as Chief Jus-
tice has been what Shirley just touched on, and that’s the ability to asso-
ciate with all of the incredible members of our judicial branch of govern-
ment. I’m not referring only to judges who contribute and give of their
off-bench time in so many important efforts, but also to the staff, the
people who have embraced judicial administration as a career and a disci-
pline, including the counter clerks who are the interface between our courts
and the public. It’s been so rewarding for me to see their dedication and
their service. Perhaps the greatest challenge I have experienced is finding
the time and energy to do it all. Shirley Abrahamson has been a mentor to me for many years and especially after I became Chief. She has been telling me to relax and to have fun for years. I am having fun, but the relaxing part is coming slowly. Which takes me to the advice. My friend Ruth McGregor took over as Chief Justice in Arizona a couple of years ago. I saw her recently at a meeting and she said that I gave her the best advice when she became Chief Justice. She said that I quoted Woody Allen (I don’t know what a great source he is, and he was probably quoting somebody else) but he said: “85% of success in life consists of just showing up.” My point to her was that the judiciary has got to be - maybe next to the Catholic Church, I’m not sure - the most hierarchical institution left on the face of the earth. When you become Chief, you automatically have power. It’s not personal power, although you can develop and infuse the job with personal power as well, but you have a mantle fall because of the responsibilities you hold, and that means that if you show up at an event, if you endorse a project, if you criticize an effort, your comments and your expressions have enormous influence and power. Apparently Ruth was happy to have gotten that message before she started, and I must have given her the message because I didn’t realize it until I had been on the job for a while. So, while I endorse all of the more general messages, I think, as far as the judiciary is concerned, women are still learning the kind of power that comes with high public office, and I hope we continue to have the opportunities to do it.

Lynn Hecht Schafran: I thank all of our panelists, and now we have an opportunity for questions. We have a standing microphone there. Yes?

Questioner: Linda Hirshman, in a book I think is called Back to Work¹, laments about very highly educated women opting out of the workforce and concludes, that there won’t be too many women to put on the bench to be Chief Justices. I’d like to hear your comments on that.

Chief Justice Marshall: I simply want to reiterate what Judith said. It is both an obligation and an opportunity for all of us in leadership positions to keep everybody in the society represented in positions of responsibility. To do this we have to address what is called the “balance of work and family.” I am an optimist, perhaps because I have a sense of history. Women now have the vote; we are admitted to law schools; and I have no

doubt that collectively we can solve this problem. There are so many ways that it can be tackled. If it is a question of 80 hours at work or you don’t succeed, or don’t move up the ladder of success, that is inconsistent with family responsibilities. In the United States we all work very long hours. But I am confident that together we can find solutions if we put our best minds and dedication to finding ways to balance our commitment to our work and our commitment to our families. We should not accept an unbalanced life as a given.

Chief Justice Durham: I agree, and let me just add, I heard, 20 years ago I think, Patricia Wald at a women judges luncheon, say in reference to women lawyers and women judges, “We have been given our tickets of admission to the ball park. We’re in the game. The question remains ‘will we change the rules?’ referring to the way the game is played, the way law is practiced, the way the profession conducts itself.” As Judith alluded to, there is a lot of basis for concern that in that 20 years the economics of law practice has become such that many women, and men too, who care about family commitment are taking themselves out of certain aspects of the practice of law, which isn’t to say there aren’t many other opportunities in the law, but I wonder about the extent to which we have sufficiently put the need to change the rules on the national agenda. I see signs that it’s getting on the agenda but it’s been a long time coming.

Lynn Hecht Schafran: Does anyone else want to add to that?

Chief Judge Kaye: These are really tough questions. There are just too many women, especially women, leaving the practice of law, which I think is devastating. I’m so sad to see that. I think we all need to put our heads together and find ways to stop this. It’s in the interest of everyone, for all of society, that we find the answers, and we just haven’t found the answers.

Questioner: You mentioned earlier that, I believe, each of you could only think of a few instances in which your gender influenced the outcome of your decision. I’m wondering if you can think of any times when you reached the same outcome as the men on the Court but because of your experiences as women or your gender you reached it by different reasoning, and along the same line, I wonder whether your gender or your experience as women has ever affected your decision whether to publish either a concurring or a dissenting opinion?
Lynn Hecht Schafran: That’s an interesting question in the sense that one of the questions I didn’t get to ask was about the issue of consensus. You’ve all seen in the press recently Chief Justice Roberts coming out very strongly for consensus, and you know the old maxim that today’s dissent is tomorrow’s majority. So if we only have consensus, what will happen? Who would like to respond?

Chief Judge Kaye: Well, I think it’s only the academics who say that today’s dissenter is tomorrow’s majority. If you play to the press that way, we’d have more dissents, right? I agree completely with Chief Justice Roberts that it is very desirable to build consensus and for the high court to articulate the principle of law as clearly and coherently as possible and not to sow the seeds of dissension. But as to the particular question that was asked, I’m very interested. I don’t know whether it was Shirley or Christine who mentioned the social sciences—I guess Christine—and this is one where I don’t feel comfortable judging my own work as to whether I expressed a view as a woman or a view as a daughter of immigrants or whatever. I think we need a more objective view here than certainly I could express as to my own work.

Chief Justice Durham: Could I have a dissenting view on the first point? I’m thinking of a recent case in which our court decided a question of statutory interpretation that was very open. There was enormous ambiguity in the statute, and a member of the court viewed the statute differently and believed that the majority had it wrong in terms of what the Legislature intended. I thought it was important to publish that dissent in order to contribute to the discussion, which I hope will happen, with the Legislature, which is a function particularly of state courts. I’m not speaking of the function of the United States Supreme Court, which is of a different order, but a state court is in constant dialogue with the other branches of government, and sometimes the dissenting opinion can illuminate policy issues that I think are important to put into the public discussion. It’s not that I disagree with the notion of consensus, but I do think that dissents have their place, particularly in state courts, where this dialogue is ongoing.

Chief Justice Abrahamson: As to the first part of that question, I think it’s very difficult to separate the various threads of your life—gender, age, background, education, practice. So I’d have a hard time saying what part of my life and life’s experiences shape my views. My views have
been deeply shaped by my law school training and law practice. Now, if everybody would just agree with me, we wouldn't have these dissents and concurring opinions, but unfortunately they don't. Sometimes I'm in a unanimous court, sometimes I'm in the majority, and other times I write a concurring or dissenting opinion. I will write a dissenting or concurring opinion if I think I can add something to the law. Opinions are the beginning of a dialogue, a dialogue with your colleagues on the bench, a dialogue with the lawyers—not only those who appear before you but the rest of the bar—a dialogue with the academy, a dialogue with my fellow and sister judges across the state. A minority opinion may be the basis some years or maybe some months later for a further discussion about this issue when it arises in a different case. Also a minority opinion on one state court may persuade a judge of another state court. Your effort may save another judge a lot of time and effort; they can build on your work, and then you can build on theirs. So I think there are many cases where a unanimous court may be very important for the development of the law and that generally it's good to have a unanimous court; but dissenting and concurring opinions play a very important role in the development of the law.

**Questioner:** I'm a first-year student at law school, and it's been my experience and my friends' experience that women still experience law school very differently than the men. We speak far less in class, we're not as well represented on the journals, we don't form relationships with professors in the same way, and I was wondering if any of you had any advice for women law students about these issues or just in general?

**Chief Justice Marshall:** I think you have pointed to a phenomenon that is well known to professors and students. There are good reasons for the reticence of women, and bad reasons for it. One Yale Law School professor asks students who do not wish to answer a question to raise their hands. Instead of saying, “If you want to be called on, raise your hand,” the professor asks, “If you do not want to be called on, please raise your hand.” In so doing, he observed that he had a very different set of students from whom he could select to answer questions. When I was a partner in a large law firm, many young men associates came to ask my advice. I was struck by how few women took that opportunity. Women are also less willing to seek out mentors. All of us on this panel, I suspect, had mentors, and not only mentors of the same gender. Quite the contrary. Many of my mentors were men. (That's not surprising because there were
not very many women in positions of authority who could act as a mentor to me.) The skills you need to succeed are ones that you have to learn; you are not born with them. There are so many ways we can learn the skills. It is a combination of wanting to be the very best you can, and learning from others. Do not think you have to reinvent the wheel all the time. Whatever the challenge, others have met it before.

**Chief Justice Durham:** I suspect that none of us, and probably none of you in this room, got where you are by staying in your comfort zone. And I was one of those women law students who didn’t realize that it was a good thing to get to know faculty outside of class or to approach other people for advice and so on. And it’s not that I learned to keep my mouth shut. That was a foregone conclusion after college, but you really have to push yourself out of your comfort zone and watch the students that you think are getting more out of their educational experience and do what they do. Sometimes it doesn’t come as easily to one person as to another, and I suspect that women may have been socialized to a greater degree even now in the 21st century to stay in their comfort zones more often. But it doesn’t get you to very many places that you really want to go.

**Questioner:** I have two questions. I was wondering whether during your very successful legal careers, you have encountered situations in which you’ve been labeled as one of two very common stereotypes, either of women being too aggressive . . .

**Chief Justice Durham:** “Pushy broad,” I think would be the term. Yes?

**Questioner:** . . . or of being a pushover, and how have you dealt with it? And my second question is whether there are times where either by choice or due to pressure you choose to perhaps stand down when there’s something you believe in. Do you decide to stand down due to your gender because perhaps society isn’t ready for such a decision or you thought that strategically for some reason it would be best to do so.

**Chief Judge Kaye:** Well, I’ll take the first part because I just remember in discovery once in a large litigation finding out that my adversary referred to me by the initials D.L., which I learned was Dragon Lady. And I felt proud.

**Chief Justice Abrahamson:** I always thought when I was in practice
that if the lawyer on the other side started commenting on my gender or making me worry about being aggressive or domineering, that he was in trouble and had a bad case. If opposing counsel had to play that way, I was in the saddle; I was in the driver's seat. I had to just stay calm and keep focused. I was not to let opposing counsel distract me; just stay on the merits of the issue at hand. That happened to be litigation, but it could be anywhere. You are the winner when the best argument the opposition can make is personal; if that’s the best, he’s a loser. So you can’t worry about that. Not everybody is going to like you all the time. I’m sorry to tell you that. Of course I’m an exception to that rule! But the rest of you just have to put up with that and do what you think is right. You have an internal, sound compass; have confidence, follow it. No one said life was going to be easy for you.

Chief Justice Marshall: I have two quick anecdotes. I was going to Germany to give a speech. The administrator of an institute who asked me to come and talk, sent an e-mail to my wonderful assistant, which read literally as follows: “I have just Googled Chief Justice Marshall. Does anybody ever say anything nice about her?” The other thing is, we have not talked about influences of mothers. I want you to listen to the nursery rhyme my mother taught me—the whole nursery rhyme: “There was a little girl who had a little curl right in the middle of her forehead; and when she was good, she was very, very good; and when she was bad, she was wonderful.”

Lynn Hecht Schafran: Now there was someone else with a question. Yes?

Questioner: I have one question. As chief administrator of justice in your states, what reform effort are you engaged in now that you haven’t succeeded in yet that is dear to your heart, and why? And what kind of obstacles are you facing to achieve it?

Chief Justice Marshall: I am not going to admit that any reforms I am undertaking have not succeeded! I testified today before the Joint Committee on Ways and Means, and I know I’m going to get full funding for the budget I submitted.

Lynn Hecht Schafran: Chief Judge Kaye, do you want to offer anything?

Chief Judge Kaye: Well, I would say as a general answer that it would be a terrible mistake for any of us to declare that any reform we really
cared about had succeeded. It’s always a work in progress. Habits—old habits—die hard, and if you don’t watch all the time, even something you think you’ve absolutely put in place, goes back to its very beginnings. We’re battling right now in the State of New York for salary increases for judges. I hope in a couple of months to tell you that is one where we have succeeded 100% in every aspect of the reform because the judges of this State so richly deserve it. But I stay with my general proposition, which is never to declare something finished and walk away from it, point one. Point two: always be optimistic that you will succeed.

Chief Justice Durham: I just thought of a wonderful example of something that is underway but is meeting obstacles. I’m not going to say a word about it. Just in case somebody in Utah watches C-SPAN.

Chief Justice Abrahamson: I agree, of course, with all of the speakers, but especially Judith, who said everything we do is a work in progress. Just when you think you’ve got it where it’s really going well, life changes, courts change, society changes, and you have to keep working at it. So you just can’t take your eyes off any of the matters. Just keep moving on them as best we can.

Lynn Hecht Schafran: I just want to quote something from Chief Judge Kaye. This was with respect to the work of the Task Force on Gender Bias in the Courts. She came last April to speak at the 20th anniversary of the committee charged with implementing the recommendations in New York, and she used a phrase that I have quoted constantly ever since because I think it applies to our work in so many respects and it’s certainly a good phrase for the question that was just asked: “Impressive progress alongside persistent problems.”

Lynn Hecht Schafran: Any other questions?

Questioner: I have a question just in follow-up to Chief Judge Kaye’s challenge to younger women in reforming and changing the quality of work/life balance in law firms specifically. I just ask you, each of you, as employers and as women formerly in our positions of being young associates and lawyers in the field, what you have learned from your experience that you would maybe do differently or what you’re doing in your courts as employers. I know as a native of Utah, Chief Justice Durham has a fantastic reputation as an employer of women and mothers specifically.
So I’m just wondering what kind of advice from those two perspectives you might pass along to younger generations.

**Lynn Hecht Schafran:** Why don’t we start with Chief Justice Durham?

**Chief Justice Durham:** Babies in chambers are great for the blood pressure. And as employers, as women, as managing partners of law firms who are outsourcing legal work, you really can have an impact by making accommodations in your own practices, by insisting on diversity in the people and firms and entities that you hire and supervise. One of the things that greatly concerns me is the economics of law practice. I really think we’ve got to do something about the billable hour. I think the billable hour has transformed the practice of law in some very malignant ways, and there are some efforts for change out there. There’s at least one major law firm originating in the Midwest that is focusing on a new form of law firm economics and management, trying to do away with billable hours, transforming relationships with clients and so on. I think it’s time for us to demand more research and more effort on our part, and I’m talking to all of you who are in the practice. Judges, we could do our part. One of my favorite stories of all time goes back to when I was a trial judge. I was trying a four-month-long, big construction case. One of the lawyers stood up one afternoon about 5 or 5:30 after we’d let the jury go home, and he said, “It’s my night to pick up the children. Is there any chance we could recess?” I said, “Of course,” and I stopped court. I don’t know whether he would have had the nerve to ask a male judge that question or whether a male judge would have responded differently, but more judges need to account for the needs of litigators in their courts.

**Chief Judge Kaye:** You’ve just reminded me of an experience—a really critical experience—in my own life, I was litigating in a firm in Manhattan and was sent to a case in Jacksonville, Florida, which was really an interesting case, and I was so pleased to have been sent there, but I had three children. The eldest was 3-1/2 years old, and every Friday night my husband and the children would come pick me up at the airport and every Sunday afternoon they would take me out to the airport to go back to Jacksonville, Florida. This went on for several months. And one day I simply submitted my resignation to the firm, and they were just so startled. They said, “We thought everything was great. We thought you were really enjoying this.” I said, “I know, but I have three children under the age of 4 at home and this is devastating. They said, “Oh my goodness, it never
occurred to us that this was a problem for you.” Christine started a sentence with being more demanding. I would put a period there. Be bold. I would put a period there. And I think we’ve achieved a point in society in the workforce where we can be more bold and more demanding and can assume a better response than in an earlier day when there were just one or two of us there. I think that employers such as Christine has just described are trying to be responsive and would like to be.

Chief Justice Abrahamson: In our court we have job-sharing, so if men or women want to work only part-time, they can. It’s very difficult to do good job-sharing, but it can be done and is done. We also have opportunities for part-time work, and I also think it depends on the individuals and their circumstances. But I think we should view people coming in and out of the job market very well and that women (or men) who decide that they want to take several years off and be full time homemakers—favorably. We all should recognize the value of the homemaker and how difficult a job that is. One reason I didn’t do it was because it was too tough for me. I hire people who’ve been out of the job market and have been homemakers because they can multitask. Nothing fazes them. They can talk on the phone, listen to everybody else in the office scream, and do a whole multitude of things because they have learned to do that as homemakers. And they know how to budget their time and make the most out of a minute. I think we have to recognize the values that people learn in whole life experiences including homemakers. So although I’m always sorry to see a woman who has been well-trained in the law leave the law, I do not view that as a total loss to the law or to women professionals because she’s doing something very important at home and she’s going to come back. When she comes back, she’s going to be better trained to do the work. We have to open up the job market to people who leave for a while.

Lynn Hecht Schafran: It is now 9:00 and even though I’m sure that we want to hear more from this fantastic panel, we are going to call the evening to a close. When we began, Justice Ginsburg said that she came to this evening as a spirit-lifting event before she went on to some difficult writing and wrangling.

I think this has been a spirit-lifting event for all of us. It is phenomenal to know the kind of wonderful talent and commitment to justice that these four women exemplify. So, Justice Ginsburg, we thank you for letting us honor you and for being the occasion of this wonderful program, and we thank all of you for coming. Good night.
Orison S. Marden Lecture

The Legal Profession and the Unmet Needs of the Immigrant Poor

Robert A. Katzmann


It is a great privilege to deliver the Orison S. Marden Lecture of the New York City Bar—a series honoring the memory of a person deeply committed to providing legal services to the poor, an individual who was steadfast in that support as a partner in White & Case, and remarkably as president of three distinguished bars (the New York City Bar, the New York State Bar, and the American Bar Association). I thank Peter Eikenberry for inviting me, Barry Kamins for his gracious welcome, Barbara Berger Opotowsky and her able staff for all of their efforts, and Jed Rakoff, a most distinguished judge and treasured colleague, for his all too generous introduction. And all of you for coming.

My subject tonight is a pressing one, the unmet legal needs of immigrants, a vulnerable population of human beings who come to this country in the hopes of a better life, who enter often without knowing the English language and culture, in economic deprivation, often in fear. I think we can all imagine our own ancestors or ancestors of friends and

1. For their criticisms and suggestions, I am very grateful to Robert Juceam, Eleanor Acer, Claudia Slovinsky, Linda Kenepaske, John Palmer, Andrew Schoenholtz, Donald Kerwin, Elizabeth Cronin, and Jennifer Callahan.
relate to the anxieties of today’s newcomers. We are a nation of immi-
grants, whose contributions have been vital to who we are and hope to
be. All too often immigrants are deprived of adequate legal representa-
tion, essential if they and their families are to live openly and with secu-

My views are shaped by experience as a judge on the U.S. Court of
Appeals for the Second Circuit where our caseload dockets have virtually
doubled in the last couple of years as a consequence of an avalanche of
immigration cases (ranging from 32-48 cases per week). I speak tonight, I
should emphasize, in an individual capacity, not as an official represen-
tative of my Court. I begin this evening with some words about the lawyer's
ethical responsibility to provide effective representation, then offer a pro-
file of the immigrant’s plight, move next to a description of ongoing
efforts to secure adequate representation, and then conclude with some
ideas for further action. I salute those who have worked to provide effec-
tive representation of immigrants and hope to encourage those who have
yet to be involved in these efforts.

THE LAWYER’S RESPONSIBILITY

Some years ago, in a volume, The Law Firm and the Public Good, I
observed that at least since Greek times, lawyers have been viewed by the
public as economically greedy, indeed unscrupulous opponents of the
common good. Aristophanes described the typical “lawyer” of his day as
“a law book of legs, who can snoop like a beagle, a double-faced, lethal-
tongued legal eagle” and further asserted: “If you pay them [lawyers] well,
they can teach you how to win your case—whether you’re in the right or
not.” This perception, however simplistic, underscores the importance of
assuring that the administration of justice is as fair as we can make it.

In our legal system, driven by complex rules and procedures, a lack of
access to competent legal services damages fundamental concepts of fair-
ness and equality before the law. The lawyer’s function is grounded in
role morality, the notion that special obligations attach to certain roles—
in the lawyer’s case, to serve justice. As a consequence of specialized knowledge
and skill, lawyers claim autonomy to perform their jobs. In large measure,
the state grants such autonomy, an effective monopoly, in exchange for
lawyers, as officers of the court, discharging their duty to further equality
before the law. After all, the very reason that the state conferred such a
monopoly was so that justice be served—a notion that surely means that
lawyers have an obligation to provide effective representation and some responsibility towards those unable to pay or those pursuing an unpopular cause. A lawyer’s duty to serve those unable to pay is not an act of charity or benevolence alone, but rather one of professional responsibility, reinforced by the terms under which the state has granted to the profession effective control of the legal system.

Immigrants can secure legal representation in immigration proceedings, but “at no expense to the Government.” 8 U.S.C. sec. 1362. The importance of quality representation, paid or pro bono representation is especially acute for immigrants, not only because the stakes are often so high—whether individuals will be able to stay in this country or reunite their families or be employed—but also because there is a wide disparity in the success rate of those who have lawyers and those who proceed pro se. For example, several studies have shown that asylum seekers are much more likely to be granted asylum when they are represented in immigration proceedings. These findings are particularly noteworthy because they do not even take into account the varying quality of representation that asylum seekers receive. Justice should not depend upon the income level of immigrants. While differences in success rates do not by themselves tell us about causation, these data uncomfortably suggest that outcomes can be affected by whether the immigrant can afford a lawyer or has the ability to access free legal services. (I will leave for a little later comment my concerns about the wide range in quality of representation that actually is secured). For immigrants with limited means, who seek asylum, the difficulty of securing legal representation is compounded by regulations generally forbidding them from working during the initial pendency of their claims, thus depriving them of the capacity to earn money to hire a lawyer. (Schoenholtz and Jacobs:747; Code of Federal Regulations 2004: 8 CFR §208.7a).

THE IMMIGRANT’S PLIGHT IN PROFILE

While my remarks will focus on individual immigrants in administrative immigration proceedings and their judicial review, the problem of

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2. Kerwin, p. 6: In political asylum cases, 39% of non-detained, represented asylum seekers received political asylum, compared with 14% of non-detained, unrepresented asylum seekers. Eighteen percent of represented, detained asylum seekers were granted asylum, compared to three percent of asylum seekers who lacked counsel; USCIRF, http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/execsum.pdf at 4: asylum seekers without a lawyer had much lower chance of being granted asylum (2 percent) than those with an attorney (25 percent); Schoenholtz and Jacobs; asylum seekers are four to six times more likely to be granted asylum in immigration proceedings when represented.
the unmet legal needs of aliens goes well beyond the application to secure lawful status or in resisting removal. All present a challenge to the legal profession and the administration of justice, including: unlawful discrimination in housing and employment based on alienage or national origin, disputes over access to public education and other public benefits.

I come to this subject, as I noted earlier, as an appellate judge for some seven and a half years. From the outset, I have found immigration cases to be of special interest, as the son and grandson of immigrants. Our Court’s involvement in immigration has deeply intensified in the last few years. By way of background, the Board of Immigration Appeals (BIA) from which appeals to the Second Circuit come, had accumulated by March 2002 a backlog of more than 56,000 cases nationally. To reduce the backlog, the BIA dramatically began to expand its resort to summary procedures such as single Board members rather than three member panels to adjudicate cases, and to permit single Board members to summarily decide appeals through summary dismissals and affirmances without opinion. Consequently, the number of petitions for review in federal court increased exponentially. My colleague Judge Jon O. Newman put it this way: “It’s as if a dam had built up a massive amount of water over the years, and then suddenly the sluice gates were opened up and the water poured out.” By 2005, appellate courts were receiving about five times as many petitions for review as they were before 2002. As then Second Circuit Chief Judge John M. Walker, Jr., remarked in April 2006: “What we thought was a one-time bubble has turned into a steady flow of cases, in excess of 2,500 a year, and about a 50% increase in our total annual filings.” Most of these cases are asylum matters. The Second Circuit receives about 21% of the more than 12,000 petitions for review filed each year nationwide, behind only the Ninth Circuit.

To handle these matters, the Second Circuit in October 2005 instituted a non-argument calendar (“NAC”) for asylum cases, running parallel to the regular argument calendar (“RAC”). Under that procedure the Court, with three-judge panels, adjudicated 32-48 NAC cases per week in the first year, and 27-36 NAC cases per week more recently, in addition to one or two cases per sitting day on the regular argument calendar. Especially with respect to decisions that are affirmed by the BIA without opinion, the Court of Appeals is effectively the first line of review, however limited, in a system where the immigration judges and the Board of Immigration Appeals, which hears appeals from the immigration court, are under extraordinary pressure to resolve cases. At the time of Judge Walker’s testimony in April 2006, each immigration judge, he noted, had to dis-
pose of 1,400 cases a year, or more than five each business day to stay current with his docket. Similarly, even with streamlining so that dispositions can be made by a single judge, each BIA member, Judge Walker reported, had to dispose of about 80 cases per week. The burdens on immigration officials are extraordinary and the challenges for any judge, however conscientious, to dispose of all these cases with due care are overwhelming. Judge Walker observed in testimony before the Senate Judiciary Committee: “I fail to see how Immigration Judges can be expected to make thorough and competent findings of fact and conclusions of law under these circumstances.” I know that immigration judges and the BIA are optimistic that various recent reforms, noted later, once fully implemented, will alleviate some of these problems. For their sake and for the sake of the immigrant population who seek the benefit of a fully deliberative adjudicatory system, we can only hope so.

As an appellate judge, immigration cases tend to come before me in a legally circumscribed context. A judge’s role is to review the administrative record and decision; the Court is largely constrained to defer to the agency’s ruling, absent legal error or lack of substantial evidence supporting the decision. What record is made by the immigrant, therefore, and what legal points are preserved for review in the record are critical to the outcome, especially where the alien has the burden of coming forward with evidence and the burden of proof of entitlement to status or relief. Even if a judge would have ruled differently in the first instance, he or she has no authority to do so. Thus, quality legal representation in gathering and presenting evidence in a hearing context and the skill in advocacy as to any legal issues and their preservation for appeal can make all the difference between the right to remain here and being deported. It also means that getting effective counseling BEFORE, not after, petitioning for relief or getting immersed in proceedings provides the best chance for fleshing out the merits of the case, avoiding false or prejudicial filings, and securing lawful status or appropriate relief.

A snapshot offers some perspective about the challenge the legal profession faces in immigrant representation. The United States Immigration and Customs Enforcement Service removed 186,000 persons in fiscal year 2006. One out of three asylum seekers do not have counsel in asylum interviews conducted by asylum officers. (Schoenholtz and Jacobs, 2002:742). [U.S. Immigration and Customs Enforcement detained more than 250,000 persons, including 4,700 unaccompanied children. About 10% of detainees secured legal counsel.] In 2005, immigration courts handled almost 369,000 cases, about 33,000 in immigration courts within the Second Cir-
cuit. Approximately 35% were represented. Twelve per cent of Immigration Judge decisions were appealed to the BIA, with approximately 69% securing counseled representation. In the Second Circuit, approximately 42% of the BIA decisions were appealed. Of those cases on appeal in the Second Circuit, 76% had represented counsel and the rest were handled pro se. Data indicate that 9% of counseled cases were reversed, vacated, and/or remanded in whole or part, while only 2% of pro se cases were reversed, vacated, and/or remanded in whole or part.

Numbers alone cannot capture the human drama on display in the immigration process. All immigrants, whether or not refugees or asylum seekers, are largely strangers to our language, our culture, our laws, certainly the complicated maze of immigration laws. Especially for those fleeing from persecution, however, their first encounters with immigration authorities may be difficult. Experience has led them to be distrustful and fearful of government. Having lived life in the shadows in their native lands, they enter this country afraid and often are easy prey for unscrupulous parties. Not knowing where to turn, anecdotal evidence suggests that they often depend on notarios and travel agents—persons who generally share the language and culture—for advice as to how to secure legal entry. And anecdotal evidence suggests that not all notarios and travel agents are competent or honest; travel agents often refer the immigrants to persons with whom they have relationships, but who are not licensed to practice law. These unauthorized practitioners, sometimes known, misleadingly as “notarios”, charge immigrants for their services in filing documents and preparing applicants for relief and benefits, but often lead the immigrants astray with incorrect information and terrible advice with lasting, damaging consequences that can fatally prejudice what otherwise would be a proper claim to entry. The immigrants are also referred to licensed lawyers, too many of whom render inadequate and incompetent service. These attorneys do not even meet with their clients to flush out all the relevant facts and supporting evidence or prepare them for their hearings; these are “stall” lawyers who hover around the immigrant community, taking dollars from vulnerable people with meager resources. They undermine trust in the American legal system, with damaging consequences for the immigrants’ lives.

What is filed and what is said have enduring effects. Immigration judges will often make findings of adverse credibility based on the disparity between the two. Often times, the reviewing appellate judge, who is constrained at the time the case comes before her, is left with the feeling that if only the immigrant had secured adequate representation at the
outset, the outcome might have been different. For the immigrant who is ultimately deported, the consequences of faulty representation are devastating. Unlike a person in the U.S. who can sue a lawyer for malpractice, or file a bar complaint, a deported immigrant for financial, geographic or other reasons, is unlikely to pursue such recourse.

Legal representation could be useful, in sum, at a variety of stages. Consider the asylum seeker. At the point of entry, an asylum seeker might face expedited removal, without a hearing, unless she expresses a fear of returning to her home country or asks for political asylum. But she may be unfamiliar with this requirement and its importance. If the asylum seeker expresses a credible fear and is given an interview, some form of counseling, even if not full representation in every instance, could be very helpful. For those asylum seekers who apply for asylum after entering the United States through an affirmative application process, legal representation at the asylum interview in preparing the application itself often is critical - incomplete information then provided could later figure prominently in an IJ’s credibility findings.

Proceedings before the immigration judge are fact-intensive. An immigrant often has limited fluency with the English language, and the immigration judge must work with a translator in the effort to understand the immigrant’s case; frequently, because of the language difficulty, the judge must ask the immigrant the same question repeatedly in order to be secure about his or her complete answer. An immigrant who appears pro se or does not have the benefit of adequate counsel will be at a disadvantage in such proceedings.

And there are the sizeable number of immigrants, who are legal permanent residents, with criminal convictions (large and small), who are placed in removal proceedings following the completion of their criminal sentences (sometimes long after a conviction). It is a gross understatement that their futures are very much affected by whether they can secure quality legal assistance. Asylum seekers and others who are detained in jails may confront special challenges; as Human Rights First documented in its report “In Liberty’s Shadow,” in some areas in which a facility is located there are a few locally-based lawyers to provide legal representation, such that attorneys from other jurisdictions have to travel lengthy distances.

I might also say, from sitting on an appellate court, that the quality of representation varies widely. There are, of course, many lawyers in the immigration bar who serve their clients well, who submit briefs which reflect considerable thinking; they deserve our praise and appreciation. But too many of the briefs which I see are barely competent, often boilerplate
submissions. John Palmer, a superb staff attorney with the Second Circuit, undertook a study with coauthors Stephen Yale-Loehr and Elizabeth Cronin, and determined that ten law offices (most with just one attorney) had 34.87% of the petitions for review pending in the Second Circuit on April 21, 2005, and that the total for top 20 offices was 46.54%. What is particularly striking is that several of these solo practitioners each had more than 100 cases pending for review. From my vantage point, one cannot help but feel that at some point the quality of representation suffers under the volume of cases.

ONGOING EFFORTS TO MEET LEGAL NEEDS

The immigrant’s plight would be even more dire were it not for efforts of various organizations and law firms, which have provided pro bono assistance, and of which many of you here have played so important a part. Various approaches abound. What follows is hardly an exhaustive survey, but a description of what is happening mostly in the area of the Second Circuit, and even then offering examples of activity; with apologies, I cannot for reasons of time and space note all of the valuable programs underway. My focus here is on immigrants as they face the hurdles upon entry to secure legal status. Quite obviously, the legal profession has much that it can do to support immigrants once they are settled in their communities, as the work of such organizations as Sanctuary for Families and New York Lawyers for the Public Interest attest.

A. Nonprofit organizations. As to efforts to provide assistance to secure legal assistance, a wide variety of organizations have been involved, including Human Rights First, the Legal Aid Society, the International Senior Lawyers Project, and Catholic Legal Immigration Network (CLINIC). Some non-profits provide direct in-house representation (though a decline in funding has led to a decline in such activity); some organizations offer legal aid by recruiting, training and supporting pro bono lawyers; and a few organizations do both.

By a way of example, Human Rights First, as Eleanor Acer has written, has used two models of pro bono representation—national representation and individual pro bono refugee representation.

The national representation model involves the coordinated response to a national representation challenge, such as when 2000 Haitian asylum seekers were detained in facilities across the country. In that circumstance, Arthur Helton, then of Human Rights First’s predecessor, The Lawyer’s
Committee for Human Rights, and colleagues created and fully implemented a plan to recruit and train 2000 volunteer lawyers in 20 states, with the support of the American Immigration Lawyers Association (AILA) and the American Bar Association (ABA). In the direct representation approach, organizations such as the Legal Aid Society and Human Rights First also provide counseled representation to asylum seekers at various stages - some are awaiting non-adversarial interviews, others are before an Immigration Court Judge, still others are on appeal. An innovative example of the delivery of legal aid is the Immigration Representation Project (IRP), which seeks to help meet the needs of detainees and nondetained immigrants. In cases in which there is a plausible claim, immigration judges and service organizations refer non-detained unrepresented immigrants to screening sessions at which attorneys provided by four participating non-profit agencies, interview referred clients. Income-eligible clients with viable claims are referred to one of the participating agencies or to pro bono attorneys for representation. In New York City, Human Rights First, Catholic Charities and the Legal Aid Society are especially active participating agencies, with funding provided by the New York Community Trust.

An important component of both the national and direct representation approaches has been the recruitment, training and supervision of pro bono attorneys in solo offices or general practice firms, and by such organizations as Sanctuary for Families, The City Bar Justice Center, and Human Rights First. For instance, Human Rights First offers training seminars featuring immigration judges, asylum officers and its own staff; case support including case law and memos covering asylum law, regulations and procedures; consultations with staff lawyers about strategies and procedures; review of all submissions by staff lawyers; referrals to country experts and medical experts; and access to Probono.net and its on-line library of sample asylum submissions, and relevant case law. Other nonprofits, such as the ACLU Immigrants’ Rights Project, focus more on declaratory judgment, injunctive proceedings and class action impact litigation as well as public education. The National Center for Refugee and Immigrant Children provides pro bono legal and social services to unaccompanied children released from detention in the United States, not through direct representation, but by matching children with pro bono providers.

In the context of criminal representation, the New York State Defenders Association sponsors the Immigrant Defense Project which seeks to “serve as a legal resource and training center for criminal defense attorneys, criminal justice and immigrant advocates, and immigrants fighting against deportation and detention”; (2) promote community-based ad-
vocacy; and (3) “promote immigrant-protective impact litigation by recruiting and mentoring pro bono attorneys to provide legal assistance to immigrants challenging their detention or removal order in federal court.”

B. Bar Associations. The City Bar, apart from its own nationally respected Pro Bono program in which law firms agree to provide such legal assistance, has had an active immigration and nationality committee, under the leadership most recently of Linda Kenepaske and Claudia Slovinsky, and with the able work of Jennifer Kim and Suzanne Tomatore. I note the Committee’s instructive symposium on deportation without representation organized by the Committee; the Immigrant Women and Children Project, which seeks to recruit and train volunteer lawyers to help victims of domestic violence free themselves from their abusers and attain legal status; and the Refugee Assistance Project, which recruits and trains volunteer lawyers to represent asylum seekers (finding pro bono representation, supervising that representation, assisting immigrants with filings, mock interviews, and the like). My understanding is that the City Bar also accepts two cases per month as referrals from the Immigration Representation Project. And, coincidentally, today is the first day the Fragomen Fellow will work at the City Bar Justice Center on immigration issues. Through this program the law firm of Fragomen, Del Rey, Bernsen & Loewy is lending a Fragomen attorney to the City Bar Justice Center for six months to a year (and paying salary). NYC Bar executive director Barbara Opotowsky and Maria Imperial of the City Bar Justice Center inform me that this is the first time that they know of that an immigration law firm is earmarking support specifically for providing immigration legal services to those who cannot afford such services. The Fellow program provides an innovative way for a law firm to demonstrate their pro bono commitment.

There are other City Bar initiatives such as the naturalization clinic which provides free legal assistance in completing naturalization forms; monitoring of immigration courts; exploring ways legislatively to allow young people to secure legal status; and examining how immigrant criminal defendants who are considering taking pleas can be made aware of the consequences of accepting such pleas on their immigration status. I want also to acknowledge that Claudia Slovinsky was very helpful to my Court when she helped us secure counsel in cases where the attorney at record failed to provide adequate counsel.

The American Bar Association (ABA) has been very active, through its Commission on Immigration, in focusing on issues of expanding representation. The Commission: “1) advocates for statutory and regulatory
modifications in law and governmental practice consistent with ABA policy; 2) provides continuing education and timely information about trends, court decisions and pertinent developments for members of the legal community, judges, affected individuals and the public; and (3) develops and assists the operation of pro bono programs that encourage volunteer lawyers to provide high quality, effective legal representation for individuals in immigration proceedings, with a special emphasis on the needs of the most vulnerable immigrant and refugee populations.” Over the years, the ABA has assumed a leadership role in helping to fund and create pro bono representation projects.

The American Immigration Lawyers Association (AILA) is the national association of 10,200 immigration lawyers established “to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members.” Among its stated goals are to: increase member participation in advocacy before Congress, the Judiciary, federal agencies, and the media, for the immigration-related interests of clients and society; promote and support delivery of competent, ethical, and lawful immigration services by lawyers, authorized accredited representatives, and pro bono programs; and to encourage and facilitate member participation in, and support for, pro bono services and programs. Among the ways it seeks to stimulate pro bono efforts, AILA has recently created the position of pro bono coordinator to work with its membership, a development that holds the promise of a broadening of services to the immigrant poor. It also bestows awards and provides recognition through coverage in its magazine, Immigration Law Today. A recent issue focused on the pro bono work of Cyrus Mehta, currently secretary of the NYC Bar. The American Immigration Law Foundation, affiliated with AILA, created the Legal Action Center to promote fundamental fairness for immigrants, their families, and their employers. Staffed by experienced immigration practitioners and litigators, it conducts impact litigation files merits and amicus briefs in the federal courts and before administrative agencies, and provides technical assistance and support to lawyers litigating immigration issues.

C. Law Firms. Over the last several years, partly in response to the Pro Bono Institute’s Law Firm Pro Bono Challenge and other projects of the ABA’s Center for Pro Bono (www.abanet.org/legalserivices/probono) and Sections of Litigation and Senior Lawyers, large law firms have devoted more resources to pro bono cases, including immigration (largely asylum) cases.
It is estimated that some 200 large law firms have volunteered to represent asylum applicants. For instance, White & Case (with the work of lawyers such as James Stillwaggon), quite fittingly given the roots of the Orison Marden Lecture, has handled many asylum cases for Human Rights First and has figured importantly in matters having to do with unaccompanied minors. To offer another example, lawyers at Latham & Watkins, through coordinated efforts in ten of its US offices, have represented more than 40 individual children in various immigration proceedings. At Fried Frank, yet another prominent exemplar, Robert Juceam, has spearheaded efforts to secure legal representation for immigrants for more than twenty years, including Haitian immigrants fleeing the Cedras regime.

D. Government. Since 2003, the U.S. Department of Justice Executive Office for Immigration Review (EOIR) has carried out the Legal Orientation Program (LOP) to improve judicial efficiency and assist all parties in detained removal proceedings—detained aliens, the immigration court, Immigration and Customs Enforcement (ICE) and the detention facility. Through the LOP, representatives from nonprofit organizations explain immigration court procedures along with other basic legal information to large groups of detained individuals. The orientations generally have three parts: “1) the interactive group orientation, which is open to general questions; 2) the individual orientation, where non-represented individuals can briefly discuss their cases with experienced counselors; and 3) the referral/self-help component, where those with potential relief, or those who wish to voluntarily depart the country or request removal are referred to pro bono counsel, or given self-help legal materials and basic training through group workshops, where appropriate.” In 2005, over 20,000 detainees were served by the LOP, or roughly 20 percent of all ICE detainees who appeared before EOIR immigration courts.

In January of 2001, EOIR's Pro Bono Program, with the BIA Clerk's Office, implemented the Board of Immigration Appeals (BIA) Pro Bono Project (the “Project”) to increase pro bono representation for individuals detained by the U.S. Immigration and Customs Enforcement (ICE) with immigration cases under appeal. The Project was developed between EOIR and several non-governmental organizations, including the Catholic Legal Immigration Network, Inc., the Capital Area Immigrants’ Rights Coalition, the National Immigration Project of the National Lawyers Guild, and the American Immigration Law Foundation. Since its start, the Project has secured pro bono counsel for close to 400 detainees around the country—individuals who would not have otherwise been represented by counsel.
As I noted earlier, many immigrants in removal proceedings are without resources such that they have no choice but to appear before the immigration courts and the BIA without legal representation. Agencies that provide legal services to immigrants normally face great obstacles in identifying, locating, and communicating with detained and unrepresented individuals in time to write and file an appeal brief. Under the Project, EOIR assists in identifying certain cases based upon criteria determined by the partnering volunteer groups. Once cases are identified and reviewed, their summaries are then distributed via e-mail to pro bono representatives across the United States. Volunteers who accept a case under the Project receive a copy of the file, as well as additional time to file the appeal brief.

Through new pro bono outreach programs, the Legal Orientation Program is working with national nonprofit agencies and the Division for Unaccompanied Children’s Services at the Office of Refugee Resettlement to improve legal services for detained children, who are unaccompanied by a family member or legal guardian.

The Model Hearing Program is an educational program developed by the Pro Bono Project to enhance the quality of advocacy before the court, as well as increase levels of pro bono representation. Model Hearings consist of small-scale mock trial training sessions held in the immigration court and presented by volunteer immigration judges. The training sessions, carried out in cooperation with partnering bar associations and/or pro bono agencies, provide practical immigration court training to small groups of attorneys/law students with an emphasis on practice, procedure and advocacy skills. Participants receive training materials and CLE credit, and commit to a minimal level of pro bono representation throughout the year.

Also involved in immigration issues is the Department of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices in the Civil Rights Division. This office seeks to protect US citizens and work authorized immigrants against employment discrimination based on citizenship, immigration status or national origin. Individuals may file charges with the office and, if successful, secure injunctive relief, be awarded back pay and reinstatement, among other remedies. The office conducts outreach workshops for immigrants and employers, awards grants for orientation programs as to the IRCA laws’ requirements, operates a worldwide web information and materials page and has signed memorandum of understanding with various state and local human rights agencies to promote awareness of the office and the rights it seeks to protect (www.usdoj.gov/crt/osc/htm/facts.htm).
E. Law School Clinics. Virtually all of the law schools in the Second Circuit have clinics which afford law students the chance to represent immigrants and asylum seekers. Many have formal mentoring programs with the immigration bar. Although such clinics are limited in the number of cases they can assume, they provide an invaluable service not just in terms of needed representation, but also by demonstrating to students how important and dynamic the field of immigration law can be, and thus helping to add new generations of well-trained immigration attorneys. More broadly, the ABA Center for Pro Bono has teamed with the American Association of Law Schools to publish the Directory of Law School Public Interest and Pro Bono Programs (www.abanet.org/legalservices/probono/lawschools) to facilitate the exchange of program models and educational materials among those providing direct representation to immigrants.

F. Advocacy/Think Tank/Policy. In addition to providing direct legal representation, some organizations, such as the New York Immigration Coalition concentrate on policy analysis and advocacy, civic participation, voter education and training and leadership development. Nationally, the Migration Policy Institute is an independent, non-partisan think-tank in Washington, D.C. which analyzes migration and refugee policies. The Institute for the Study of International Migration at Georgetown University undertakes studies of immigration, and its director of law and policy studies, Andrew Schoenholtz has explored the state of asylum representation. The Vera Institute of Justice conducts studies and projects, including monitoring, analyzing, and providing technical assistance to EOIR’s Legal Orientation Program.

G. Governmental Lawyer Pro Bono. Many departments and agencies of the federal and state governments have sought to encourage governmental lawyers (some 80,000+ in federal and state governments) to undertake pro bono activities, and over the last 15 years there have been important strides in eliminating the obstacles to their lawyers meeting their pro bono moral obligations. Certainly, the conflict of interest problem is a real one for those lawyers who are involved, for example, in law enforcement as it relates to immigration. Thinking about how to draw upon government and military lawyers in counseling aliens as to the consequences of their status on such matters as employment eligibility, housing, flood relief, and matrimonial status has been a focus of the Government and Public Sector Lawyers Division of the ABA and its Center for Pro Bono (See www.abanet.org/govpub/probono.html).
H. Inside Corporate Counsel. The American Corporate Counsel Association, in conjunction with the Pro Bono Institute, has developed a nationwide program and website to promote pro bono activities generally by in-house lawyers. One notable success in the immigration area has been a project, launched in 2001, in which Seattle-based Microsoft funds and partners inside counsel with local advocacy groups and private law firms in providing “know your rights” presentations to immigrant detainees and, in selected cases, fostering direct representation of immigrants.

I. Media. The media have played a constructive role in encouraging pro bono work. For instance, the American Lawyer not long ago published an issue that was dedicated in large measure to describing the work of a variety of law firms undertaking asylum cases. And, as I noted earlier, Immigration Law Today, the magazine of AILA, has a column devoted to pro bono efforts, spotlighting the work of individuals and organizations. The New York Law Journal published a monthly column, “Pro Bono Digest” by William J. Dean, Executive Director of Volunteers of Legal Service, which celebrated the work of pro bono providers and the need for expanded activity. Daily reporting in the New York Law Journal by such reporters as Mark Hamblett of particular cases is first rate and gives the legal community a sense of developing immigration law. More generally, reporting on the immigrant’s legal plight, as exemplified by the sophisticated stories of Nina Bernstein and Julia Preston in the New York Times, puts a spotlight increasing wider public understanding of the issues.

STEPS TOWARDS MEETING THE LARGELY UNMET NEED: WHAT THE LEGAL PROFESSION CAN DO

All of these and other significant efforts notwithstanding, the sheer number of immigrants in need of competent legal representation is so large as to suggest that the legal profession must do more both to improve the quality of paid counseled representation and to expand pro bono assistance. Keep in mind that 65% of aliens whose cases were completed in immigration courts during FY 2005 were unrepresented. [US DOJ, EOIR, FY 2005 Statistical Year Book (February 2006) p. A. 1, p. 23] Although this statistic suggests the magnitude of the challenge, the excellent work already underway should inspire to think that the legal profession has the capacity to expand and deepen its commitment to the immigrant population.

I recognize that there are proposals calling for legislation to provide government funded legal representation. Even before the immigration
caseload explosion hit, some legislators were sufficiently concerned about unrepresented immigrants to advance legislative solutions. In 1999, Senator Daniel Patrick Moynihan proposed a mandated counsel pilot project in three Immigration and Naturalization Service districts, arguing that asylum seekers should have the right to representation in removal provisions and that such provisions would be cost effective by obviating the need for frequent continuances for asylum seekers who search for pro bono legal support. [Amendments to the Immigration and Naturalization Act, section 173, (1999) available at http://thomas.loc.gov/cgi-bin/query/R?r106:FLD001:S00603-S00604]. Senator Diane Feinstein proposed legislation mandating legal representation for unaccompanied children in immigration proceedings, reasoning that youngsters should not be expected to navigate the immigration process. [Unaccompanied Alien Child Protection Act of 2000, section 3117, available at http://thomas.loc.gov/cgi-bin/query/R?r106:FD001:S00603-S00604.] As a sitting judge, it is not appropriate for me to assess such legislative proposals requiring counsel, other than to note their existence and to leave to you their consideration. My focus, rather, is on steps the legal profession itself can undertake towards meeting the need, here and now. And in making these recommendations, I stand on the shoulders of many of you here, whose daily commitment to the work is essential to continuing success, and whose suggestions have refined my own thinking.

First, competent legal assistance should be available at the earliest stages of an immigrant’s entry into this country. As I noted earlier, those who have adequate legal assistance fare much better than those who do not. When immigrants fall prey to travel agents, notarios and those lawyers who do not serve them well, their fates are all but sealed.

Second, a mix of approaches to provide adequate legal assistance should be employed. In the absence of government funded direct legal support there is much that can be done pro bono by law firms and nonprofit organizations. As Donald Kerwin suggested, it would be desirable if there could be routine legal screening of unrepresented immigrants in removal proceedings by a qualified and impartial attorney or a BIA-accredited representative. Worth considering is whether such screening should be provided even earlier as when individuals apply affirmatively for asylum. As Mr. Kerwin also noted, it would be useful if there were a system of referral for representation of noncitizens with plausible claims of relief, as determined by that screening. And any system should provide for training and support for the lawyers and BIA-accredited representatives. I have already described a variety of efforts that support direct legal representation such
as the Immigration Representation Project and the EOIR funded legal orientation/rights counseling programs whereby incoming noncitizens in a detention facility are educated about the law and the removal process. These and other programs should be encouraged.

Third, a central component of any plan for improved representation is the infusion of more competent paid counsel from the immigration bar as well as pro bono counsel from the immigration bar as well as firms.

A. Immigration Bar. As to paid counsel, we might start with finding ways to engage more fully the many competent immigration lawyers, who focus mostly on business immigration practice, to take on cases in the area of asylum, removal and family based immigration. If they would accept even a few more such cases, they could assume leadership roles in encouraging others and helping to meet the need.

As to those paid lawyers who have failed in their responsibilities to provide competent service, John Palmer proposes the idea that an enterprising lawyer or firm consider tracking down deported aliens or aliens who have lost their cases and not yet been deported, and pursue malpractice suits.

B. Large Law Firms. Large law firms, too, have much to contribute. When senior partners send the signal to the firm of their support for pro bono, the work happens. Yet, the Pro Bono Institute at Georgetown University, under the leadership of pro bono pioneer, Esther Lardent, have produced data indicating that less than fifty percent of lawyers undertake pro bono work in a given year. And Ms. Lardent recently warned of a flattening out of such activities by AmLaw’s 200 largest firms, though New York City seems still to be in the top of firms doing pro bono work.

Skeptics may scoff at the vision of lawyers doing more to serve the public good. And those who focus on the economics of law firm practice will no doubt point to countervailing forces against providing services at little or no fees: the pressure to log more billable hours to support the extraordinary growth in firm size, and to keep pace with rising costs, and the burgeoning of paid legal work as more firms recently seem to be engaged near capacity.

But a Governance Institute study of a group of lawyers, which I directed a dozen year ago produced, after four years of intensive work, evidence dispelling myths about the economics of firm practice and offered reason to hope that large law firms with 100 or more lawyers, are in a position to allocate more resources to pro bono activities. Not only do
lawyers have a moral obligation to represent the financially needy, which in itself justifies expanded pro bono work; the self-interest of the law firm supports greater attention to pro bono activity.

Given the pressures of everyday practice, appeals to moral principle may not be enough to move firms to more vigorous action. Our study shows that it is possible to do well financially and fulfill responsibilities to the wider community. Pro bono activity is positively related to firm performance: the larger the firm and the greater its gross revenues, the more willing it is to encourage or permit pro bono activity. The conventional wisdom that pro bono involves a financial sacrifice to the firm fails to measure the reality and benefits of such activity. Even in the limited circumstances when a law firm operates at near capacity, committed lawyers can almost always expand their day for pro bono work. A firm that encourages such work will have a competitive advantage in the recruitment and retention of lawyers who are interested in serving the wider community and obtaining, earlier than otherwise, the opportunity for case leadership and client interaction. Thus, professional responsibility and self-interest are not opposing goals, but rather complementary ones.

Pro bono work can improve lawyering in various respects. By dealing with a broader cross-section of the community, the lawyer becomes more attentive to the attitudes and values of the entire community. Such work can sharpen the lawyer's ability to manage a team effort, select a jury, interrogate a witness, negotiate a transaction, or interview a prospective client. Young lawyers will mature more rapidly through community service than they will in the structured setting of most law firms. With respect of immigration, pro bono work broadens and deepens a young lawyer, offering an opportunity to represent clients directly, appear in court, and write briefs.

Pro bono work can also raise lawyer morale. Life in a large law firm has its own stresses: the acute concern with billable hours; administrative burdens; threats to collegiality, and the decline of client loyalty. Community service can provide a safety valve against these pressures, and the constructive engagement that lawyers often miss. By infusing professional life with more immediacy and larger public purposes, and with a sense of renewal, community service increases personal satisfaction that can energize the other more mundane aspects of everyday practice. Why should a lawyer working long hours do pro bono work for immigrants? Ask any attorney who has experienced the rewards of assisting an immigrant, of making a difference not just in the life of that immigrant but also in the lives of the immigrant's family.
Professional responsibility and self-interest reinforce the same conclusion: the law firm and the public good are inextricably linked, and each can draw strength from the other in ways that nourish both. At stake is nothing more or less than the access to justice for those who come into contact with the American legal system. Given the wide disparity in legal services between the haves and the have-nots, the active engagement of law firms is critical if the gap is to be narrowed. And, by the active engagement of law firms, I mean involvement at all levels of senior lawyers supervising associates in collaborative effort.

C. Senior Lawyers and Retirees. As the ranks of senior lawyers grow, many have to leave partnerships or want to leave the full time active practice of paid representation, yet stay involved in legal issues on a reduced schedule. For these lawyers, immigration and nationality law could provide important and satisfying work. Most state and local bars have begun senior lawyer projects to recruit and train lawyers to undertake pro bono in fields they did not practice. Immigration needs lawyers for counseling, administrative filings and appeals, preparing regulatory proposal comments, drafting materials and presenting them in public education settings, promoting funding of direct representation projects—in short functions that could benefit from the broad, seasoned skills of the mature lawyer. This “Second Season of Service Initiative” has broad ABA support from its elected leadership, its Senior Lawyers Division and groups it has promoted such as ISLIP. What next? Those who promote pro bono efforts in bars and non-profits might consider deepening efforts to recruit senior lawyers in organization, law reform and direct representation roles. Moreover, innovative ways to effect delivery of legal services to the poor and those of limited means need to tested, promoted and funded. Senior lawyers are well equipped to bring their career experience to bear on such initiatives and to find a way to eliminate the duplication in effort and cost for basic services to those who do direct delivery. A concrete challenge is how to coordinate, organize and consolidate the materials on the 500 websites that offer legal services resources readily available to the pro bono community.

D. Bar Associations. The continued work of such organizations as the New York City Bar, American Bar Association and the American Immigration Lawyers Association is critical. The Federal Bar Council, through its public services committee, might also play a useful role in immigration cases. Bar associations set the tone of legal practice. They can spur an
intensified effort in the immigration area through their support for pro bono assistance programs, by publicly recognizing the activities of firms and individuals in private practice, and through the creation of task forces concerned more broadly about immigration policy. Worthy of endorsement is the American Bar Association Commission on Immigration’s call for a partnership of the ABA and AILA, along with local bars and AILA chapters, with the EOIR to establish legal information centers in all facilities where immigration matters are processed or adjudicated. Such centers could make it possible for immigration applicants to secure preliminary advice from counsel, and where feasible, limited legal assistance for extended representation. (American Bar Association Commission on Immigration Report to the House of Delegates, February 2006, pp. 4-5). These bar organizations might also collaborate and examine how best to address the problem of substandard legal representation. Perhaps the New York City Bar could undertake a pilot project which seeks to explore workable collaborative activity.

E. CLE Programs. Continuing legal education programs on immigration can not only educate lawyers on the subject, but also tap into a pool of attorneys who might be willing to provide pro bono assistance with additional training and support.

F. Law Schools. The ongoing efforts of law school clinics are valuable as well, not simply because they provide services to the indigent immigrant, but also because they sensitize law students to problems about which they should be concerned once they enter the profession upon graduation. Apart from clinical programs, law students would also benefit from expanded lecture and seminar opportunities focusing on immigration.

G. Nonprofits and Foundations. It is an understatement to say that without the engagement of nonprofit organizations, the plight of the immigrant in need of legal assistance would be much worse. The immigration work of these organizations is essential, in providing direct representation and in offering needed support to pro bono attorneys; and I very much commend the work that they do in the area of immigration representation. They depend upon the support of foundations and other individual sources of charitable giving. More than ever, foundation assistance for immigration work is necessary if the various nonprofits involved are to battle high costs that threaten to result in cutbacks in services. More funding for immigration programs could provide expanded opportunities for le-
gal representation and different approaches to the delivery of services. With more funding, additional skilled immigration lawyers could be employed, not only to provide direct legal assistance to immigrants, but also to train lawyers in firms who are interested in pro bono practice. Lawyers not trained in immigration law are at a disadvantage in providing meaningful representation when they do not have access to attorneys who have a detailed understanding of this body of law. With more funding, there could be developed storefront, drop-in legal centers in the immigrant communities themselves. One could imagine a storefront legal assistance office which consisted of a mix of full-time lawyers and attorneys willing to give part-time pro bono assistance. Immigrants could learn of such facilities, not just through word of mouth, but also through advertisements in newspapers in the immigrants’ native languages and advertisements posted in community and business establishments. Physically integrated in those communities, such centers could provide alternatives to immigrants who find themselves without direction, and too often prey to unscrupulous individuals. Foundations could also work with nonprofit organizations and bar associations to develop widely accessible, easy to use legal resources that provide immigrants with information on the immigration application process. Those materials, available on the web, could be translated into several languages. Foundations might also support the development of phone information lines, whereby immigrants could call and speak to trained immigration lawyers, and where possible, immigration lawyers who are fluent in the immigrant’s language.

H. Corporate-Non-Profit-Law Firm Partnerships. As I noted earlier, a promising development was the founding of a unique pro bono partnership to assist immigrants, funded by the Microsoft Corporation, bringing together local Seattle law firms, in-house corporate counsel of Microsoft Corporation, and a newly founded public service non-profit, the Volunteer Advocates for Immigrant Justice (VAIJ). The program was the outgrowth of initiatives through Association of Corporate Counsel, the American Bar Association and the Pro Bono Institute. Robert Juceam informs me that of 500 immigrants, the number routinely detained in the State of Washington, less that 20 per cent had any legal representation. VAIJ has recruited more than 100 volunteers with whom it had placed 70 cases as of mid-2006 and it has provided screening for over 450 detained individuals, including 21 unaccompanied detained. This partnership model is worthy of study and replication in other parts of the country, including New York.
I. Immigration Authorities. My focus in this lecture is not the workings of the governmental institutions involved in the resolution of immigration cases. I, do note, however, as many of you know, that the Attorney General ordered a “comprehensive review” on January 9, 2006 of the immigration courts and the Board of Immigration Appeals in response to concerns that the system was not functioning fairly and effectively, and that following this examination, the Department of Justice announced on August 9 of that year a number of measures to enhance the performance of the Immigration Courts and the Board of Immigration Appeals. Those steps include: periodic performance evaluations of each immigration judge and member of the BIA and a new code of conduct for these officials; immigration law examinations for IJA and BIA members; Executive Office of Immigration Review consideration, and where appropriate, drafting of proposed new rules and revisions to existing rules to increase the authority of IJs and the BIA to sanction litigants and counsel for defined categories of gross misconduct; Department of Justice (DOJ) requests for budget increases starting in FY 2009 to hire more IJs, and more staff attorneys to support the Board; four members added to the BIA; making adjustments to the BIA streamlining practices, including the increased use of one-member written opinions to address poor or intemperate immigration judge decisions and the issuance of more precedential opinions, especially in a small class of complex cases; and a DOJ commitment to improve the screening, hiring and certification of interpreters.

For now, I offer a few thoughts on what immigration officials can do to encourage more effective lawyering. As to counseled representation, the Executive Office for Immigration Review should continue to use its authority to discipline lawyers for unprofessional conduct and to publicize those actions. As to pro bono activities, the Executive Office of Immigration Review should be supported such that it can expand its pro bono office, legal orientation presentations and pro bono representation project at the BIA. There is much merit to the recommendation of the US Commission on International Religious Freedom that legal orientation programs be expanded nationwide (volume 1, page 83). As part of its August 2006 package of measures to improve the immigration system, the Department announced that the Director of EOIR will consider forming a committee to manage the expansion of its sponsored pro bono program, with such committee being comprised of immigration judges, BIA representatives, other EOIR personnel, representatives of the Department of Homeland Security, the private immigration bar, and any other participants the Director deems necessary. In addition to this welcome step, I think
there is much to be said for the proposals of Human Rights First that immigration judges and the BIA should be encouraged to grant adjournments necessary to allow indigent immigrants to try to secure pro bono assistance; that, following the model of the Arlington, Virginia immigration courts, the Department of Justice and EOIR routinize throughout the country regular local meetings between local pro bono providers and local liaison immigration judges; and that immigration authorities provide all pro se litigants with accessible information about the whole application process, including the right to appeal BIA decisions to federal appeals courts.

J. Government Lawyers. Worthy of further consideration is how government lawyers might, in ways that do not present conflicts, provide pro bono legal assistance to immigrants. For instance, there is value in assessing the role that such lawyers could play in providing public education, offering citizenship qualification training and counseling, that is, in participating in fora other than immigration courts and appeals where the conflicts issue may render service problematic. Despite great strides in removing the underbrush of objections to government lawyer pro bono, government lawyers in the United States are a largely untapped resource. This is especially so for many state employed government lawyers for whom there may be fewer circumstances where conflicts would be an impediment to such activities.

K. Policy Work. Lawyers should also be involved in policy, in thinking about systemic approaches that might effectively address the larger immigration issues. Their experience directly representing immigrants could assist policymakers who seek to tackle broad questions of immigration reform. As to problems of representation in individual cases, lawyers who have been involved in immigration, could advise the legislative branch as to questions bearing upon right to counsel in immigration cases. Lawyers also can play a role in educating the public and the media as to the immigration problem and responsible reforms. For instance, lawyers could work with government, foundations, and the bar in developing programs for reporters who might cover and explain immigration issues to the wider public.

L. Media. As to steps, the media too can continue to play a useful part by educating the public as to the immigration issue, and by highlighting the work of those firms that have provided pro bono support, recognizing such contributions through annual awards.
M. Judiciary. Last, but not least, I believe there is a role for the judiciary, state and federal, in welcoming and promoting pro bono services for immigrants and in encouraging quality paid representation. Efforts such as those under the auspices of the Third Circuit, sponsoring recruitment sessions for lawyers interested in doing immigration work, should be replicated. As a Court, we in the Second Circuit can host periodic meetings, bringing together immigration authorities, bar associations, immigration lawyers, non-profits, and law firms to promote the recruitment, training and recognition of lawyers in immigration cases. Judges need to speak at bar association gatherings such as this one about the importance of securing able legal representation for immigrants, whether that representation be paid or pro bono. Perhaps the Court should consider an advisory committee of members of the bar focused on immigrant representation. The recent creation by the Second Circuit of a committee of distinguished attorneys to handle grievances against lawyers for misconduct that are referred to it by the court, chaired by former judge Michael B. Mukasey, will no doubt increase oversight of defective immigrant counseling. We should explore ways to recognize immigrant pro bono work in awards ceremonies at the Courthouse and/or at circuit judicial conferences. As Robert Juceam has suggested, courts could sponsor programs and exhibitions that explore the immigrant experience and the law. More systematically, Chief Judge Dennis Jacobs of the United States Court of Appeals for the Second Circuit, has held meetings of our judges and BIA officials in an effort to foster communication and understanding of the immigration caseload challenges before us, and that dialogue should continue.

CONCLUSION

As I conclude, I am reminded of the words of John Adams, who in 1761 wrote of the lawyer's responsibility. He asked:

to what greater object, to what greater character, can we aspire as lawyers than to assist the helpless and friendless in a worthy cause [?] I say there is none.

To devote your skill and energy to the plight of another, without the promise of a material reward for oneself, is what sets us apart as professionals.

Tonight I have presented some of the problems and steps towards improvements to you, this audience of lawyers, because whether in fact
justice can be secured depends so much on your vigorous involvement. I hope that we might come together periodically to assess the progress we have made and the challenges we still face in meeting the unmet needs of our immigrant poor. And I hope that you might enlist your colleagues to join with us in that effort. The City Bar, which has been a leader in promoting effective representation of immigrants, is the ideal organization to spearhead continuing activity.

I thank the City Bar and all of you for your great courtesy.
The Immigration Consequences of Deferred Adjudication Programs In New York City

The Committee on Criminal Justice Operations

I. INTRODUCTION

Immigrants in New York City may face many negative immigration consequences, including detention, deportation, and ineligibility for citizenship, as a result of even minor criminal charges, pleas, and sentences. These outcomes are often unexpected and unintended by anyone in the criminal justice system, particularly in the context of the city's innovative diversion programs and problem-solving courts. These courts and programs are designed to provide defendants with the means to break out of the cycle of recidivism and to overcome traditional barriers to reentry and reintegration into society following a criminal disposition. Defendants are given the opportunity to seek rehabilitation and treatment and earn a reduction in or dismissal of their charges. They then can return to their families and communities as productive, law-abiding individuals. Yet, due to the requirement of an upfront guilty plea for participation in these programs, many of the city's residents are not able to reach this ultimate goal. Noncitizens still face deportation and other negative immigration consequences as a result of participating in these deferred adjudication programs.
In a city where thirty-eight percent of its residents are foreign-born, the stakes of failing to address these problems are high. It is impossible to know precisely how many people will be subject to deportation and other immigration problems due to deferred adjudication programs given the lack of statistics in this area, but many New Yorkers who are noncitizens and participate in such programs may be exposed to these unintended consequences. Given the scope of this problem, every person involved in criminal justice operations in New York City should be aware of these consequences and the appropriate players should be prepared to inform noncitizen defendants, their families, and communities of these risks. This report explains why noncitizens face deportation and other negative immigration consequences as a result of pleading guilty through deferred adjudication programs. It then discusses in further detail how these consequences affect defendants, their families and communities, as well as the key players in the criminal justice system including prosecutors, defense attorneys, judges, court programs, and reentry service providers. It then presents some alternative approaches that would enhance immigrant participation in diversion and rehabilitative programs and preserve their ability to rejoin their communities as productive and law-abiding individuals.

II. THE PROBLEM: WHY NONCITIZEN DEFENDANTS FACE NEGATIVE IMMIGRATION CONSEQUENCES DUE TO PARTICIPATION IN DEFERRED ADJUDICATION PROGRAMS

The criminal grounds triggering deportation, detention, and other negative immigration consequences have greatly expanded over the years through amendments to immigration law as well as case law interpretation. The extent of these negative immigration consequences often turns on whether the criminal disposition falls within certain immigration law categories including, but not limited to, “aggravated felonies,” “crimes involving moral turpitude,” “controlled substance offenses,” and other categories. The scope of these categories is not necessarily intuitive—an “aggravated felony” in immigration law, for example, has been interpreted to cover offenses that are neither aggravated nor felonies. Similarly, dis-

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5. For example, a misdemeanor conviction for shoplifting with a sentence of a year may be considered a theft aggravated felony. See U.S. v. Pacheco, 225 F.3d 148 (2d Cir. 2000).
positions that are not convictions under state law—such as a deferred adjudication program that results in the dismissal of all charges—may be considered “convictions” under immigration law and thus may trigger many of the categories described above that lead to deportation.

This section of this report explains why noncitizen defendants face deportation and other negative immigration outcomes due to their participation in deferred adjudication programs. Such outcomes are an unintended consequence of the interplay between the upfront guilty plea requirement in deferred adjudication programs and the broad definition of “conviction” in immigration law.

A. The Guilty Plea Requirement of Deferred Adjudication Programs in New York City

Many New York City courts, particularly problem-solving courts, offer deferred adjudication programs to eligible defendants. To participate in these programs, defendants are typically required to plead guilty to the charges against them. Rather than adjudicating guilt and entering a traditional sentence, however, courts that participate in these programs will instead defer adjudication while the defendant completes certain requirements, such as drug treatment or special classes combined with community service. The purpose of these programs is to provide the defendant with an alternative to incarceration through which he or she can seek rehabilitation and/or redress his or her wrongdoing, and thus break the cycle of recidivism. Successful participation in these programs often results in a reduction or dismissal of the charges and, in some cases, the sealing of the record. Because the defendant is not incarcerated and may avoid a more serious criminal record, the defendant often does not have to face the full extent of the barriers to reentry and reintegration into society that other defendants face after their experiences in the criminal justice system. This end result benefits not only the defendant, but also his or her family and community.

The diversion model commonly used in problem-solving courts across New York was not always based on deferred adjudication, however. Many programs in the state once operated on a pre-plea deferred prosecution basis—i.e., defendants could enter treatment and rehabilitative programs without having to plead guilty initially. If a defendant failed to comply

with the court-ordered program, his or her case would be put back on the
calendar for prosecution. However, many prosecutors and court planners
preferred using a post-plea deferred adjudication model, and even those
programs that were initially based on the pre-plea deferred prosecution
model began to require upfront guilty pleas. Prosecutors and court plan-
ners preferred the post-plea deferred adjudication model because it in-
creased the defendant’s motivation to comply with the court order and
prevented the problems of stale evidence and lost witnesses that stemmed
from delayed prosecutions. A defendant who complied with the court
order would still get his or her charges reduced or dismissed—so using the
deferred adjudication model was, in theory, not harmful for individuals
who were successful in their efforts towards rehabilitation. However, few
realized or considered how rehabilitated noncitizen defendants would be
affected by the deferred adjudication model and its upfront guilty plea re-
quirement. For such defendants, they remained “convicted” of a deportable
offense for immigration purposes despite their compliance with the court
order, due to the broad definition of “conviction” in immigration law.

B. The Broad Definition of “Conviction” in Immigration Law

Under the Immigration and Nationality Act (“INA”), a “conviction”
for immigration purposes includes:

[A] formal judgment of guilt of the alien entered by a court or,
if adjudication of guilt has been withheld, where:

(i) a judge or jury has found the alien guilty or the alien
has entered a plea of guilty or nolo contendere or has ad-
mitt ed sufficient facts to warrant a finding of guilt, AND

(ii) the judge has ordered some form of punishment, pen-
alty, or restraint on the alien’s liberty to be imposed.

a typical criminal conviction (a guilty plea with entry of sentence, or a
conviction as a result of a trial) meets the definition of “conviction” in
immigration law. This is true even when the conviction is for a non-
criminal offense, such as a “violation” under New York law. However, the

Crossing_the_bridge_March2003.pdf. In addition, several upstate New York drug courts did
not require upfront guilty pleas. See Michael Rempel et al., The New York State Adult Drug

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definition of “conviction” in immigration law has also been interpreted to include dispositions that are not considered convictions under state law (such as a post-plea diversion program in which the defendant has entered a plea of guilty to some offense and the judge has ordered some form of substance abuse treatment or intervention program, which has been interpreted to be a punishment, penalty, or “restraint on liberty,” even in cases where no formal sentence or criminal conviction results). Thus, even where the court vacates the defendant’s plea based on his or her successful compliance with the court order and never sentences him or her to any incarceration or probation, the combination of the defendant’s initial guilty plea and the court-ordered program has been interpreted to meet the definition of “conviction” in immigration law.

There is little indication that this result—the deportability of individuals who successfully completed diversion and treatment programs as an alternative to incarceration—was intended by Congress when it codified the definition of “conviction” in the INA in 1996. At that time, diversion programs did not necessarily require guilty pleas. For example, in 1996, Brooklyn’s Drug Treatment Alternative to Prison program—the model for prosecutor-led drug treatment diversion—was still based on a pre-plea, deferred prosecution system. When the National Association of Drug Court Professionals defined the “key components” of drug courts in a report issued through the Department of Justice in 1997, it did not include the upfront guilty plea requirement in its list. See National Association of Drug Court Professionals, Office of Justice Programs, U.S. Department of Justice, Defining Drug Courts: The Key Components (January 1997). It was in this context, in which upfront guilty pleas were not required for diversion, that Congress defined what constitutes a conviction for immigration purposes. Rather than specifying that immigrants should face deportation for their participation in pre-plea diversion programs, Congress focused instead on the consequences of guilty pleas.

Over the years, however, problem-solving courts and diversion programs in New York and across the country have increasingly required upfront pleas, a trend that Congress had no reason to foresee at the time the definition of “conviction” was codified. As previously mentioned, problem-solving court planners and diversion program practitioners viewed the upfront guilty plea as a means to ensure compliance with court orders. Prosecutors also favored the upfront guilty plea as a means to provide swift sentencing in the event that defendants failed out of their diversion and treatment programs, thus avoiding the problems associated with delayed prosecutions. However, the upfront plea requirement was
not viewed as a mechanism for punishing successful participants of diversion and treatment or creating a barrier to their reintegration into society. The idea was that successful participants would still get their plea vacated and their charges dropped and be able to return to their families and communities as law-abiding individuals. Yet the interaction of the broad definition of “conviction” in immigration law and the application of the upfront plea requirement has resulted in the deportability of individuals who have rehabilitated themselves through successful completion of diversion programs—the ultimate unintended consequence.

III. THE CONSEQUENCES FOR IMMIGRANTS, THEIR FAMILIES AND COMMUNITIES, AND THE CRIMINAL JUSTICE SYSTEM

Immigrants and their families and communities face the most obvious difficulties given the prospect of deportation and permanent separation of families and communities. However, the immigration outcomes associated with deferred adjudication programs also have negative effects for individuals and entities throughout the criminal justice system. This section will explain what some of the unintended consequences of the problem are for various people involved in the criminal justice system.

A. Immigrants, their families and communities

All noncitizens (including lawful permanent residents, i.e., “green card holders,” as well as refugees/asylees, visa holders, and undocumented immigrants7) face negative immigration consequences as a result of a plea in a problem-solving court or as part of a diversion program, affecting their ability to live, work, support and remain with their families and communities in the United States. Many pleas result in mandatory detention and the initiation of deportation proceedings—even if the noncitizen defendant is a longtime lawful permanent resident and has a U.S. citizen family. Some of the consequences facing a noncitizen defendant who pleads guilty to an offense as part of a deferred adjudication program might include:

- Inability to obtain an official I.D. card
- Inability to work

7. As a practical matter, some diversion options are not available to undocumented immigrants due to their ineligibility for Medicaid (health insurance often being a requirement for participation in inpatient treatment programs, for example) and other funding limitations. Lawful permanent residents and other immigrants with lawful status generally can participate in the full range of diversion programs.
Inability to get housing
Inability to get health insurance
Inability to go to college
Inability to travel outside of the U.S.
Inability to renew permanent resident card (i.e., green card)
Ineligibility for lawful permanent residence (i.e., green card status)
Ineligibility for citizenship
Initiation of deportation proceedings
Immediate or imminent placement in immigration detention anywhere across the U.S.
Ineligibility for waivers and other forms of relief from deportation
Ineligibility for asylum even if faced with persecution abroad
Lengthy or permanent exile from the U.S.
Enhanced sentences upon reentry into the U.S.
Inability to live or work safely in the country of deportation

Some of these consequences are more disastrous for a noncitizen defendant than any criminal penalty typically associated with the underlying offense itself. Individuals deported based on criminal dispositions will endure lengthy or permanent separation from family members, and may face dangerous and inhumane conditions in their native countries. Even for those noncitizens not immediately placed in deportation proceedings, many are left in a state of limbo, at risk of deportation, with necessities like employment, housing, and health insurance lost or in jeopardy.

Some individuals who enter deferred adjudication programs have prior convictions for which they may already be deportable. For these individuals, the guilty plea in a problem-solving court or through a diversion program may nonetheless pose a serious problem for their immigration status. For certain old convictions, noncitizens may still have certain forms of relief from deportation available to them—but a new “conviction” through a deferred adjudication program may eliminate that relief and any chance they will have to argue their equities in front of an immigration judge.

For defendants who are aware of the negative immigration conse-
quences of a guilty plea, the severity of deportation creates incentives for them to choose to go to trial rather than plead guilty and participate in the treatment or services that a deferred adjudication program may offer. These individuals might otherwise be inclined to participate in the special programs and treatment opportunities, but refuse because they realize that a guilty plea will subject them to deportation.

Ultimately, the families and communities of the defendants suffer the consequences when their relatives and community members do not receive treatment and services through these special programs or receive treatment and services but are later deported. Families and communities lose wage-earners and caretakers who would otherwise rejoin them as law-abiding and productive individuals following a criminal disposition. Many communities suffer an even larger loss when whole families are uprooted because the primary wage-earner or caretaker is deported. In these ways, the current system undermines the purpose and effectiveness of these deferred adjudication programs for immigrant defendants, their families and communities, and society as a whole.

B. Prosecutors, defense attorneys, judges, court programs and reentry service providers

These deportation risks and the broad definition of conviction create problems not only for defendants, but also for prosecutors, defense attorneys, judges, court programs and reentry service providers, and the criminal justice system as a whole.

Prosecutors who work with problem-solving courts and diversion programs in New York City indicate that some noncitizen defendants and their defense attorneys are not aware of the deportation consequences of their participation in deferred adjudication programs. In some cases, no one in the criminal justice system is aware that the defendant is a noncitizen, only to discover the fact later when the Department of Homeland Security initiates removal proceedings against the defendant. Some prosecutors have expressed concern about these unexpected results, particularly where they, along with the court and defense attorneys, had assured the defendant that he or she would get to return to his or her family and community upon successful completion of court requirements. In cases where defendants were unaware of or misinformed about the immigration consequences, prosecutors report that they are increasingly dealing with motions to vacate dispositions under NYCPL § 440. In cases where the defendant and the defense attorneys are aware of the immigration consequences, prosecutors report an increase in refusals by defendants to
participate in deferred adjudication programs given the knowledge that the plea requirement means deportation.

Defense attorneys similarly point out problems in advising clients whether to participate in deferred adjudication programs. In some cases, defense attorneys feel that deferred adjudication programs would be appropriate for their clients, if it were not for the negative immigration consequences. In such cases, defense attorneys advise their clients not to participate unless they are willing to face the deportation risks. Some defense attorneys also report that many of their fellow defense attorneys are not aware of the negative immigration consequences of deferred adjudication programs that do not result in criminal convictions. Sometimes, defense attorneys are just as surprised as their clients to learn that their clients have become deportable.

Judges are feeling the effects of these problems as well. Some judges feel uncertain of what to advise defendants who may or may not be citizens in their courts, particularly in cases where a disposition is not even a conviction under state criminal law. New York State has an immigration advisal law that requires state court judges to advise defendants charged with felony offenses of the possible immigration consequences of their pleas. See NYCPL §220.50(7). However, the law does not provide any mechanism for defendants to seek redress in the event that a state court judge fails to provide this advisal. See id. Moreover, by its terms, the statute only applies to felony charges. Id. Even where the statute applies, some judges—including judges in problem-solving courts—do not routinely include an immigration advisal in their plea allocutions. Sometimes, judges are unaware that immigration issues exist until a defendant is taken into immigration custody in the middle of a pending deferred adjudication case, or until a defendant returns to court years later to seek a vacatur of an old disposition.

Reentry service providers and court programs face similar problems—confusion over what offenses will lead to deportation of their clients, as well as surprise and uncertainty when a participant is suddenly pulled from treatment or another diversion program due to deportation proceedings. Even for those defendants who successfully complete a program, some service providers have difficulty in placing them in housing, securing employment opportunities, and providing other services because the

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8. The law specifically states that "[t]he failure to advise the defendant pursuant to this subdivision shall not be deemed to affect the voluntariness of a plea of guilty or the validity of a conviction, nor shall it afford a defendant any rights in a subsequent proceeding relating to such defendant's deportation, exclusion or denial of naturalization." NYCPL § 220.50(7).
individuals are potentially deportable and thus may have problems in renewing their permanent resident cards, obtaining health insurance, or attending school. Increasingly, some court programs and reentry service providers are also finding that they are losing opportunities to work with immigrant clients altogether, because noncitizens are being advised not to enter deferred adjudication programs due to the deportation risks.

For each of these key players in the criminal justice system, the broad definition of conviction in immigration law and its application to deferred adjudication dispositions have created problems. Defendants, their families and communities, prosecutors, defense attorneys, judges, reentry service providers and court programs have all faced difficulties due to these consequences.

IV. SURVEY OF ALTERNATIVES

Some people involved in the criminal justice system in New York City have expressed concern over whether pre-plea diversion programs could work for various types of offenses. This section of the report discusses a small selection of pre-plea diversion programs that have operated on the federal level and within various jurisdictions within New York State and elsewhere across the country. These programs provide examples of dispositions that are meaningful alternatives to both incarceration and deportation. These programs are available for all eligible defendants—citizens and noncitizens alike. However, in some instances, the immigration consequences of a particular plea may be part of the reason a defense attorney will argue that a pre-plea diversion program is particularly appropriate for his or her client.

A. Federal pre-plea diversion

The federal government operates a Pretrial Diversion Program for certain individuals arrested on federal charges. To participate in the federal program, eligible individuals must waive their rights to a speedy trial and presentment of their cases within the statute of limitations, and must enter into a pretrial diversion agreement. They are not required to admit their guilt or formally plead guilty. Successful completion of program requirements will result in the dismissal of charges.

B. Programs and alternatives already operating in New York State

Some jurisdictions in New York State offer pre-plea diversion programs in certain cases. For example, the Pre-Trial Services Corporation of the Monroe County Bar Association offers pre-trial, pre-plea diversion opportunities for defendants charged with certain low-level New York offenses. The program is voluntary and the criminal court must approve the option for the defendant. The defendant does not have to plead to the underlying charge, but instead must agree to participate in counseling and/or treatment to address the issues that brought him or her to the attention of the criminal justice system. Participation in such a program, where no plea is required and no formal admissions of guilt are made in the court record, would be a viable alternative for citizens and noncitizens alike, because such dispositions would not lead to deportation.

While such formally-structured pre-plea diversion programs are not prevalent in New York State, many jurisdictions have permitted such pre-plea alternatives to be offered on a case-by-case basis. Some defendants in New York City, for example, have been permitted to participate in special diversion programs without having to enter an upfront guilty plea. These examples are few and far between, however, and represent a departure from the post-plea norm in most New York City diversion programs and problem-solving courts.

C. Programs and alternatives used outside of New York State

Several states across the country have developed their own pre-plea diversion programs. Because these programs do not require an up-front guilty plea, they do not, generally speaking, trigger deportation for non-citizen defendants. Some of the states that have such programs include:

Connecticut: Connecticut law provides a number of pretrial disposition programs that do not require the defendant to plead guilty or to admit sufficient facts to warrant a finding of guilt, and which will therefore not count as a “conviction” for immigration purposes. Such programs include, but are not limited to: (a) Accelerated Pretrial Rehabilitation, for certain low-level offenses (including some felonies under certain circumstances), Conn. Gen. Stat. § 54-56e; (b) Pretrial Family Violence Education Program, for certain low-level family violence offenses (including some felonies under certain circumstances), Conn. Gen.

Stat. § 46b-38c(g); (c) Pre-trial School Violence Prevention Program, for certain offenses committed by students under certain circumstances, Conn. Gen. Stat. § 54-56j; (d) Pretrial Alcohol Education System, for certain offenses related to the operation of a motor vehicle or vessel while under the influence of alcohol or drugs, Conn. Gen. Stat. § 54-56g; (e) Pretrial Drug Education Program, for certain drug offenses, Conn. Gen. Stat. § 54-56i.

New Jersey: New Jersey law authorizes a dismissal of charges upon the completion of a Pre-Trial Intervention (PTI) program, for which an upfront plea or admission of guilt is not required. See N.J. Stat. § 2C:43-12. Eligibility for participation in PTI is determined on a case-by-case basis, considering the factors described in the New Jersey statute. Id. New Jersey law also permits the suspension of prosecution and placement in supervisory treatment, without an upfront guilty plea, for certain low-level offenses involving drugs. See N.J. Stat. § 2C:36A-1(a)(1).

Vermont: Vermont law authorizes a diversion program through which certain defendants may enter into a diversion contract with the prosecutor in the case. See 3 V.S.A. § 164. The defendant does not have to plead guilty and the court does not adjudicate the defendant’s guilt. If the defendant successfully completes the terms of the contract, the prosecutor will dismiss the case.

In addition, various cities and counties have adopted pre-plea diversion programs that are not necessarily tied to any particular state statute:

Seattle, Washington State: The Domestic Violence Unit of the Seattle City Attorney’s Office uses deferral agreements on a case-by-case basis, which do not require a defendant to plead guilty or admit guilt in court.

Cook County, Illinois (Chicago): Cook County State’s Attorney’s Office offers a Drug School Program for certain eligible defendants faced with drug charges. A defendant who participates in the program waives the right to a preliminary hearing and agrees


12. More information about the Drug School can be found by contacting the Cook County State’s Attorney’s Office. See www.statesattorney.org.
to attend drug education classes. The defendant does not enter a plea with the court and the court does not adjudicate the guilt of the defendant. If the defendant successfully completes the required classes, the case against him or her is dismissed.

These federal, state, and local programs are only some of the examples of pre-plea diversion programs that are available by statute or policy. They may provide models for how criminal justice planners in New York City can craft alternatives to incarceration that will be truly accessible to citizens and noncitizens alike.

V. RECOMMENDATIONS

Under the recent amendment to New York Penal Law § 1.05(6), one of the core goals of sentencing in New York is to promote the defendant’s “successful and productive reentry and reintegration into society.” Thus, courts must consider how a particular disposition will affect a defendant’s ability to reintegrate into society. In many ways, deferred adjudication programs are designed to ease a defendant’s ability to reintegrate into society—yet they provide little hope for noncitizen defendants. For many of the residents of this diverse, heavily immigrant-populated city, the primary obstacle to reintegration is the threat of deportation and other negative immigration consequences. In light of the severe consequences that noncitizen defendants may face, we offer the following recommendations for crafting diversion programs and other alternatives to incarceration in New York City. These recommendations focus on ensuring better awareness and advisal of defendants regarding the consequences of New York City’s current special diversion programs, as well as calling for increased flexibility in dealing with cases where all sides agree that the individual can benefit from rehabilitation and a chance to rejoin his or her family and community.

A. Advisal of immigration consequences

First and foremost, defendants should be aware of the immigration consequences of their participation in deferred adjudication programs. Defense attorneys should advise defendants of these consequences prior to the entry of a guilty plea. In addition, New York State’s immigration advisory statute should be strengthened, by, for example, requiring court advisal of immigration consequences in all cases (not just felonies) prior to the entry of a guilty plea, including cases involving pleas to misde-
meanors and lesser offenses that are handled through diversion programs and problem-solving courts. Courts also should develop model colloquies to ask defense counsel whether they have ascertained the immigration status of their clients and advised them of immigration consequences of their pleas. If defense counsel has not done so, then courts should provide time for that issue to be explored. Where no advisory is given and the plea record is silent as to immigration consequences, courts should entertain subsequent applications in appropriate circumstances for plea withdrawal or vacatur.

B. Pre-plea diversion and other alternatives

Deferred adjudication programs and problem-solving courts in New York City should also consider adopting more flexible approaches to diversion in appropriate cases for citizens and noncitizens alike, including:

• Pre-plea diversion: In light of the difficulties faced by noncitizen New Yorkers due to criminal dispositions, diversion programs and problem-solving courts in New York City should consider whether, in appropriate cases, defendants could be permitted to enter programs for treatment or other services without having to enter a guilty plea or make any admissions of guilt on the record. Such pre-plea diversion alternatives could be similar to the “deferred prosecution” model that initially characterized the DTAP program in Brooklyn, or modeled after pre-plea programs currently adopted in certain jurisdictions in upstate New York and in other states across the country. This option should be employed in appropriate cases for citizens and noncitizens alike.

• Pre-plea diversion with additional requirements: As an alternative in cases where courts may be unwilling to proceed without some assurance that the defendant can be quickly held accountable if he or she fails to comply with treatment or other court-ordered intervention programs, diversion programs and problem-solving courts should consider whether, instead of a formal plea, a stipulation/contract-based disposition can be crafted to give the court or prosecutor a tool by which to facilitate compliance by the defendant (but will preserve the defendant’s opportunity to rejoin his or her family and community following treatment and/or services). Such stipulations/contracts could be modeled after the few New York City cases that have attempted these dispositions and/or the agreements used in other jurisdictions such as Seattle, Washington or Chicago, Illinois.
Alternative pleas: Finally, every deferred adjudication program or problem-solving court in New York City should assess whether noncitizen defendants can participate in their programs by pleading guilty to an applicable offense that carries criminal consequences but will not lead to deportation. This option should be used as a last resort where pre-plea diversion is not available.

Allowing a flexible approach will ensure that deferred adjudication programs and problem-solving courts will provide meaningful alternatives for citizens and noncitizens alike. Taking these steps will help our city reach the goal of ensuring every New Yorker’s successful reintegration in society following a criminal disposition.

June 2007
Electric Regulation in the State of New York

The Committee on Energy

1. INTRODUCTION

The role of electricity in contemporary society is increasingly important and supplying it reliably and economically is crucial to the economy. While the business of generating and delivering electricity has long been comprehensively regulated, in 1996 the New York Public Service Commission ("Commission") embarked on a restructuring of New York's electricity industry.¹ The Commission's overall objective was to "identify regulatory and ratemaking practices that will assist in the transition to a more competitive electric industry designed to increase efficiency in the provision of electricity while maintaining safety, environmental, affordability, and service quality goals."²


² Id. at 4.
Since 1996, the Commission has overseen the divesture by the State’s electric utilities of their generating facilities; the establishment of an independent system operator, which operates both the State’s competitive wholesale markets and its bulk power transmission system; and the creation of competitive retail markets, which permit end use customers to purchase electricity from energy service companies (“ESCOs”) which compete with incumbent utilities. The election of a new Governor, following a twelve-year administration by a Governor who supported the Commission’s restructuring initiative, provides an appropriate opportunity to examine the regulation of New York’s electric utility industry.

Consideration of the state of electric regulation in New York is also timely because important developments in the supply of electricity have occurred over the past two decades and seem likely to occur over the next decade. The cost of energy fuels has risen, making the goal of supplying electricity efficiently even more important. Such cost increases seem likely to continue, particularly if the worldwide demand for energy continues to increase. International geopolitical concerns have led to a national call for increased energy independence. The “environmental footprint” of energy production and use is also very significant. There is a growing consensus that greenhouse gas emissions are affecting the global climate and have the potential to cause massive dislocations in worldwide societies and economies, and steps necessary to reduce global warming will further increase the cost of energy fuels. Finally, New York’s energy prices are well above the national average and industrial energy prices average over 8.0 cents per kilowatt-hour, compared with 2.5 cents to 5.5 cents per kilowatt-hour in states which compete with New York for businesses.3 (See discussion of current electric power industry conditions in Section 2 of this Report.)

This Report addresses two issues pertinent to the regulation of the electric industry in New York. First, what changes should be made to encourage long-term investments in new generating capacity? Several studies of the State’s future need for generating capacity indicate that new power plants will have to be added to the electrical grid.4 This need arises


4. Of course, the growth of demand response and energy efficiency programs will limit the amount of new generating capacity that would otherwise be needed.
primarily from continued growth in the demand for electric power and the expected retirement of existing power plants. In addition to this need for new capacity to meet reliability needs, new generating plants have another benefit: they are more efficient than the older, existing plants with less adverse impact on the environment. Moreover, the limited addition of new plants to the State's electric capacity resources in recent years is affecting the overall supply of electricity and thus appears to be creating the potential for upward pressure on price levels in the wholesale competitive markets, particularly in zones or sub-regions of the State where demand has historically exceeded generation. (See discussion of the need for new generating capacity below in Section 3, including particular focus on three options.)

Second, should a State-administered energy planning function be re-established? Legislative authority for State-administered energy planning has been allowed to expire and the State Energy Office, which was charged with conducting energy planning, was eliminated. In general, the Commission and the New York Independent System Operator ("NYISO") now look to the competitive market to guide when, where and what type of energy investments are made. The NYISO, for example, conducts comprehensive system planning, but only for the purpose of meeting reliability needs. Is this planning approach sufficient and appropriate? Is the State's current approach to planning for new bulk transmission facilities, which is conducted by the NYISO and participants in the wholesale markets, leading to under-investment in transmission facilities? 5 (See discussion below in Section 4.)

With respect to the first of these issues, the need for new generating capacity, a number of independent power plant developers have secured siting permits for construction of new power plants, but some of these developers have opted not to proceed with construction and operation of the plants. A common explanation of the absence of construction of new power plants is the reluctance of plant sponsors and lenders to finance the new plants in the restructured wholesale market on a “merchant ba-

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5. The competitive wholesale markets operated by the NYISO are regulated by the Federal government (i.e., the FERC), and thus fall beyond the direct regulatory authority of the State. It appears that the wholesale competitive market has, at a minimum, led to the wholesale cost of electric power being lower than it would have otherwise been. (See Note 15, below.) For these reasons, the Committee does not examine the regulation or restructuring of the wholesale electricity markets in this Report. The Committee does suggest a role for the State regarding energy planning, which would encompass significant interaction with the NYISO in coordinating energy planning.
sis,” that is, without the economic support of long-term power supply agreements (“PSAs”). This explanation is supported by the fact that virtually all additional generation facilities constructed recently have been backed by long-term PSAs, the use of public financing, or both.6

At present, there is no organized long-term forward capacity market in New York. Moreover, traditional utilities have been discouraged by Commission policies from entering into long-term PSAs. A number of industry experts agree that some action must be taken to assure the development of additional generating capacity in the near term. Accordingly, the Committee is considering three options to foster the development of additional capacity: (1) Should the NYISO institute market structure changes designed to elicit new merchant generation development, including the creation of an effective, long-term forward capacity market? (2) Should the Commission encourage load serving entities (“LSEs”), which include utilities and ESCOs, to enter into long-term PSAs with project sponsors, thereby providing them with the needed financial assurance to allow construction of new power plants? (3) Should a new entity be created—or an existing entity restructured and authorized, e.g., NYPA—to fill the role of a creditworthy buyer under long-term PSAs?

These are difficult questions that must be answered, and each option draws objections from certain market participants. The Committee suggests in this Report: (1) that the State encourage the development of new generating capacity either by (a) working collaboratively with the NYISO to institute certain market structure changes to encourage merchant power plant development, including developing an appropriate long-term forward wholesale capacity market, or (b) determining whether the current structure of the market should be amended to facilitate entry into long-term PSAs by utilities or a special purpose entity sufficient to allow the construction of new generation and transmission projects, or by pursuing both of these strategies; and (2) that the State re-establish State-administered energy planning, which complements the planning now undertaken by the NYISO, the Commission, utilities and other market participants.

6. For example, the only truly merchant plant built in New York City since 1999 has been KeySpan-Ravenswood’s 250 megawatt (“MW”) project. Orion Power also invested approximately $25 million in restarting a retired unit at the Astoria Generating Station. Otherwise, all major new plants have been either built by the New York Power Authority (“NYPA”) or under long-term contract to the Consolidated Edison Company of New York, Inc. (“Con Edison”) or the Long Island Power Authority. Outside New York City, however, plants have been constructed on a merchant basis.
2. CURRENT FRAMEWORK FOR ELECTRICITY REGULATION

The restructuring of the utility industry created distinct wholesale and retail electric markets in place of the previous integration of those functions. The wholesale market—that is, transactions which do not include end use customers—encompasses generating facilities, both those divested by incumbent electric utilities and other plants owned by independent power producers; and bulk power transmission facilities, which continue to be owned by the electric utilities. The wholesale supply of electricity involves specific auction markets for electric energy,7 electric capacity8 and the ancillary services required to operate the system safely.9 The provision of transmission service is a part of the wholesale markets. The functions of the wholesale markets are regulated by the FERC, under the Federal Power Act. In New York, most wholesale market functions are administered by the NYISO, which is subject to FERC supervision.

Since 1996, the Commission has issued a number of opinions and secured a number of agreements and settlements with regulated utilities that have resulted in utilities’ divestiture of their generating facilities, creation of holding companies and specific-purpose subsidiaries, and creation of competitive retail markets for electricity. The NYISO commenced operations in late 1999 after extensive discussions among entities involved in the electric power business, which were facilitated by the Commission. Among its other functions, the NYISO operates day-ahead and balancing markets for energy, ancillary services and capacity.

The NYISO also operates the New York bulk power transmission system and provides transmission service to bulk supply customers. While in concept the price of energy should be the same throughout the State at a given time, in fact transmission constraints impose limits on how much energy can be transmitted to certain regions. When the available capacity of particular transmission facilities is exhausted and the transfer of lower cost electric power to regions such as southeastern New York is limited, there is a “congestion cost” included in the affected energy transactions.10

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7. “Energy” describes the units of electric energy actually used by customers, and is expressed as kilowatt hours.

8. “Capacity” refers to customers’ demand for electricity power and generators’ capability to supply electric power, and is expressed as kilowatts.

9. “Ancillary services” include operating reserves, system regulation, scheduling, system control and dispatch, voltage control and black start capability (the ability to start a generator following a system shutdown).

10. The congestion cost is not a penalty or fee, but results because the electricity purchaser must use higher cost generation on the “high cost side” of the transmission constraint to meet its full demand.
In general, electricity costs in New York City and on Long Island are considerably higher than in other parts of the State because of the higher cost of generation in these regions and transmission constraints which limit transfers of lower cost electricity from other regions.

The NYISO operates three forward auctions of installed capacity ("ICAP"): a strip auction, which includes each of the months in the upcoming six-month capability period, a monthly auction and a spot monthly auction. In addition, LSEs\textsuperscript{11} are permitted to satisfy their capacity requirements through bilateral arrangements. Starting in 2003, the NYISO introduced (and the FERC approved) a new way of valuing capacity, known as the demand curve. The demand curve is used to set prices for capacity in three capacity markets: New York City, Long Island and the remainder of the State. The demand curve for New York City is set so that if the amount of capacity available in the New York City equals 80 percent of the projected peak load, such capacity is valued at the cost of a peaking power plant.\textsuperscript{12} In addition to the NYISO's requirements, the Commission has indicated that utilities should maintain a portfolio of capacity supply agreements of different periods, known as a "balanced contract portfolio," for the benefit of customers that are not likely to migrate to competitive suppliers, i.e., residential customers.\textsuperscript{13}

Retail markets include electric service delivered to end use customers, including sale and delivery of energy and capacity. All customers obtain delivery service for their electricity from the incumbent utility – whether the customer buys electricity from an ESCO or from the utility itself. The utility includes certain non-bypassable charges in its delivery service rates. In some cases, these charges constitute contributions to important social goals, such as research and development or creating a fund that provides subsidies to low income customers. In other cases, however, the non-bypassable charge may reflect the imposition of a charge to amortize utility investments made in the past which the Commission has permitted to be passed on to customers.\textsuperscript{14}

\textsuperscript{11} LSEs include both regulated utilities and ESCOs.

\textsuperscript{12} The arrangements for Long Island and the rest of the State are comparable, but the pricing is different. Capacity prices in the statewide market are lower because surplus capacity exists (i.e., capacity that exceeds demand). There is no locational component to the statewide market, meaning capacity obligations can be satisfied from resources anywhere on the system.


\textsuperscript{14} Two examples of such charges for "stranded costs" result from above-market legacy costs
While measurement of the impact of competitive wholesale markets is difficult because of the number of independent variables, such as fuel costs, a number of studies indicate that the introduction of competitive wholesale markets has led to reduced costs to customers. A recent study of the impact of the introduction of competitive wholesale markets by the NYISO and PJM Interconnection, L.L.C. ("PJM") indicates that customers in the NYISO and PJM regions are experiencing substantial savings, compared to the costs that otherwise would have been incurred. This conclusion is similar to the results found by the Staff of the New York Department of Public Service in a recent report. Between 1996 and 2004, the real price of electricity to a typical residential customer, which did not switch to a competitive supplier, dropped an average of 15.9 percent.

The State’s utilities have been permitted—even encouraged—to engage in hedging in their purchase of the electricity needed to supply residential customers. Instead of buying all of the needed power supply for residential customers in the NYISO’s short-term markets (e.g., day ahead and balancing), utilities may build portfolios of energy supplies through contracting directly with energy suppliers for longer term supplies. Such contracts permit the utility to protect itself—and its residential customers—from sudden short-term price swings in the energy and capacity markets. Price changes resulting from changes in fuel costs and other market-affecting causes are moderated over a longer period. By contrast, utilities are generally not permitted by the Commission to engage in such smoothing of contracts with small power producers and utilities’ investments in particular power generating facilities, such as nuclear plants.

15. Scott M. Harvey, Bruce M. McConihe & Susan L. Pope, *Analysis of the Impact of Coordinated Electricity Markets on Consumer Electricity Charges* (Nov. 20, 2006), available at http://www.ksg.harvard.edu/hepg/Papers/LECG_Analysis_112006pdf.pdf. For the PJM and NYISO regions’ average load of around 100,000 MW per hour, the study estimates a rate reduction of $0.50/MWh. This projects to $1.2 million per day and $430 million in total savings over a year. Based on 2004 numbers, the study indicates yearly savings in New York alone of approximately $190 million. Other studies’ models, identified in this study, show estimated rate reductions of $1.5/MWh.


or hedging transactions for the electricity which they sell to larger customers. As a result, electricity prices for larger customers are likely to be more volatile than are prices for residential customers. These customers, however, can obtain energy hedges which have the effect of tempering such changes.

3. ADDITIONAL GENERATING CAPACITY IS NEEDED TO MEET NEW YORK’S NEEDS

A. New York’s Future Generating Capacity Needs

Experts agree that additional generation capacity is required, particularly in southeastern New York. Thus, the NYISO and others have argued that New York’s former power plant siting law, Article X of the Public Service Law, should be re-enacted to facilitate permitting of new generating projects that will be needed in the near future. The NYISO considers that New York could be facing a supply deficiency relatively soon, and that there may well be a reliability need for additional capacity in New York City before the rest of the State. In particular, the NYISO’s initial Reliability Needs Assessment (“RNA”) in December 2005 indicated that the State’s transmission and generation resources should be adequate through 2007. This initial estimate of need was revised in the first Comprehensive Reliability Plan issued in August 2006, in which the NYISO projected a reliability need by 2011, while Con Edison, in its own December 2005 assessment, suggested 2012 as a system reliability need date. Given the lengthy lead time associated with developing new capacity, such projected need dates are closer than they may appear. Moreover, the RNA identified potential reliability issues in southeastern New York, starting in 2008, due to increased power demand and the scheduled retirement of several generating units. Those shortfalls could reach 2,250 MW by 2015 if no action is taken.


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20. Con Edison’s System Reliability Assessment Study (issued Dec 30, 2005).
21. CRP, Note 15.
approximately 665 MW of new capacity was required through 2008 to meet reliability standards. While that projected shortfall was based in part on expected plant retirements, which do not now seem likely to occur, more recent submissions by New York City call for new generating capacity that will be needed in the foreseeable future.

New York has adopted an installed capacity requirement for the State, and for specific regions within the State. Although this requirement has served to meet the defined reliability requirements, it has not led to construction of a significant amount of new merchant generation capacity. In 2003, the NYISO amended the operation of the installed capacity requirement to make the pricing more transparent to market participants. The key innovation, the demand curve, allows market participants to understand gradual changes in the value of capacity. To the extent that the demand curve was expected to spur construction of new power supply, however, it has not been successful.

Arranging for sufficient generation capacity is important both to maintain reliability and to ensure that the wholesale markets are workably competitive. Thus, additional generating capacity is needed not only to meet engineering-based reliability requirements, but also to meet the State’s goal of maintaining competitive wholesale and retail markets. The City’s Task Force indicated that an additional 1,000 MW of capacity would be required to meet the requirements of a workably competitive market, to avoid excessive volatility in the price of electricity in the newly deregulated power generation market and to assure market stability. Similarly, the NYISO has indicated that generating capacity, above what is required to meet reliability standards, is needed to create robust wholesale markets.

Turning now to how capacity requirements are met, the restructuring of the electric industry has dramatically changed how LSEs obtain their power supply. Prior to restructuring, a significant portion of such supply

23. Id. at 10.
25. See, e.g., NYISO, Power Alert: New York’s Energy Crossroads 6, 9 & 14 (Mar. 2001), http://www.nyiso.com/public/archive/webdocs/newsroom/power_alert_wp.pdf. This level is compared to the statewide reliability-based reserve standard of 118 percent of projected peak load. The reserve margin is used to determine capacity prices and locational capacity requirements (i.e., the percentage of capacity that must be located in New York City and on Long Island).
26. See Staff Report, supra note 16 (identifying a pending proceeding before the Commission).
came from utilities’ own generating resources, plus supplies committed to the utilities under long-term bilateral contracts. The divestiture of utility-owned generation, however, ended utilities’ ability to supply customers from their own sources. There are three other sources of generation capacity. First, LSEs may have legacy long-term bilateral power supply agreements with independent power producers which predate the current regulatory policies. Second, LSEs may maintain capacity supply portfolios of medium-term and short-term power supply agreements. Third, LSEs make purchases in the NYISO-administered capacity markets of commitments not longer than six months.

One result of restructuring, therefore, has been to reduce the average length of power supply arrangements. No longer are most LSEs able to rely upon the output of a power plant it owns, which can be projected to operate for more than 30 years. Typical power supply agreements are not now as long as the contracts which were used to finance the wave of new construction that flourished as a result of the Public Utility Regulatory Policies Act of 1978. The benefit to customers of this change of policy is that long-term commitments that turn out to be above market price are less likely to be made, and customers are spared the risk and responsibility of such commitments.

The Committee believes that the shortened term of power supply arrangements, however, has also adversely affected financing of new capacity projects. There are now a number of proposed power generating projects which have received siting approval to be built, but have not obtained the necessary funding. Although generation projects have been approved in the siting process, the risks of financing a plant without the assured cash flow represented by long-term contracts have inhibited new projects from moving forward. Moreover, the expense of building new supply capacity in the high cost regions of the State, the potential for changes in the market rules and market conditions and environmental constraints affect the financing of these new power projects.

The Committee does not intend to comment generally on the issues raised in Case 06-M-1017, supra note 17.

27. See Staff Report, supra note 16. While the phrase “long-term” to describe power supply agreements is used variously in different contexts, the Committee uses the phrase to describe agreements with a term of ten or more years.


associated with the downstate congestion pose additional difficulties for project sponsors seeking to finance new supply capacity projects.

The Staff Report recognizes that energy markets have unique characteristics and that unlike typical competitive models it is not clear that in the energy arena “energy-only markets, without regulatory interference, will provide sufficient signals to ensure adequate system capacity, including needed reserves, to ensure reliability on a going-forward basis.” The energy markets the question is complicated by “the long lead-times needed to develop, site and construct facilities, regulatory and political uncertainties inherent in the development process, and financial uncertainties due in part to the still-relatively-new energy markets as well as the capital intensive character of energy facilities.” The Staff Report recognizes that “[g]iven the present relatively low levels of price-responsive load, an energy-only competitive wholesale market design relying solely on energy prices to finance new generation may lead to unacceptably high levels of involuntary curtailments, particularly within major load pockets such as New York City and Long Island.”

As noted above, the NYISO has imposed capacity requirements and instituted use of a demand curve to mitigate against this risk, but the Staff Report recognizes that there has not yet been a definitive test of the effectiveness of these mitigation measures and that “[t]he true test will come when the need for new generation is on the near-term horizon and investors decide whether to enter the market in time to satisfy that need.” It appears to the Committee that the true test has come in New York City and the energy and short-term capacity model currently in effect in New York State is simply not working to lead to development of the additional generation and transmission needed. The energy sector is of such significance to every aspect of the economy and to life itself that the State does not have the luxury of leisurely waiting for the market to correct itself.

B. Three Options for Adding New Long-Term Generating Capacity

Accordingly, the Committee believes that steps should be taken to facilitate the addition of new generating capacity. There are at least three
options for the State which could lead to construction of increased generating capacity: (1) the NYISO’s development of market structure changes to encourage new merchant development, including an adequate forward capacity market; (2) the Commission’s encouragement of utilities to enter into long-term PSAs (i.e., ten years or more duration) in areas of the State where capacity has consistently fallen short of demand; and (3) the creation of a special purpose entity for the purpose of financing construction of new generating capacity. Each of these options is described in the balance of this Section and key advantages and disadvantages of each option are noted.

(1) The NYISO Could Develop an Adequate Forward Capacity Market
(a) Description

As noted above, the NYISO-administered existing capacity market is limited to six months. This absence of market or regulatory mechanisms to encourage construction of new power supply is highlighted by comparison to the market frameworks of the two adjacent regional transmission organizations, ISO New England and PJM. In November 2006, ISO New England adopted a new capacity auction market. In essence, ISO New England conducts an auction for existing and new generating capacity about three years prior to the delivery year. Demand response, conservation and intermittent resources are permitted to bid as well as traditional generating facilities. The auction is designed so that only capacity needed to meet the projected installed capacity requirement is purchased. The capacity market is intended to attract new resources to constrained regions. A new capacity resource can choose a commitment period up to five years.

The PJM system operator similarly conducts an auction for capacity three years ahead of the delivery year. Incremental auctions are held prior to the delivery year and a bilateral market exists as well for capacity. The basic auction is established so that load serving entities can procure the resource commitments needed to satisfy the region’s unforced capacity obligation. The incremental auctions provide an opportunity to respond to changes in the region’s capacity requirements, while the bilateral market allows for hedging and for covering any auction commitment shortages.

While the details of a new forward capacity market in New York will necessarily be addressed by market participants in NYISO discussions, it appears to the Committee that creation of such a market comparable to the capacity markets in the adjacent control areas, New England and PJM,
would be beneficial. Such a market should address what at least some observers see as key shortcomings in the current wholesale market in New York.

Developers are resistant to investing in larger new facilities, without long-term supply agreements, for fear of reducing the very capacity payments that they view as essential to finance their facilities. Furthermore, developers without long-term PSAs may fear contracts will be awarded to other developers (or assets may be self-built by large LSEs and thus produce the same unattractive result), and may not be reflected in the ICAP market, thus producing lower market prices while at the same time benefiting a competitor.

A means to address this issue is to require contracts to be reflected in the market. One such method is to require that the contract counterparty be obligated to enter the contracted-for volume at some discount to contract value. A “floor,” such as 70 percent of contract value, would be enforced unless the counterparty could demonstrate why this was inequitable. Thus, the counterparty would receive the benefit of the contracted-for volume at its contracted-for price but not distort the overall market results to the detriment of all market suppliers.

Under existing NYISO market rules for ICAP, bilateral ICAP contracts are essentially entered into the relevant ICAP auction at zero dollars. While a long-term contract for capacity from a new power plant is not worth zero dollars, that is the value imputed to it by its treatment in the ICAP market auction. Under the NYISO’s demand curve, this has the effect of reducing the clearing price for ICAP, because the resulting clearing price does not reflect the value of all the capacity contracts. On the other hand, certain parties argue that this does not injure suppliers because under the NYISO market structure the highest accepted bid needed to clear the market sets the price for all suppliers, regardless of how much lower many other bidders’ costs may be. Moreover, as has been noted recently by the NYISO’s Independent Market Advisor, Dr. David B. Patton, in the case of the capacity market, the short-term costs of supplying capacity, once a resource has been constructed and placed in service, approach zero. This is because the so-called capacity market is essentially intended to address system reliability concerns, rather than function as a genuine market, as that term is generally understood. It identifies system resources that are prepared to generate power or reduce load when called upon by the NYISO dispatch schedule.

35. NYISO, Affidavit of David B. Patton, No. ER07-360-000 (FERC Dec. 22, 2006).
(b) Advantages and Disadvantages of the Option

Advantages

- The creation of a new forward capacity market in New York could be implemented by the NYISO, subject to approval by the FERC.
- The forward capacity market in New York would address an aspect of the New York wholesale market in which there is a sharp difference between the markets in New York and those in the adjacent control areas.
- The forward capacity market would be consistent with the encouragement of long-term PSAs.
- Creating a forward market that is consistent with the NYISO's planning horizon for its reliability plan would facilitate the ability of market-based resource additions to prevent reliability issues from arising.

Disadvantages

- Changing the market rules will necessarily benefit certain participants and injure others. Also, changing the market rules unsettles the expectations of all market participants.
- The expected costs of establishing a forward capacity market are as yet unknown, but are likely to be significant, and will be additive to the costs already imposed on ratepayers.
- Since the forward capacity markets in the areas adjacent to New York State have only been recently approved by FERC, there is limited experience regarding how they actually work and whether the net benefits will exceed the expected costs associated with those forward markets.
- While financing for capacity typically requires long-term contracts, (ten years or more) in order to be viable, existing forward capacity markets are of far shorter duration. It is unclear whether there will be any beneficial incremental effect from the initiation of such a short-term market.

(2) The Commission Could Encourage Utilities to Enter Into Long-Term Power Supply Agreements

(a) Description

Another way LSEs can meet their capacity requirements is through entry into long-term PSAs. Such agreements also provide long-term fi-
nancing assurance for project sponsors, allowing construction of new capacity projects. Utilities have traditionally been reluctant to enter into such agreements without clear regulatory approval that they will be able to recover these costs in rates. However, such approvals, often referred to as advance prudence approvals, are inconsistent with the Commission’s regulatory practice precluding such approvals. In the face of this regulatory practice, an advance prudence review mechanism would have to be developed to provide adequate assurance to the LSEs.

An alternative to explicit, advance regulatory approval of a long-term PSA would be for the Commission to establish a regulatory “roadmap,” which if followed by a regulated utility would provide a sufficient level of confidence that the Commission would approve the inclusion of the costs of the PSA in the utility’s rates. In essence, the roadmap would involve due diligence measures to be taken by the regulated utility to establish the reasonableness of the costs under the proposed long-term agreement. One essential part of such a roadmap would be regulatory assurance that the Commission would view the facts as they appeared at the time the PSA was negotiated, not later when one or more market circumstances may have changed. Consideration can be given to whether the long-term PSA would have to be sized to cover the entire cost of a proposed project or be for only so much of a plant’s output as is needed to retire the debt on the project and so assure the availability of financing. It may be reasonable to expect that independent power producers and their financiers, who are in business to take risks and gain appropriate rewards, would share in the financial risk. Finally, such a roadmap should incorporate a diligent review process including an analysis of whether utilities seeking to enter into PSAs have adequately considered alternatives such as demand side resources.36

In addition, any exploration of utilization of long-term PSAs should include an analysis of their impact on competitive retail market structures already in place in New York. As of December 2006, 76.4% of the large commercial and industrial customer load, 48.6% of the small commercial and industrial customer load and 11.2% of the residential customer load have migrated to ESCOs for their commodity supply service.37 These num-

36. Some utilities question the Commission’s ability to adhere to such a roadmap approach in the event of changing economic and/or political circumstances. The utilities also note that entering into long-term PSAs entails financial risk, the level of which likely will not be known fully at the time of contract execution. While the utilities are currently uncompensated for such risk, they consider it unlikely that rating agencies will turn a blind eye to such exposure.

bers are consistent with migration trends outlined in the Commission’s Staff Report, confirming the existence of a robust and sustainable retail electric market for commercial and industrial customers. Several ESCO stakeholders, however, have pointed out that market-reflective default service pricing is essential for maintaining the robustness and sustainability of the retail markets because without it customers cannot receive accurate price signals that enable them to choose the commodity supply product that is most compatible with their specific needs and ESCOs cannot tailor their product offerings to customer-specific needs without conveyance of market-reflective price signals. To the extent long-term PSAs move default service pricing away from current structures—such as mandatory hourly-priced service for large commercial and industrial customers and partial NYISO day-ahead hourly pricing for small commercial and residential customers—ESCO stakeholders argue that this mechanism will undermine and destroy even the robust retail electric market now in place for large commercial and industrial customers. Therefore, the impact of long-term PSAs on the competitive retail electric markets now in place in New York should be part of any State consideration of this mechanism.

In contrast with the pre-restructuring era, when investments in capital projects were generally collected through rates, the number of projects given explicit approval under the Committee’s suggested new policy is expected to be limited and subject to Commission control. While it may be too restrictive to determine that only projects which meet “public policy” goals be approved for the rate treatment suggested here, the most immediate need for such agreements is for regions which are facing limited capacity resources, such as New York City.

38. See Staff Report, supra note 16, at 47-57.
40. Id.
41. The State of California has been faced with a comparable problem of inadequate market signals to foster necessary additional generation capacity. California established a system to assure new generation by (1) identifying how much new capacity is required, (2) requiring utilities to submit plans for how they will provide such capacity, (3) having the California Public Utility Commission (“CPUC”) pre-approve requests for offers by utilities to meet the additional capacity requirements and (4) having the CPUC approve the PSAs, including cost recovery arrangements. The contracts entered into pursuant to this process are ten years in duration and provide the long-term PSA commitment required to lead to new generation. See CPUC Procurement & Resource Adequacy website, http://www.cpuc.ca.gov/static/hottopics/1energy/r0404003.htm.
Advantages and Disadvantages of the Option

Advantages
- Provides a backstop approach to the need for new generating capacity in the event the market fails to provide the required capacity.\(^{42}\)

- The addition of new capacity into the wholesale markets, particularly if most or all of the capacity additions are in one or two presently concentrated markets, will have a significant impact on the market. The Committee expects that the resulting new capacity should reduce capacity and energy costs for customers simply by increasing the supply of relatively low cost, efficient generating capacity. In addition, the concentration of supply-side (but not buy-side) market power that exists in New York City will be reduced, which may lead to further cost reductions.\(^{43}\) The Commission’s oversight of the new long-term PSAs will help to assure that efficiency gains from introduction of these new supply resources are passed on to customers.

- Since the ultimate source of credit is the utility’s ability to collect PSA-related payments from its large number of end use customers, the long-term PSAs between project sponsors and utilities are the simplest and most direct means of using that credit for the benefit of the entity seeking to build the new capacity and, hence, for the benefit of the end use customers. This simplicity may be reflected in interest rates or advantageous contract terms, which could be shared by investors and customers.

- While the entry into long-term PSAs is essentially shifting the risk of loss to the utility and/or the end use customer, there are

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\(^{42}\) Some experts have argued that long-term PSAs are not additive to the proposed NYISO-administered forward capacity market but a mutually exclusive alternative. With the approaching deadline for starting new generating capacity projects for the downstate market, however, this contention might result in an unacceptable delay while the forward capacity market’s potential was explored without any new capacity being added through long-term PSAs.

\(^{43}\) See Independent Market Advisor to the New York ISO, 2005 State of the Market Report to the New York ISO (Aug. 2006), http://www.nyiso.com/public/webdocs/documents/market_advisor_reports/2005_NYISO_SOM_Final.pdf (suggesting that a certain amount of capacity in New York City is not being accepted in the capacity market but is participating in the energy markets and that this may imply an inappropriate exercise of market power). The NYISO Board recently proposed certain capacity market mitigation measures, which are currently under review at FERC.
mitigating factors that lessen this risk. State-administered energy planning could provide value to the State, particularly to address the question of when a utility should seek a long-term power supply agreement. The use of requests for proposals ("RFP") to secure the most appropriate type of project from which to purchase electricity limits the potential for self-dealing by the LSE, by making it transparent.

Disadvantages
- New York has had a poor record of predicting what appropriate investments in new generating capacity are. Over the past 25 years, substantial investments in small power producers, co-generation plants and large nuclear power plants proved to be uneconomic in light of changed circumstances. The result is that end use customers are paying today for these classes of over-market value investments.

- The addition of new supply capacity will affect the market’s balance among suppliers. In particular, the new plants will benefit from the new State-approved PSAs, either explicitly or through the roadmap described above, thus affecting the balance among existing and new power suppliers. Existing generators may well have not had the advantage of a PSA approved by the State.

- Due to potential economic and/or political changes, there is no guarantee that the Commission will not limit the ability of utilities to collect PSA-related costs directly from customers on a timely basis, or alternatively will not make other ratemaking adjustments detrimental to the utilities. Any such action by the Commission will adversely affect the financial health of utilities, ultimately raising the cost of service, and affects the corresponding ability of utilities to make necessary investments in their delivery systems.

- The implementation of long-term PSAs will disable customers from receiving the market-reflective price signaling necessary for ESCOs to tailor their products to fit the customers’ specific needs. For ESCO stakeholders, this could seriously undermine retail electric markets that are already robust and sustainable, such as large commercial and industrial customer markets.

- The regulatory adoption of long-term PSAs to ensure the availability of electric capacity may interfere with the development of a viable competitive market.

- To the extent that non-economic market standards are used
to determine whether to add capacity, there is an increased probability that uneconomic facilities will be acquired.

(3) The State Could Create a Special Purpose Entity, or Authorize NYPA, to Finance New Generation Capacity
(a) Description

If it is determined that a capacity need identified by the NYISO or another planning entity is not being met by the market, a new Special Purpose Entity (“SPE”) created by law for this purpose, including perhaps NYPA, could issue a request for proposals for resources that would meet the identified need. If the entity were NYPA, it is assumed that this role would be separate from serving the needs of its current customers through separate RFPs. Whether this role was assigned to a new SPE or to NYPA, appropriate legislation would likely be required to authorize the activity and secure cost recovery.

The SPE would issue an RFP requesting bids for capacity or capacity and energy. The RFP could seek physical generation, demand side resources or transmission, depending on the need and NYISO requirements. Upon an award, the SPE would enter into a PSA of sufficient duration to enable the developer to finance the project. The SPE would offer to resell the products purchased under the PSA through an auction, under which ESCOs, marketers, utilities, etc. could buy all or part of the RFP products. Any amounts not disposed of by this process would be sold by the SPE into the NYISO-administered markets (e.g., capacity auctions and/or the daily energy markets).

The SPE’s internal costs and payments to the developer would be reconciled to its revenues from sale of the output. The net under- or over-recovery would be passed on to end use customers in the regions of the State benefiting from the resource either through an “uplift” administered by the NYISO, in a manner similar to the existing NTAC charge, or by direct assessments to the incumbent distribution utilities by the Com-

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44. This option is presented in the context of an RFP for generation (or demand side) capacity, but the same model could be explored for the acquisition of transmission built to meet a generation capacity need. Such a line could be a dedicated generator lead or controllable line designed to deliver capacity from outside a zone that would qualify under NYISO rules as capacity within the zone, such as In-City Capacity. Because of the complexities of transmission pricing and cost recovery under the NYISO’s Open Access Transmission Tariff, it is possible that costs of transmission projects financed by contracts with an SPE might have to be recovered entirely through a mechanism like the NYPA Transmission Adjustment Clause (“NTAC”) that is assessed by the NYISO on end use customers. Such a charge could be assessed only on customers in regions that benefit from the project.
mission. In either event, the SPE would need legally-binding assurance that it would be made whole and that its other customers would not be at risk of covering losses on the transaction. These requirements could be addressed in authorizing legislation. 45

It should be noted that the NYISO’s CRP is intended to lead to identification of a regulated reliability solution if the market does not respond. This solution could be new transmission, generation or demand side actions. The transmission owner in whose district the reliability violation occurs is responsible for developing a solution to the need. This process, however, is still developing and could be improved.

(b) Advantages and Disadvantages of the Option

Advantages

• Allows the market to be the primary source for new capacity, but provides a backstop mechanism to assure adequate and reliable service if the market fails to do so.
• Model could be used to build energy infrastructure consistent with State energy policy objectives that might not otherwise be built in a pure market environment (e.g., clean coal with CO₂ sequestration, renewables, etc.).
• If NYPA were the SPE, it has established credit and is a large NYISO market participant with experience managing large, complex RFPs and PSAs.

Disadvantages

• Looks like old fashioned “Central Committee Planning.”
• It will be difficult to assure the public that the best deal can be achieved through an RFP if cost recovery is assured to the entity evaluating the bids.
• Actions requiring legislative action may be delayed or significantly transformed.
• It will be difficult to assure that the SPE will recover its costs, based on utility experience with Commission’s prudence reviews, need for FERC approval of NYISO role, and the reluctance of the Commission to bind future Commissions.
• If NYPA were the SPE, it would essentially be a “bank,” even though its strengths are asset development, ownership and op-

45. As in the Case of Option 2, the term of the PSAs secured by a contract with an SPE or NYPA need not necessarily last as long as the plants’ expected life spans.
eration. It would also be necessary to protect NYPA’s other customers and lenders from losses.

- Might undermine the competitive markets and discourage new market-based resource entry. It would be difficult for any generator recovering its costs in a competitive market to compete with a SPE which had guaranteed recovery of its costs, especially if the SPE has access to tax-exempt financing.


A. History of Energy Planning in New York State

Until the expiration of Article 6 of the Energy Law on January 1, 2003, the New York State Energy Planning Board agencies were required to review and if necessary update a state energy master plan at least once every two years. The State Energy Plan included: a forecast of state energy requirements, together with the bases for such forecasts; a summary of the plans of the State’s major energy suppliers for meeting forecasted energy requirements; an identification and analysis of emerging trends related to energy supply, price and demand; and recommendations for specific energy policies including administrative and legislative actions. The state energy planning process benefited from the participation of knowledgeable staff from key State agencies as well as the opportunity for interested parties to submit written and oral comments. The result of the process was useful plans that created a framework for State agency action that forced the agencies to think and work collaboratively.

The 2002 State Energy Plan and Final Environmental Impact Statement were released by the State Energy Planning Board in June 2002. Since then, there have been no subsequent State Energy Plans because of the expiration of Article 6. Staffs of the Energy Planning Board agencies, however, issued memoranda documenting progress with the 2002 Energy Plan in December 2002, February 2004, February 2005 and March 2006. In March 2006, the New York State Energy Research and Development Authority ended its requests for information on a voluntary basis “as compliance with this voluntary request has waned considerably.” New York State no longer has a comprehensive state energy planning process.

46. The Energy Planning Board agencies were the Commission, N.Y.S. Energy Research and Development Authority, N.Y.S. Department of Transportation, N.Y.S. Department of Economic Development, and N.Y.S. Department of Environmental Conservation.

B. Interaction of Administrative Energy Planning with NYISO System Planning

The NYISO addresses system reliability needs through its Comprehensive Reliability Planning Process, but it does not attempt to provide the type of comprehensive planning that existed in the past through the state energy planning process. In particular, the NYISO does not attempt to analyze the variety of emerging trends related to energy supply, price and demand that had been previously been addressed by the Energy Planning Board.

In addition, the NYISO does not address non-reliability-related issues, such as fuel diversity, whether transmission capacity should be increased to meet economic needs, whether specific measures addressing load pockets and bottled generation should be taken and whether sufficient attention is being paid to demand response and energy efficiency programs. Fuel diversity, for example, is a crucial long-term issue for the State as most, if not all, of the new capacity resource proposals involves a generating plant which uses natural gas. Each of the other issues is comparably of critical importance to the provision of affordable energy while minimizing the environmental footprint of meeting the State’s energy needs.

These limitations on the NYISO’s planning process are particularly important as market forces have led to construction of limited new supply resources or transmission infrastructure in the regions of the State with the highest cost electricity. While it is conceivable that the competitive market may provide the most efficient answers to energy planning over the long-term, it remains unclear as to whether the competitive market will provide such answers in the short-term. Also of significance is that the NYISO does not address the environmental implications of its system reliability planning.

State-administered energy planning, particularly to the extent it replicates traditional integrated resource planning, can be considered to interfere with the operation of the market. The Committee is sensitive to the adverse impact that some form of energy planning could have on the operation of a robust market and urges that in any state planning care be taken not to interfere with the competitive markets absent an overriding public policy purpose.

C. NYISO’s System Planning Balance of New Transmission and Generation

While new transmission projects can be may be viewed as substituting for new generation projects in particular regions, in a broader sense

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transmission provides the infrastructure on which the State's entire electric system works and enables competition in that it allows remote generation to compete with local generation. The NYISO’s planning process permits the submission of transmission projects as market responses to the NYISO’s reliability needs assessment, but no transmission projects were submitted by market participants in response to the NYISO’s initial request for market-based project proposals. The transmission projects identified in the current plan were submitted by transmission owners in response to their obligation to maintain a safe and reliable system. The financing of transmission projects, which connect different transmission regions of the State and are proposed by independent transmission sponsors, is particularly difficult to arrange as it may be difficult to determine who benefits from a new facility and to assign benefit shares to different sets of customers.

Moreover, it is not clear whether the current competitive wholesale market is leading to new construction of sufficient generation and transmission where customer costs are highest and demand requires additional supply because the NYISO planning process does not adequately identify and address economic needs. Only when economic needs are addressed and a process is developed to identify both market and cost-effective regulated solutions to those needs, will the State be able to evaluate whether customer costs are higher than they need or ought to be, whether there is new generation and/or transmission that could be built to the benefit of customers, and whether existing market incentives are sending the right signals to merchant producers in constrained areas, such as New York City. The limited amount of new merchant power plant construction in New York City is an indication that the right signals are not being sent.

D. State Energy Planning in the Context of Competitive Electric Utility Markets

Assuming that competitive electric utility markets will continue to exist in New York, state energy planning continues to be essential in order to enable the State to comprehensively analyze and respond to emerging affordability, environmental, reliability, economic planning and national security effects of supplying energy. There is no inherent conflict between state energy planning and the existence of competitive markets. In Pennsylvania, for example, state energy planning exists along with the PJM regional transmission operator, which administers competitive markets.

49. Id.
comparable to the NYISO’s markets. The competitive market rules in the State are designed to meet the State’s objectives and those rules can be changed, as necessary, to respond to State policy as determined in a comprehensive planning process.

In other regions of the country, where a regional transmission operator covers a number of states, FERC is encouraging the creation of regional state committees (“RSCs”). The proposed RSC for New England, for example, will address key system planning issues, including, resource adequacy and system planning-expansion. The New England RSC:

will strive to achieve a comprehensive and integrated approach to achieving resource adequacy and system planning and expansion without relying unduly on any single resource or type of infrastructure. . . . [It] will recommend policies and comment on proposed market rule and tariff changes related to resource adequacy, demand response and energy efficiency. . . . [Finally, the RSC] will recommend policies designed to ensure that resources are available to provide for regional electric reliability and, where it is feasible and cost-effective, to eliminate persistent and costly congestion over transmission lines and to enable the inter-connection of generation resources. In addition, [the RSC] will study and evaluate approaches to the siting of interstate transmission lines on a regional basis.

Although the adoption of an RSC identical to New England’s is inapposite in New York State because the NYISO operates in only one state, the goals of New England’s RSC can be adopted for New York’s energy planning effort.

5. Committee Conclusions
The Committee suggests that the State’s most significant energy issue

50. See Penn. Pub. Util. Comm’n, Bureau of Conservation, Econ. & Energy Planning website, http://www.puc.state.pa.us/general/com_org/bur_cons_eco_ener_plan.aspx. The Bureau develops energy, water, and telecommunications policy; disseminates information and analysis on utility operational aspects; and researches a broad range of utility policy issues, including potential impacts of utility restructuring activities, market power, energy strategies, mandatory water conservation plans with appropriate technologies, resource planning, competitive bidding and rate design.

is the encouragement of construction of new generating capacity in regions of the State where it is needed.\textsuperscript{52} New generating capacity provided by merchant generators is needed to address reliability issues and the market conditions in southeast New York over the next few years. While the re-enactment of Article X, the power plant siting law, is crucially important, the Committee does not consider that such legislative action by itself will be sufficient.

In addition to action on Article X, the Committee, first, suggests the NYISO can act promptly to implement a forward capacity market along the lines described above in Section 3(B) of this Report. Second, the Committee suggests that relying solely on an untested forward capacity market at this juncture is ill advised. Accordingly, the Committee proposes exploration of two additional alternative approaches, namely amendment of the current structure of the market to facilitate (1) LSEs or (2) an SPE entering into long-term PSAs with non-rate base sponsors of new generating plants and thus assisting such developers to build new generating capacity. The choice between these two financing options will require careful analysis, including an open process with comments from all stakeholders, on the advantages and disadvantages of each option.

In addition to spurring construction of new generation capacity, the Committee recommends that the State re-instate some form of energy planning. New York faces critically important energy planning challenges in the coming years in order to ensure the provision of affordable, reliable and clean energy. The State must ensure adequate generating capacity and the transmission and distribution capacity necessary to avoid constrained areas, such as those that currently exist in downstate New York, while simultaneously protecting the State’s environment and reducing global warming. New York needs to maximize the benefits of fuel diversity, energy efficiency, renewable energy, new technologies and energy security, while strengthening the State’s economy.

The State should supplement—not supplant—the NYISO’s existing planning processes by reestablishing the essential elements of the state energy planning process that existed prior to the expiration of Article 6 of the Energy Law. There is no requirement, however, to reenact a law similar in detail to Article 6. Rather, State-administered energy planning should provide the opportunity for State agencies to work collaboratively to ana-

\textsuperscript{52} Alternatively, the facilitation of investment in transmission capacity in order to improve the transfer of power from upstate where it is surplus to downstate where it is needed may be an equally effective way to address capacity issues in southeastern New York.
lyze and respond to emerging trends and problems, with ample opportunity for public input, and to make appropriate recommendations for administrative, executive and legislative action. We do not pretend that nothing has changed since the expiration of Article 6. Rather, the new process should be designed to build upon changes that have taken place with the advent of more competitive markets, to take advantage of the planning completed by the NYISO and to respond to the critical need to assure the adequacy of supply, forestall price increases and reduce environmental impacts. The Committee would be pleased to provide its expertise as the State develops the details of a new State planning process.

February 2007

**ABBREVIATIONS**

- CPUC: California Public Utility Commission
- Con Edison: Consolidated Edison Company of New York, Inc.
- DPS: Department of Public Service
- ESCO: Energy service company
- FERC: Federal Energy Regulatory Commission
- ICAP: Installed capacity
- LSE: Load serving entity
- MW: Megawatt
- NYISO: New York Independent System Operator
- NYPA: New York Power Authority Commission
- NTAC: NYPAP Transmission Adjustment Clause
- PJM: PJM Interconnection, L.L.C.
- PSA: Power supply agreement
- RSC: Regional state committee
- RNA: Reliability Needs Assessment
- RFP: Requests for proposal
- SPE: Special Purpose Entity
Committee on Energy

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The Financing of the Hudson Yards Development Project

The Committee on New York City Affairs

The New York City Affairs Committee (the “Committee”) of the New York City Bar Association (the “Association”) conducted an extensive review of the financing by New York City (“City”) of the development of the Hudson Rail Yards, a 45-block area on the far west side of Manhattan adjacent to the mid-Manhattan central business district. The Committee focused on the historical and fiscal ramifications of the financing and its incentive structures which can be fairly characterized as creative and unusual. The Association’s review is intended to provoke discussion about the means of financing infrastructure in New York City.

I. INTRODUCTION

On December 7, 2006, the Hudson Yards Infrastructure Corporation (“HYIC”), a special purpose local development corporation created by the City as an instrumentality of the City, successfully sold $2 billion of revenue bonds to provide initial financing for the City’s Hudson Yards Development Project (the “Hudson Yards Project”).¹ As described on the website

¹. The HYIC is able to issue its bonds on a tax-exempt basis under IRS Revenue Ruling 63-20 and Revenue Procedure 82-26, governing obligations issued by a non-profit corporation formed under the general non-profit corporation law of a state for the purpose of stimulating industrial development within a political subdivision of the state.
FINANCING THE HUDSON YARDS DEVELOPMENT PROJECT

of the Hudson Yards Development Corporation ("HYDC"), also a local development corporation created by the City to manage the Hudson Yards Project, Hudson Yards is the area of Manhattan generally bounded by West 43rd Street on the north, Seventh and Eighth Avenues on the east, West 29th and 30th Streets on the south, and Twelfth Avenue on the west. The City, the Metropolitan Transportation Authority ("MTA"), and the State of New York ("State") have collaborated on extraordinary planning initiatives over the past 5 years intended to create a development program intended to transform the Hudson Yards area into a vibrant, pedestrian-friendly, transit-oriented mixed-use district.

Key components of the Hudson Yards Project are:

- Rezoning of the area from manufacturing to commercial and residential, which was adopted by the City in January 2005. As rezoned, Hudson Yards now has capacity for approximately 25 million square feet of new office development, 14 million square feet of housing, including in excess of 4,000 affordable units, 1.3 million square feet of retail, and 2.3 million square feet of hotel space.
- The extension of the No. 7 subway line from its current terminus at Times Square to a new terminal station at 34th Street and 11th Avenue (the "Subway Extension").
- Mixed-use development over the eastern section of the MTA West Side Rail Yards.
- A joint planning and development effort, together with the MTA and the City Council, for the western section of the MTA West Side Rail Yards.
- Creation of new parks and public open space throughout the Hudson Yards area.

The Hudson Yards Project is intended to provide infrastructure that facilitates the creation of a medium to high density, mixed-use commercial and residential district containing new medium to large scale commercial, residential, hotel and retail developments and new parks and public open spaces in a significant portion of the Hudson Yards Project area.

The Hudson Yards Project, if completed as planned, would constitute the fourth largest central business district in the United States, after

Midtown Manhattan, the Chicago Loop, and the Downtown Manhattan Financial District. The development will feature a new nine-block boulevard and park akin to Park Avenue and currently referred to as “10½ Avenue.”

The Hudson Yards Project, breathtaking in scale and imagination, represents a spectacular episode of urban planning and government leadership in partial response to the projected increase of one million in the City’s population by the year 2030 and in recognition that the primary business district growth area in Manhattan is the far west side. The rezoning of the 45-block Hudson Yards Project area, part of the City’s sustained rezoning effort, the largest in its history, was a triumphant political and legal accomplishment that took years of planning, outreach, and negotiation. While many consider expansion of the mid-Manhattan central business district to the far west side to be inexorable, it could not occur without the rezoning and planning that the City has completed. The New York City Bar Association salutes the City’s leadership for this accomplishment, which should be considered in the context of the anti-development sentiment on the far west side exhibited in the demise of the Westway Interstate Highway development project in the 1980s.

The HYIC December 2006 financing was the first tranche of an authorized $3.5 billion financing, of which $2.1 billion of the proceeds is intended to pay for the design and construction of the western extension of the No. 7 subway line, first from Times Square to West 41st Street and Eleventh Avenue and then to West 34th Street and Eleventh Avenue. Based on the $2.1 billion cost estimate, the City intends to pay 100 percent of the cost of the Subway Extension. The No. 7 line is controlled and operated by the MTA. Under normal circumstances, capital projects of the MTA in the City would be funded 80 percent by the federal government, 15 percent by the State, and 5 percent by the City. Because the MTA and the State refused to consider the extension of the No. 7 line to be a capital priority, the City made the decision to pay for the Subway Extension itself, at least to the extent of the 2006 cost estimate. (It is not clear, however, who would pay for any cost increases if the $2.1 billion cost estimate for the Subway Extension proves to be insufficient. The City has said that in that event, it will negotiate with the MTA but the MTA has said it will not pay any of the costs of the Subway Extension. It is also uncertain who will pay for a contemplated station at 41st Street and Eleventh Avenue.)

The City’s decision to pay 100 percent of the 2006 cost estimate of the Subway Extension reflects its importance to the Hudson Yards Project. Much as the construction of the City subway system unified the City and allowed it to develop and grow in an orderly fashion, the City believes that subway investment will spur development in the Hudson Yards Project area so as to generate revenues sufficient to pay for the Subway Extension, rendering it a self-financing project. Eventually, it is planned and hoped that the extended No. 7 line will link with Penn Station, moved and reborn as the Moynihan Station Complex at 34th Street and Eighth Avenue, a State project to be financed, in part, by the Empire State Development Corporation that has not yet received the necessary governmental approvals.

The decision to pay 100 percent of the 2006 cost estimate of the Subway Extension and also to pay for the necessary infrastructure to create parks and open spaces in the commercial, residential, hotel and retail development areas required the City to select a method of financing to generate proceeds sufficient to complete the Hudson Yards Project. The City decided to bypass the normal capital budget processes that must be completed to issue General Obligation Bonds backed by the full faith and credit of the City (essentially City guaranteed debt). The City devised an innovative financing scheme whereby it would create an entity—HYIC—to issue revenue bonds backed by payments in lieu of real estate taxes (“PILOT”) applicable to, and designed to incentivize new development in the Hudson Yards Project. The new development falling under this regime would not be subject to City real estate taxes for 19 years and the PILOT revenues would be dedicated to HYIC to pay the debt service. That decision and that financing scheme necessitated a series of consequential legal, political, and policy decisions that are laden with risk/reward calculations. These calculations define risks that the City has decided to undertake. Those risks are the subject of this Report.

4. See Charles V. Bagli, West Side Plan is Risky Effort, Forecasters Say, N.Y. TIMES, Dec. 21, 2004, at B1 (quoting Deputy Mayor Daniel L. Doctoroff’s testimony to the City Council that “[w]e developed at creative financing plan that pays for itself with new revenues it will generate—not with capital budget money.”


enth Avenue, which is not part of the cost estimate and is not included in the initial expansion.)
II. THE FINANCING PLAN—CONTRACTUAL (AND MORAL?) OBLIGATION

As initially conceived, the Hudson Yards Project featured expansion of the Javits Convention Center (to be financed by a State authority) to be accompanied by construction of a new football stadium for the New York Jets at the Hudson Rail Yards (to be financed by City, State and private sources). This initial plan in large part was designed in support of the City’s effort to attract the 2012 Olympics, with the proposed Jets stadium intended to be the Olympic stadium and also a plenary session adjunct of the Convention Center.7 The Subway Extension was central to the Olympic, stadium and Convention Center plans.

The initial plan also was designed to bypass lengthy and uncertain political approvals so as to avoid delay and enhance the Olympic bid. In effect, the Olympic bid and football stadium proposals put the elaborate far west side development plan on the back pages (sports) and not the front pages (politics). The Jets stadium proposal, however, generated well-financed controversy that was not anticipated, and the intricate stadium financing, which involved assets of the MTA, required approval of the Public Authorities Control Board (“PACB”), a joint State legislative/executive body. The PACB rejected the stadium, and the City did not win the right to host the 2012 Olympics. After those events, the white hot political controversy generated by the proposed stadium dissipated. But the City proceeded with the overall west side development, having largely avoided the necessity of various governmental reviews that normally serve as vehicles of political opposition. The City reached accommodation with the MTA on a land and air rights fair market valuation methodology for the Rail Yards and also reached agreement, theretofore eschewed, with the City Council with respect to the Hudson Yards Project financing plan.

The essence of the revenue bond financing plan for the HYIC is that developers of properties in the Hudson Yards Project area will make Payments in Lieu of [real estate] Taxes (“PILOTs”) dedicated to the HYIC so that HYIC could pay the debt service (interest only for 40 years) on the HYIC bonds.8 The developers’ obligation to pay PILOTs as opposed to real estate taxes is a result of a Uniform Tax Exemption Policy (“UTEP”) adopted by the City’s Industrial Development Agency (“IDA”). UTEP provides a “substantial discount” from property taxes for 19 years to developers of

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7. See id. (describing the incorporation of the Jets/Olympic stadium into the Hudson Yards development plan).
8. See HYIC Official Statement at p. 15-16.
commercial properties in the Hudson Yards Project development area who enter into arrangements with the IDA under the IDA’s economic development authority.\(^9\) The IDA is an affiliate of and is controlled by the City’s Economic Development Corporation (“EDC”). The HYIC and the HYDC are also affiliates of EDC.

Under usual circumstances, developers who construct buildings or revenue generating facilities on government owned land in New York are exempt from real estate taxes but are required to pay PILOTs instead in an amount equivalent to the real estate tax. PILOTs are calculated and assessed in the same manner as are real estate taxes, and they are paid into the City’s general fund.

The IDA has utilized PILOT diversion previously but never on the scale of the Hudson Yards Project. In a prototypical IDA transaction, the IDA acquires a manufacturing site with the proceeds of tax-free bonds issued by it. This transaction is done to provide less expensive tax-free financing to a job-creating entity that would enter into a lease-back agreement with the IDA for the factory. The rent that the manufacturer would pay would be equal to the debt service on the IDA bonds. On some occasions the PILOT (since the site would be on government-owned and, therefore, tax-exempt property) also would be applied to the debt service. This job creation/retention device is employed throughout the State as a means to offer private employers access to less expensive financing as an inducement to locate or stay in the State and create jobs in the State.\(^{10}\)

Two very recent and precedent setting uses of this technique will be manifested in the development of the new baseball stadia for the Mets and the Yankees using tax-free debt issued by the IDA. The clubs will pay PILOTs to service the debt under agreements made pursuant to a special tax ruling of the U.S. Internal Revenue Service. While this financing technique for private baseball teams can be criticized as an inappropriate subsidy to the teams and an unnecessary diversion of PILOTs, the PILOTs are

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9. Id.

10. A developer planning to build within the Hudson Yards district would have the option of entering a PILOT agreement with the New York City Industrial Development Agency (“IDA”). Under such an agreement, IDA would buy the land to be developed from the developer for a token amount, which would take the land off the property tax rolls, and the developer would then make PILOT payments to IDA for the term of the agreement. Generally, the developer would enter the PILOT agreement when making other financing arrangements. At the end of the term of the Agreement, the IDA would return the land to the developer for a token amount and the land would return to the City’s property tax rolls. The IDA would establish a uniform PILOT payment schedule for Hudson Yards.
not discounted, and the financing is solely for the benefit of a single, job creating entity.\(^{11}\) With particular respect to the Yankees transaction, the PILOTs are going to be generated by luxury suites and season ticket sales. In the previous two seasons the Yankees have had an average attendance of 4 million, and an attendance of less than 750,000 is all that is needed to generate the annual debt service revenues, so there is virtually no financing risk. Also, there is a guaranteed maximum price construction contract, so there is limited construction cost overrun risk. Finally, there is bond insurance, and the stadium will be built on City land which otherwise would not have produced real estate tax revenue. In the HYIC financing plan, on the other hand, PILOTs are to be diverted and discounted substantially across the board for the purpose of permitting revenue bond financing as opposed to general obligation financing,\(^{12}\) and much of the land on which development may occur previously was subject to real estate taxation. Other instances where the City discounted real estate taxes for job retention purposes include agreements made in the 1990’s with NBC and Prudential Securities. The Committee did not examine these transactions.

1. Capital Budget; General Obligation Debt

The alternative to use of the PILOT (and similar) revenues to create a revenue stream to service the HYIC bonds would have been to subject the development to real estate taxes and for the City to issue general obligation bonds pursuant to its regular capital budget processes. The building of a capital project on the scale of an extension of a subway line with associated amenities normally would be a function of the City capital budget assuming there would be room under the debt limit (See below.).\(^{13}\) The City Independent Budget Office publishes a guide to the capital budget, which reads in pertinent part:

New York City has a Capital Budget, separate from its annual

\(^{11}\) The proposed Nets Arena in the proposed Atlantic Yards Development in Brooklyn also will employ IDA/PILOT financing.

\(^{12}\) Developers also will be excused from paying Mortgage Reporting Taxes. Instead they will make Payments in Lieu of Mortgage Reporting Taxes (“PILOMRT’S”) to the HYIC.

\(^{13}\) See New York City Charter, Chapter 9 (“Capital Projects and Budget”), available at http://www.nyc.gov/html/charter/downloads/pdf/citycharter2004.pdf—As of the end of City Fiscal Year 2005, the City’s total outstanding debt was $78.2 billion, of which $34.6 billion was General Obligation Debt. The balance was Authority debt including the Transitional Finance Authority which was employed as a borrowing vehicle when the City debt limit was constricted. (Source: Citizen’s Budget Commission, September 2006).
operating (or expense) budget, which presents the funding plans for construction and repair projects; and purchases of land, buildings or equipment. Technically speaking, a “capital project” involves the construction, reconstruction, acquisition, or installation of a physical public improvement, with a value of $35,000 or more and a “useful life” of at least five years. This may include everything from building bridges to building housing.\textsuperscript{14}

The Guide adds further “The capital program is generally financed by borrowing money, usually through the sale of bonds. This differs from the City’s Expense Budget, which covers day-to-day operating expenditures and is financed by City taxes and other revenues along with state and federal aid.”\textsuperscript{15}

The City capital budget has a vetting process, described in lay terms in the Guide, which is similar to the process whereby the City’s annual operating budget is enacted into law by the City Council. This process was sidestepped by the City’s decision to create HYIC and issue revenue bonds. In an October 20, 2004 letter, City Comptroller William C. Thompson, Jr. criticized Mayor Bloomberg for this decision:

\begin{quote}
You chose not to include this project [Hudson Yards] in the capital budget, avoiding City Council approval. In doing so, you removed the public’s only opportunity for meaningful and serious review of the merits of your plan against other priorities, such as the construction of new schools or senior centers…Indeed, if your plan for the West Side is worthy of our City’s investment, it should be included in our capital budget and subject to scrutiny beyond what is offered to date.\textsuperscript{16}
\end{quote}

In 2006, however, the Comptroller endorsed the HYIC financing plan, primarily as a result of an agreement between the City and HYIC and endorsed by the City Council with respect to interest support payments whereby the City Council would appropriate on annual basis funds that may be required to cover interest on the HYIC bonds. (See “Support and Development Agreement” below.)


\textsuperscript{15} Id.

General obligation bonds are issued for capital budget purposes and are full faith and credit obligations of the City. A buyer of a general obligation City bond is assured of payment because it has first call on all of the City's revenues, most notably the real estate tax. Unlike the State, which cannot issue general obligation debt unless a specific bond issue (e.g., a transportation bond issue) is approved by the voters in a general election, the City can issue general obligation debt up to its constitutional debt limit.

Article 8 of the State Constitution at Section 2 provides in pertinent part:

No indebtedness shall be contracted by any...city...unless such...city...shall have pledged its full faith and credit for the payment of the principal and the interest thereon.

Article 8, Section 4 of the State Constitution limits the amount of full faith and credit debt the City can issue. The City cannot issue debt in an amount in excess of its “general debt limit” of 10 percent of the average full value of taxable real estate in the City for the most recent 5 years. Currently, the City is under its general debt limit. According to the “Fiscal Year 2007 Annual Report of the Comptroller on Capital Debt and Obligations,” the City had about $13.7 billion of room in the Debt Limit when the HYIC bonds were sold. The general debt limit is dynamic; as the assessed value of the City’s taxable real estate increases, so does its general debt limit and the dramatic and continuing rise in the values of New York City real estate in the last decade have raised the City’s debt limit. The City could have issued full faith and credit City debt to finance the Hudson Yards Project but chose instead to create an entity, HYIC, to issue not-for-profit corporate debt backed by to-be generated revenues.

2. Support and Development Agreement

The use of revenue bond financing backed primarily by PILOTs carries risk because PILOTs will not be payable until the buildings against which real estate taxes would be assessed are actually built. Thus, even assuming development in the Hudson Yard Project area proceeds as anticipated, there is not expected to be a revenue stream sufficient to service the HYIC bonds until at least the Fiscal Year ending June 30, 2014.

Therefore, to create a mechanism to assure purchasers of the HYIC bonds that the HYIC

17. The City had in excess of $13.6 billion of additional room in its debt limit at the end of 2006.
bonds that the debt service would be paid during the period before the PILOT revenue stream began, or thereafter if the PILOT revenue stream were to be insufficient, the City entered into a contract with the HYIC: the Support and Development Agreement. Pursuant to the Support and Development Agreement, the City unconditionally agreed with HYIC to pay the interest on the HYIC revenue bonds to the extent revenues (mostly PILOTs) are insufficient to make the interest payments. The Support and Development Agreement extends for the life of the HYIC bonds. However, in any year that Hudson Yards Project revenues are insufficient to cover debt service on the HYIC bonds and the City is contractually obliged to pay interest support payments to the HYIC, the City Council will be asked to appropriate the required amounts. However, the City Council is not legally required to do so.

Proponents of the HYIC financing plan term the revenue bonds as “contract indebtedness.” But the City is only contractually obliged to the HYIC, a corporation it created, owns and controls. As set forth in the HYIC Official Statement dated December 7, 2006:

In resolutions adopted January 19, 2005 and October 11, 2006, the City Council recognized the importance to the City of the redevelopment of the [Hudson Yards] Project Area and supported an undertaking by the City, subject to annual appropriation, to make Interest Support Payments. (at p. 14, emphasis added)

The Support and Development Agreement and the City’s obligation to make such payments do not constitute debt of the City ... The City is not legally required to make annual appropriation for such payments. The ability of the City to fulfill its obligations under the ... Agreement ... may depend on the financial condition of the City.18

Pursuant to Resolution 760 and City Council Resolution 547 of the City Council, the HYIC also will receive the following projected revenues:

- Proceeds from the sale of certain transferable development rights which would in turn be sold by the HYIC to private developers;
- Payments from the City of revenues provided by residential real property taxes or other real property taxes generated within the Hudson Yards District not captured by other mechanisms (such as PILOTs);

The City is contractually obliged to the HYIC, but the agreement of the City Council with respect to the HYIC bonds is only articulated in two resolutions. Neither the current City Council nor a future one is legally obliged to appropriate funds to pay interest on the HYIC bonds. And even if the current City Council had enacted a law requiring it to appropriate funds to pay debt service on the HYIC bonds, one legislature cannot bind the hands of another in the future. Although the City Council is not legally obliged, one could say that by virtue of its 2005 and 2006 resolutions, the current Council is “morally obliged.”

3. Moral Obligation Debt

During the expansive period from 1959 to 1973, when Nelson Rockefeller was the governor of the State, to avoid the necessity of attaining voter approval for bond issues, which frequently were defeated, the State increased its reliance on borrowing by legislatively created State authorities, which have been described as public/private hybrids that can collect fees, issue debt and build things with little government interference. Certain authorities, such as the Triborough Bridge and Tunnel Authority, have defined and ample revenue streams, such as bridge and tunnel tolls, and are capable of supporting considerable debt. The Port Authority of New York and New Jersey and the City Water Authority are other examples of sound issuers of revenue-backed debt.

19. Developers would have the option, with respect to certain parcels, to build more than the base zoning would allow if they made a DIF payment.

20. See, Moran v. Foster, 45 N.Y.2d 287, 293 (1978) (“Unless specifically provided by statute or charter provisions, one county legislature may not bind the hands of its successors in areas relating to governmental matters (see Murphy v Erie County, 34 AD2d 295, 298, aff’d 28 NY2d 80; Edshall v Wheeler, 29 AD2d 622, 623; 10 McQuillin, Municipal Corporations, § 29.101; 40 NY Jur, Municipal Corporations, § 809.)”)

But not all authorities have recurring and well-defined revenues. In the late 1960s the Rockefeller administration embraced the concept of “moral obligation” debt, whereby authorities issued bonds backed by unpredictable revenue streams accompanied by an unenforceable promise of the State Legislature to appropriate funds for debt service on the bonds, if necessary.\textsuperscript{22} Often, a lease with the State or a contract with a State agency was the only revenue source backing moral obligation bonds. As was said in \textit{Schulz v. State}\textsuperscript{23}:

Essentially, moral obligation debt is created when the State, through legislation, directs a public authority or other public corporation to issue bonds as a means of financing various public capital improvement projects and then, through outright gift or via a variety of long-term, non recourse agreements or capital leases, provides it with the requisite income to secure the bonds and make debt service payments thereon. Because the bonds are secured only by the revenue streams from the agreements or leases and not by the full faith and credit of the State, and under the terms of the leases or agreements the State has no legal obligation to appropriate money to make payments, it has no legal liability to the bondholders and effectively divests itself of all but a moral obligation to appropriate the moneys necessary to fund and secure the bonds. (Emphasis added)

Moral obligation financing is also defined in the “Statement of Annual Information Updated Pursuant to Continuing Disclosure Agreements for Fiscal Year 2005-06” (“AIS”) published by the State on July 28, 2006, as follows\textsuperscript{24}:

Moral obligation financing generally involves the issuance of debt by a public authority to finance a revenue-producing project or other activity. The debt is secured by project revenues and includes statutory provisions requiring the State, subject to appropriation by the Legislature, to make up any deficiencies which


may occur in the issuer’s debt service reserve fund...The State
does not intend to increase statutory authorizations for moral
obligation bond programs. (Emphasis added.)

To the extent Hudson Yards revenues are insufficient to meet HYIC
debt service requirements, the HYIC financing fits the definition of moral
obligation financing. Moral obligation debt, or, as it is sometimes re-
ferred to, “back door” debt, has become discredited, and on the State
level in recent years there have been debt reform initiatives to discourage
such borrowing.25

In addition to the Schulz case, supra, the Court of Appeals has found
moral obligation financing to be constitutional and legal. See, e.g., Wein
v. City, 36 NY 2d 610.26 The HYIC Official Statement is careful to empha-
size that there can be no assurance that funds to pay annual debt service
will be appropriated. The Official Statement emphasizes that the HYIC
debt is not City debt. Despite the risks disclosed to bond buyers, the bonds
received an excellent rating and were six times over-subscribed. The planned
issuance of $1.5 billion was increased to $2 billion. The concern of the
Committee, however, is that the primary risk in the financing was as-
sumed by the City, rather than the bondholders, and that assumption
carries significant long-term public policy implications.

III. CITY RISK
There are three essential elements to the risks the City has taken in its
financing decisions with respect to the Hudson Yards Project.

1) Cost Overrun
The first element is the decision to finance 100 percent of the 2006
cost estimate of the Subway Extension. To govern is to choose, and one of
the most exquisite choices of urban government is the allocation of its
limited capital transportation funds. With respect to mass transit capital

25. New York’s Public Authorities: Promoting Accountability and Taming Debt, Citizens
06.pdf.

26. There is a limit, however, to the Court of Appeals’ tolerance to what some may consider
evasions of constitutional design with respect to municipal finance. The Court of Appeals
held the City’s note moratorium unconstitutional in Flushing National Bank v. MAC, 390 NY
S2d 22, notwithstanding the confidence of the City and State lawyers at the time that police
power considerations would trump the literal text of the State Constitution.
spending in the City, the fundamental decision makers are the State, the City, the MTA (a creature of the State), and the federal government. The federal government allocates substantial capital funds for the benefit of mass transit in the State. In the metropolitan region, these federal capital funds are applied for by the MTA. Funds accessed are required to be matched by the beneficiaries: State and local government. The MTA decided not to apply for federal capital funds for the Subway Extension. Other transit projects, such as the completion of the Second Avenue subway and the JFK Airport/Wall Street rail link were deemed to be higher priorities. But the City considered the Subway Extension of such critical importance that it decided to fund it 100 percent—at least to the extent of the 2006 cost estimate, i.e., $2.1 billion. In making this difficult choice, the City ruled out other possibly less expensive alternatives, including light rail and bus systems, without public debate.

It is beyond the expertise and scope of the Committee to assess the transportation economic correctness of the City’s decision in terms of transportation economics, but the Committee can recognize the consequences of the decision. Transportation is the servant of economics. Yet in the Hudson Yards Project, the City intends to create the transportation to drive the economics so that the transportation has a dynamic to serve. Instead of responding to a demand, the City is attempting to create one. The cost is not static, and there is a substantial likelihood that the Subway Extension will cost more than $2.1 billion. It has been reported that construction costs in New York City are increasing by about 1 percent a month. The cost estimate for the Subway Extension initially was formulated in 2004 at $2 billion and revised in 2006 to $2.1 billion. Recent reports, however, suggest that that amount is inadequate and that the actual cost could be in excess of $3 billion. The new leadership of the MTA has stated publicly that it will not pay for any of this possible increase. (The costs of other MTA projects are rising also.) The City is not committed to pay any cost overruns on the Subway Extension and runs the risk of having to do so or delaying its completion. If the Subway Extension were to be significantly delayed or discontinued, there might be a severe impact on the revenues that the Hudson Yards Project could generate. This possible dilemma could confront a future mayoral administration.

2) Revenue Shortfall
The second essential element of risk is that revenues will not be gen-

erated in the Hudson Yards Project area soon enough or in sufficient amount to service the bonds, *i.e.*, that the buildings generating the PILOTs will not be built. This risk is ameliorated by the fact that the HYIC bonds pay interest only for 40 years until their maturity. The risk dramatizes the possible significance of the City’s choice of moral obligation bonds as opposed to general obligation bonds.

For a variety of reasons development on the far west side may not proceed as planned, and very few of these reasons are in the control of the City. The City can combat but cannot necessarily prevent another catastrophic hostile attack, nor can it manage global economic events. So too, a future Mayor and City Council may be faced with unrelenting political pressures that force them to choose between revenue bondholders and other government imperatives. Development also may be impeded by rapidly rising costs, environmental problems, construction delay, labor stoppages, and adverse market conditions.

The government sponsored massive development of the far west side and its dependence on PILOT revenues bears an eerie resemblance to the development of Battery Park City in the early 1970s, in its time the largest urban development project in U.S. history. Battery Park City was financed by moral obligation bonds, *i.e.*, the revenue bonds floated to finance the development were to be serviced by the ground rents the developers of the to-be-built substantial commercial and residential high-rise buildings were going to pay. Until construction was underway and the ground rents payable, the State legislature was morally obliged to appropriate debt service on the bonds. The buildings, however, did not get built on schedule. As a result Battery Park City Authority (“BPCA”), which had been created to issue the moral obligation bonds, was not able to pay the debt service. The City fiscal crisis of the 1970s (the “Fiscal Crisis”) ensued because the capital markets abruptly closed to City debt, due in part to BPCA’s dance with default.

The pain and continuing adverse consequences of the Fiscal Crisis and the closure of the capital markets to the City do not have to be

28. HYIC Official Statement (see Summary Statement).


30. The fiscal crisis could more aptly be called the “financing crisis.”
recounted. Because of this history, however, it is unlikely that a future mayor would let the HYIC revenue bonds default, even though a future mayor legally could do so, because the capital markets likely would consider the default a failure to pay by the City. Nevertheless, the risk of such a default exists, and the choice may have to be made. And even if a future Mayor were to decide to pay debt service on the HYIC bonds, a new City Council, with no connection to the current Council, might not agree, particularly if there were politically compelling needs that the Council members deemed more essential than the needs of bondholders, who knowingly took the risk of buying debt the City was not legally obligated to honor.

Deputy Mayor Doctoroff has stated in response to a query that, if the buildings were not to be built and there were insufficient revenues to pay the debt service on the HYIC bonds, the bonds could be renegotiated. That assumption may not be realistic; if renegotiation were to be viewed by the Capital Markets as the same as default, the collateral consequences would be unduly severe. It would be perilous to ignore the clear lesson of the Fiscal Crisis. It is the Committee’s view that the Hudson Yards Project’s financing plan presents issues of public policy risks in infrastructure financing that have not received a thorough public discussion especially if the Hudson Yards were to be a model for future development.

In substantial part, the Fiscal Crisis resulted from the City’s reliance on borrowing rather than living within its means. For the Hudson Yards project, the City again may have overstepped its means. The City could have decided to live within its constitutional limits (or means) and employed general obligation debt to finance development of the far west side. That decision would have subjected the Hudson Yards Project to a greater scrutiny and a broader debate and forced choices among competing projects. Instead, the City devised a revenue bond alternative that accomplishes by indirection what the City may not have been able to accomplish by direction and avoided the need to make such choices. But in doing so, the City has embraced the risk of future difficult choices between HYIC default and the burden of paying HYIC debt service.

The City may also have set a troubling precedent by adopting a financing plan for HYIC that minimized opportunities for public debate and governmental approvals. Because the bonds were favorably received by the credit markets, this financing method may be used again for other large-scale projects which arguably should receive greater public scrutiny. It is also an undesirable precedent if continued resort to the PILOT method of finance erodes the City’s real estate tax base.
The City’s Hudson Yards Project financing decisions highlight a quandary that all governments must face. As the country simultaneously ages and grows, the demands placed on and for infrastructure grow as well. Existing infrastructure must be kept in good repair, and new, elaborate infrastructure must be installed. The costs are staggering, and they need to be financed; future generations rightly should pay for current infrastructure investments. Which infrastructure to maintain and build and how to finance these costs are critical questions, especially since such long term issues must be decided by short term political incumbents, particularly in the City where term limits prevail. Those who hold elective and appointive office today will not be in office in the figurative tomorrow when their decisions are manifested.

The bar, however, is not elected; it should take the long view. The Committee believes that the Hudson Yards Project financing raises issues germane to the larger, increasingly significant question of how infrastructure should be financed. The Committee further believes that it is in the interests and area of responsibility of the bar that it register its views on such questions, particularly as financing schemes are devised that are outside constitutionally proscribed methods. Financing infrastructure will require innovation. Over 30 years ago, however, the State began relying on then innovative conduit and moral obligation debt, and the City increasingly seems to be emulating the State’s techniques.

3) Tax Subsidies; Financing Equals Policy

A third risk element of the HYIC financing is the extensive use of tax breaks and discounts offered to developers. The substantial discounts, which vary depending on the distance the new to-be-developed commercial property is in relation to the Subway Extension, obtain for 19 years. The annual rate of increase in the discounted PILOTs is equal to the lesser of 3 percent or the actual increase in assessed valuation of the property. Developers also are excused from paying sales tax liabilities they otherwise would incur in development. There is a substantial policy question whether subsidies to developers are required to induce investment on the far west side. If commercial and residential development on the west side is inevitable because it is the only logical place to which Manhattan’s central business district can expand, why should costly artificial economic incentives be offered to encourage that development? There is an enormous risk/reward ratio in property development; it is not for the faint of heart. It is a proper function of government to control development and to provide incentives to assure certain kinds of development, e.g., affordable hous-
Zoning is the most effective tool for government to employ to put development in the context of sound planning. But government’s broad use of financial incentives (a political choice), and their possible disruption of market forces, is more debatable.

The Bond Buyer recently paraphrased comments of City Office of Management and Budget Director Mark Page with respect to the tax breaks of the Hudson Yards Project:

Questioned as to why the city should give tax discounts to developers if the area was likely to be developed anyway, Page said developers in New York are accustomed to receiving tax breaks and felt entitled to them. The tax concessions in the area are average compared to incentives in other parts of the city and are designed to favor earlier developers and those who build farther from transportation.

Are tax breaks analogous to birthday gifts to be given on a regular basis whether or not deserved? Mr. Page offers a colorable rationale, but there is no documentation that development would not take place without the tax breaks. Mr. Page was speaking extemporaneously and did not have an opportunity to elaborate.

Tax breaks are not necessarily a panacea for economic growth. In May 2002 the Bloomberg administration awarded Pfizer $46 million in tax breaks and subsidies “for the company’s decision to expand in New York City and its promises to add net jobs to the City’s economy.” 31 Four years later Pfizer announced it would close its Brooklyn manufacturing facility, eliminating about 600 jobs. At least 22% of companies that got tax breaks from the City in 2005 have cut their work forces according to a study released May 8, 2007 by New York Jobs with Justice. A recent New York Times article entitled “Are Tax Breaks for Builders Still Needed in Hot Market?” 32 began:

The Bloomberg administration’s recent move to re-evaluate the tax breaks used to encourage apartment construction in New York City has led to the beginnings of what will likely be an impassioned debate: In the hottest real estate market in decades, to what extent do developers still need tax incentives to entice

them to build? In a report to be released today, New York Acorn, a community group, argues that the city’s most popular tax-incentive program, known as 421-a, is not only generating much moderately priced housing in places like Downtown Brooklyn, but is, in effect, subsidizing a lot of expensive housing in gentrifying neighborhoods.

Senator Charles Schumer, chair of the civic organization The Group of 35, which issued a report calling for the City to develop new areas for office expansion, in a 2005 speech before the Partnership for the City of New York argued:

I do not believe we need to give developers tax breaks—the reduced PILOTS—to get them to the West Side. That money should be used for the building of the No. 7 line if needed. There is already growing developer interest in the area and I see no evidence that reductions in PILOT payments—“de facto tax breaks at the City’s expense” are needed. Traditionally in this City, infrastructure alone is sufficient to induce development . . . . As far as I am concerned, the No. 7 line IS the subsidy for that development and West Side developers should pay “full fare”33 (emphasis in original).

One explanation why the PILOT subsidies are being so extensively used in the HYIC financing plan is that they are necessary to ensure that development on the scale required occurs and that PILOT revenues are generated to pay for the infrastructure and its financing. As discussed supra, the risks of the financing failing are untenable. The need to grant the subsidies could have been avoided if the financing method selected had been general obligation debt. If that alternative had been chosen and approved, PILOTs would not have been necessary, the properties would have remained on the tax rolls, and non-discounted real estate tax revenues would have flowed to the City’s general fund.

In addition to setting the precedents of diverting PILOTs and granting generous tax subsidies to developers, which will encourage the expectation of similar subsidies in future projects, the diversion and diminu-

33. See, Testimony of James A. Parrott, PhD., Deputy Director and Chief Economist, Fiscal Policy Institute, Hearing before New York City Industrial Development Agency (“Proposal to Amend the Uniform Tax Exemption Policy for Hudson Yards Commercial Construction Projects”) New York City, August 3, 2006. Dr. Parrott warned that fights may develop in the City over whom is entitled to a tax break.
tion of the PILOTs raises a much broader question of fundamental fairness. In effect, by diverting PILOTs to specific revenue bonds, the taxpayers of the City are subsidizing developers and the buyers of the HYIC bonds. Of course, if the Hudson Yards Project were to be a success, it should generate much more benefit (including enhanced income tax revenues) than its cost. The HYIC financing plan is predicated upon an analysis by Cushman & Wakefield, Inc. of the potential revenues from development in the Hudson Yards Project area. Based on the assumptions of timely completion of the Subway Extension and sustained development activity, the Cushman & Wakefield study finds that estimates by the City, that revenues expected to be received by HYIC from projected new office, residential, hotel and retail development could aggregate between $35 billion and $39 billion during the period ending 2050, are reasonable. During this period HYIC’s financing costs could be $10 billion.

Early development activity at the Hudson Yards indicates that the Cushman & Wakefield analysis may be valid. As of April 30, 2007 the President of the Hudson Yards Development Corporation has reported that “There’s a lot of housing going forward now”. Also, the HYIC has received $20 million of district improvement fund bonus payments (See footnote 6.) according to HYIC President Alan Anders.34 There also are reports that 20 projects are either proposed or in progress that would include at least 570 condominiums, 5,228 rental units, 5 hotels and 4 commercial buildings.35

However, if projects proposed do not progress and if the Hudson Yards Project were not to be successful on the assumed time table, just as Battery Park City was not successful for many years, there will not be revenues to pay for basic City services on the far west side generated from the far west side because the property tax revenue would have been diverted from other City uses to pay debt service. The City Council may be called upon to appropriate additional City funds to pay the debt service well beyond the early development years. Such an appropriation would divert public funds to debt service from other City services to the detriment of citizens relying on such services. The political difficulties of making appropriations for debt service in such a situation would be heightened for the City Council by the pressure of the credit markets to avoid a default on bond payments with its attendant negative market consequences.

These possibilities reflect another lesson of the Fiscal Crisis, namely,

35. Ibid.
that at its height, every decision the City made was in the context of regaining access to the credit markets. Policy determination was geared to financing imperatives. Financing was policy, rather than a means of implementing policy. During the Fiscal Crisis, that was a regrettable but necessary distortion of governing. It is not necessary now. Yet, in many respects, the subsidy policies of the Hudson Yards Project are dictated by the financing choices. The Committee believes that this skewing of policy choices to enable the selected financing method should be subjected to close scrutiny.

With appreciation of the difficult infrastructure financing demands that confront public officials and with recognition of the need of such officials to make hard choices in the near term, the Committee hopes that its Report will contribute to a necessary dialogue about financing infrastructure expansion in New York.

May 2007

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Colonial Continuities: Human Rights, Terrorism, and Security Laws in India

The Committee on International Human Rights

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ACRONYMS AND OTHER REFERENCES

ABCNY Association of the Bar of the City of New York
AFSPA Armed Forces (Special Powers) Act, 1958
BJP Bharatiya Janata Party
CBI Central Bureau of Investigation
CTC U.N. Security Council Counter-Terrorism Committee
ICCPR International Covenant on Civil and Political Rights
LTTE Liberation Tigers of Tamil Eelam
MDMK Marumalarchi Dravida Munnetra Kazhagam
MISA Maintenance of Internal Security Act, 1971
NHRC National Human Rights Commission
NPC National Police Commission
NSA National Security Act, 1980
OHCHR U.N. Office of the High Commissioner for Human Rights
PDA Preventive Detention Act, 1950
PHRA Protection of Human Rights Act, 1993
POTA Prevention of Terrorism Act, 2002
POTO Prevention of Terrorism Ordinance, 2001
SIMI Students Islamic Movement of India
TAAA Terrorist Affected Areas (Special Courts) Act, 1984
TADA Terrorist and Disruptive Activities (Prevention) Act, 1985
TNM Tamil Nationalist Movement
UAPA Unlawful Activities (Prevention) Act, 1967
UDHR Universal Declaration of Human Rights
SUMMARY

In 2004, India took a significant step forward for human rights by repealing the Prevention of Terrorism Act of 2002, which had established a permissive set of legal rules to prosecute acts of terrorism largely outside the ordinary rules of the regular criminal justice system. While POTA itself
was enacted in the aftermath of the major terrorist attacks of 2001 in both the United States and India, the statute built upon a long tradition of antiterrorism and other security laws in India dating since well before independence. While India has faced serious threats from terrorism and other forms of politicized violence for decades, these special laws have not proven particularly effective in combating terrorism. Terrorism has persisted as a problem notwithstanding these laws, under which few of the individuals charged have been convicted.

Moreover, like antiterrorism laws in other countries, including the United States, aspects of India’s antiterrorism laws have raised significant human rights concerns. Some of those concerns have remained even in the aftermath of POTA’s repeal, since the government has preserved many of the law’s provisions in other statutes. Other, similar laws also remain in place at both the central and state levels, such as the Unlawful Activities (Prevention) Act. Attentiveness to these human rights concerns is not simply a moral and legal imperative, but also a crucial strategic imperative. As the Supreme Court of India has recognized, “[t]errorism often thrives where human rights are violated,” and “[t]he lack of hope for justice provides breeding grounds for terrorism.” Since terrorists often deliberately seek “to provoke an over-reaction” and thereby drive a wedge between government and its citizens—or between ethnic, racial, or religious communities—protecting human rights when combating terrorism helps to ensure that advocates of violence do not win sympathy from the ranks of those harmed and alienated by the state.

This report comprehensively examines India’s recent antiterrorism and other security laws, situating those laws in historical and institutional context in order to (1) analyze the human rights concerns that arise from these laws and (2) understand the ways in which British colonial-era patterns and practices have evolved and been maintained after independence. The study is based on information learned during a visit to India by several members of the Committee on International Human Rights of the Association of the Bar of the City of New York. In 2005, at the invitation of colleagues in India, the project participants met over a two-week period with a broad range of individuals—lawyers, human rights advocates, scholars, prosecutors, judges, senior government officials, and individuals detained or charged under India’s antiterrorism laws and their family members—in Delhi, Hyderabad, Chennai, and Ahmedabad, in order to better understand the human rights implications of these laws and to identify lessons from the Indian experience for countries facing similar challenges, including the United States. The Committee has previously
conducted projects examining similar issues in other countries, which have facilitated efforts by members of the Association to build long-term relationships to promote mutual respect for the rule of law and fundamental rights. These visits also have helped to inform the Association’s extensive work examining the human rights issues arising from antiterrorism initiatives by the United States since 2001.

POTA and other Indian antiterrorism laws have raised a host of human rights issues, some of which are similar to those raised by antiterrorism laws in other countries, including the United States. Such concerns include:

- overly broad and ambiguous definitions of terrorism that fail to satisfy the principle of legality;
- pretrial investigation and detention procedures which infringe upon due process, personal liberty, and limits on the length of pretrial detention;
- special courts and procedural rules that infringe upon judicial independence and the right to a fair trial;
- provisions that require courts to draw adverse inferences against the accused in a manner that infringes upon the presumption of innocence;
- lack of sufficient oversight of police and prosecutorial decision-making to prevent arbitrary, discriminatory, and disuniform application; and
- broad immunities from prosecution for government officials which fail to ensure the right to effective remedies.

Enforcement has varied widely from state to state, facilitating arbitrary and selective enforcement on the basis of religion, caste, and tribal status; violations of protected speech and associational activities; prosecution of ordinary crimes as terrorism-related offenses; and severe police misconduct and abuse, including torture. In most states, prolonged detention without charge or trial appears to have been the norm, rather than the limited exception. As a result, to a considerable degree India’s antiterrorism laws have functioned more as preventive detention laws than as laws intended to obtain convictions for criminal violations—but without heeding even the limited protections required for preventive detention laws under the Indian Constitution, much less the more exacting standards of international law. At times, human rights defend-
ers who have challenged these violations or defended individuals accused under the antiterrorism laws have faced retaliatory threats and intimidation.

Continuing a pattern established by the British, India’s antiterrorism and other security laws have periodically been enacted, repealed, and reenacted in the years since independence. To some extent, this cycle derives from underlying weaknesses in India’s ordinary criminal justice institutions. Even when they create distinct mechanisms and procedural rules, India’s antiterrorism laws rely upon the same institutions—police, prosecution, judiciary—used in fighting any serious crimes, and to the extent these institutions fail to protect human rights when enforcing ordinary criminal laws, they are no more likely to do so in the high pressure context of fighting terrorism. At the same time, the impulse to enact special laws stems from real and perceived problems concerning the effectiveness of the regular criminal justice system itself, which create intense pressures to take particular offenses outside of that system. To break this cycle and fully address the human rights issues arising from India’s special antiterrorism laws, it is therefore necessary to improve and reform the police and criminal justice system more generally, both to protect human rights more adequately and to alleviate the pressures to enact special antiterrorism and security laws in the first place.

While debate in India over its antiterrorism laws has been shaped principally by a domestic political context which has evolved over several decades, in recent years that debate also has been shaped in part by the U.N. Security Council’s efforts to implement and enforce Resolution 1373, the mandatory resolution adopted after the September 11, 2001 terrorist attacks under Chapter VII of the U.N. Charter. As human rights advocates have noted, the Security Council and its Counter-Terrorism Committee have not been sufficiently attentive to human rights concerns in their efforts to monitor states’ compliance with Resolution 1373. In some instances, the Security Council and CTC appear to have directly enabled human rights violations by pushing states to demonstrate compliance with the resolution’s antiterrorism mandate without simultaneously making sufficient efforts to ensure adherence with applicable human rights standards. Aspects of that neglect can be seen in the role that Resolution 1373 has played domestically in Indian public discourse and in India’s reports to the CTC on its compliance with the resolution.

Independent India’s constitutional tradition is a proud one. In combating some of the most serious terrorist threats in the world, a durable, enduring, and ever-improving commitment by India to protect funda-
mental rights can serve as an international example. And in recent years, the Indian government has taken several positive steps to limit the use of its antiterrorism laws and to renew its efforts to transform its colonial-era police and criminal justice institutions. Following the July 2006 bomb blasts in Mumbai, the Indian government also wisely chose not to enact new draconian legislation to replace POTA, emphasizing instead the need to upgrade its intelligence and investigative capacity to prevent acts of terrorism and hold perpetrators accountable.

To protect human rights and advance both the rule of law and long-term security, we urge the Indian government to maintain and build upon these recent positive steps. Part of these efforts may require the central government to develop mechanisms that provide for greater administrative and judicial oversight of investigative and prosecutorial decision-making, and transparency in that decision-making, to ensure nationwide uniformity and adherence to fundamental rights. Mechanisms for citizens to seek redress and hold government officials accountable for abuses should be improved. While broader efforts to reform the police and judiciary have proven elusive, such reforms will be essential in seeking to eliminate the human rights concerns that arise under antiterrorism laws and, indeed, in many instances under India’s ordinary criminal laws. Finally, as we have also urged the U.S. government with respect to its antiterrorism laws and policies since 2001, we urge the Indian government to take a number of steps to cooperate more fully with international institutions responsible for monitoring and implementing compliance with human rights standards.

I. INTRODUCTION

India’s decades-long struggle to combat politicized violence has created what one observer has termed a “chronic crisis of national security” that has become part of the very “essence of [India’s] being.” ¹ Thousands have been killed and injured in this violence, whether terrorist, insurgent, or communal, and in the subsequent responses of security forces. Terrorism, in particular, has affected India more than most countries. By some accounts, India has faced more significant terrorist incidents than any other country in recent years, and as the recent attacks on the Mumbai commuter rail system make clear, the threat of terrorism persists.

Like other countries, India has responded by enacting special antiter-

rorism laws, part of a broader array of emergency and security laws that periodically have been enacted in India since the British colonial period. Most recently, in the aftermath of the terrorist attacks of September 11, 2001, and the attacks soon thereafter on the Jammu & Kashmir Assembly and the Indian Parliament buildings, India enacted the sweeping Prevention of Terrorism Act of 2002. POTA incorporated many of the provisions found in an earlier law, the Terrorist and Disruptive Activities (Prevention) Act of 1985, which remained in effect until 1995. While POTA was prospectively repealed in 2004, cases pending at the time of repeal have proceeded, and the government has preserved some of POTA’s key provisions by reenacting them as amendments to the Unlawful Activities (Prevention) Act of 1967.

As human rights advocates have recognized, it is vital for governments to protect their citizens from terrorism, which endangers liberty in self-evident ways. At the same time, democratic societies committed to the rule of law must resist the pressures to “give short shrift” to fundamental rights in the name of fighting terrorism, and the sweeping antiterrorism initiatives of many countries raise serious human rights issues. In the United States, advocates have expressed concern that since 2001, the government has selectively targeted individuals (and especially recent immigrants) of Arab, Muslim, and South Asian descent, essentially using race, religion, and national origin as “prox[ies] for evidence of dangerousness.”

In India, similar concerns have been raised that extraordinary laws such as TADA and POTA have been used to target political opponents, human rights defenders, religious minorities, Dalits (so-called “untouchables”) and other “lower caste” individuals, tribal communities, the landless, and other poor and disadvantaged people.

Protection of human rights—including freedom from arbitrary arrest and detention, freedom from torture or cruel, inhuman, or degrading treatment, freedom of religion, freedom of speech and association, and the right to a fair criminal trial—certainly constitutes a moral and legal imperative. As the Supreme Court of India has noted, “[i]f the law enforcing authority becomes a law breaker, it breeds contempt for law, it invites every man to become a law unto himself and ultimately it invites anarchy.”

United States, the September 11 Commission has echoed this concern, noting that “if our liberties are curtailed, we lose the values that we are struggling to defend.”5

But frequently neglected is that attention to human rights in the struggle against terrorism is also a crucial strategic imperative. As the Supreme Court of India has recognized, “[t]errorism often thrives where human rights are violated,” and “[t]he lack of hope for justice provides breeding grounds for terrorism.”6 Since terrorists often self-consciously seek “to provoke an over-reaction” and thereby drive a wedge between government and its citizens—or between ethnic, racial, or religious communities—adhering to human rights obligations when combating terrorism helps to ensure that advocates of violence do not win sympathy from the ranks of those harmed and alienated by the state.7 Alienated communities are also less likely to cooperate with law enforcement, depriving the police of information and resources that can be used to combat terrorism.8

This strategic imperative demands caution before concluding that new, ever-tougher laws are always the most effective means of curbing terrorism. As Jaswant Singh—who later served in the cabinet of the government that enacted POTA and is now one of the opposition leaders in Parliament—commented in 1988 on the use of such laws in Punjab,

Unfortunately, [the Indian] government is a classic example of proliferating laws, none of which can be effectively applied because the moral authority of the Indian government has been extinguished, and because the needed clarity of purpose (and thought) is absent. Not surprisingly, therefore, [the government] falls back

5. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, FINAL REPORT 395 (2004), http://www.9-11commission.gov/report/911Report.pdf; see also Gurharpal Singh, Punjaban Since 1984: Disorder, Order, and Legitimacy, ASIAN SURV. 410, 418 (1996) (“A liberal democratic system that replicates the methods of terrorists in its anti-terrorist policies threatens to undermine its own foundations.”); Soli J. Sorabjee, Subverting the Constitution, SEMINAR, May 1988, at 35, 39 (“The whole basis of the fight against terrorism is that we want to preserve the security and integrity of India. But surely it is an India which adheres to ... basic [constitutional] values of justice and liberty ... [not] an India whose government does not shrink from resorting to lawlessness and criminality in its endeavour to root out terrorism”).


8. See MIGRATION POL’Y INST., supra note 3, at 145-51.
to creating a new law for every new crime ... and a new security force for every new criminal. ... [But] the primary error lies in seeking containerized, instant formulae; there is no such thing as the ‘solution.’

As the Indian experience demonstrates, special antiterrorism laws have not always proven effective in preventing serious acts of terrorism. Indeed, the 2006 train blasts in Mumbai took place in a state, Maharashtra, that itself already has had a comprehensive antiterrorism law in place for several years. Even at a purely strategic level, therefore, any effective effort to combat the extraordinarily complex problem of terrorism requires attention to a complex range of factors, not least being vigilant protection of human rights.

Given the complexity and importance of these issues in both India and the United States, the Committee on International Human Rights of the Association of the Bar of the City of New York conducted a visit to India in 2005 to better understand the human rights implications of India’s antiterrorism laws and to identify lessons from the Indian experience for countries facing similar challenges, including the United States. For many years, the Committee has sponsored projects in other countries, including Northern Ireland and Hong Kong, examining similar issues. These visits have facilitated efforts by members of the Association to build long-term relationships with lawyers, advocates, and government officials to promote mutual respect for the rule of law and fundamental rights. The Committee’s visits to these countries also have helped to inform the Association’s extensive work examining the human rights issues arising from antiterrorism initiatives by the United States since 2001. Through these efforts, the Association has repeatedly encouraged the government...
of the United States to take care to protect fundamental rights under the U.S. Constitution and international law when taking steps to combat terrorism and ensure security.11

This particular visit to India emerged from dialogues in 2003 between Indian lawyers and members of the Association. In conducting this project, the Association has followed the same approach taken with its previous human rights projects. Following preliminary discussions with Indian colleagues, the project participants traveled to and spent approximately two weeks in India, and this study draws from the information learned during that visit. As with the Association’s other projects, the project participants met with a broad range of individuals—lawyers, bar association leaders, human rights advocates, scholars, prosecutors, judges, senior gov-

government officials, and individuals detained or charged under India’s antiterrorism laws and their family members—throughout the country, traveling to and spending several days in Delhi, Hyderabad, Chennai, and Ahmedabad. These conversations encompassed a range of issues concerning antiterrorism initiatives and human rights in both India and the United States, focusing largely on the most recent Indian antiterrorism laws enacted in recent years, but also considering the historical and institutional context within which these laws have been situated.

In India, bar associations and individual lawyers have long played an important role in challenging human rights violations that have occurred in the name of security. In 2004, after extensive efforts by Indian lawyers and human rights advocates to raise awareness about the human rights issues arising from POTA, that law was repealed, in part because of the newly-elected government’s recognition of those concerns. Even in the aftermath of repeal, however, several human rights concerns remain. First, as noted above, the repeal of POTA was not complete. The repeal did not apply retroactively to pending cases or other cases arising during the period in which the law was in effect. In addition, several of POTA’s provisions remain in effect even prospectively, since at the very moment that it repealed POTA, the government simultaneously reenacted those provisions as amendments to UAPA.

Second, lawyers and advocates in India described for the project participants a broader pattern concerning the enactment and repeal of emergency, antiterrorism, and other security laws that itself warrants examination. Because rights consciousness in India is high, the most visible and draconian laws—ostensibly enacted in most cases in response to particular crises—have often been repealed when faced with strong political opposition, concerns about fundamental rights violations, or a perception that the crisis moment has passed. However, the provisions of these laws have often not completely disappeared. Rather, in the immediate aftermath of repeal, the government has invariably been able to resort to other laws conferring similar, overlapping authority. While these other laws have not always garnered as much public attention, they frequently have raised

12. For example, when human rights were undermined by the widespread misuse of detention, censorship, and other emergency powers between 1975 and 1977, lawyers and bar associations actively resisted these measures. See Granville Austin, Working a Democratic Constitution: The Indian Experience 335, 339 (1999); Ram Jethmalani, Commentary, The Indian Crisis, 23 Wayne L. Rev. 248, 249; see infra section III.C.

13. For example, when POTA was first proposed, other Indian laws conferred similar authority, a point that some advocates made in questioning the need for POTA in the first place.
similar concerns. In addition, over time—as a result of changes in government, the perceived need to respond to new crises, or other factors—new laws have been enacted along the same lines as those previously repealed, sometimes with heightened sensitivity to fundamental rights, but sometimes in more draconian form. The result, at times, has been a tendency towards the “routinising of the extraordinary,” through the institutionalization of emergency powers during non-emergency times and without formal derogation from human rights obligations. 14

The pattern itself is not necessarily one to which the United States or other countries will prove immune. Indeed, in India this pattern is intertwined with the legacy of colonial laws and institutions inherited from the British, and close examinations of other countries’ experiences might yield similar patterns. India’s experiences therefore are instructive for all democracies, including the United States, that face the challenge of developing effective responses to terrorism and other security threats while also developing the commitment and institutional capacity to protect human rights in an enduring way.

Our conversations in India suggested several possible ways to break this cycle and to place fundamental rights on a stronger, more lasting footing. In India, the cyclical pattern of enactment and repeal suggests that a broader set of structural issues might contribute to the concerns that have arisen from India’s antiterrorism laws. Such issues might effectively be addressed only over the long term, but might therefore lend themselves well to consideration by Indian lawyers in partnership and dialogue with members of the Association, whose previous projects have cultivated ongoing relationships over an extended period of time to promote institutional development and mutual respect for the rule of law.

In conducting this project, we have collaborated closely with our Indian colleagues, informing our analysis with the insights of individuals and organizations who work regularly and extensively on these issues in India. As with our previous studies, we recognize that different countries have distinct experiences with these issues, and that models that work in one legal system cannot simply be “transplanted” into another without sensitivity to context. 15 We have accordingly kept India’s distinct his-


15. See, e.g., Hiram E. Chodosh, Reforming Judicial Reform Inspired by U.S. Models, 52 DePaul L. Rev. 351, 362 (2002) (noting that “[r]eform models are more likely to succeed if they
tory and experiences in mind when examining the issues arising from its antiterrorism initiatives.

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The report begins with an overview of the legal and institutional framework within which India’s security and antiterrorism laws are situated. While criminal law matters in India are governed by a post-independence constitutional and international legal framework which includes a strong commitment to fundamental rights, that framework has been layered on top of a set of colonial-era laws and institutions that were designed not to ensure democratic accountability, but to establish British control. Many of these laws and institutions have remained largely unchanged since independence, and as a result India has faced the challenge of reconciling these inherited institutions of colonialism with its strong post-independence commitment to democracy, fundamental rights, and the rule of law.

The report then traces India’s extensive history of using extraordinary laws to combat terrorism and other security threats, which long pre-dates independence from Britain. These laws include (1) constitutional provisions and statutes authorizing the declaration of formal states of emergency, (2) constitutional provisions and statutes authorizing preventive detention during non-emergency periods, and (3) substantive criminal laws defining terrorist- and other security-related offenses during non-emergency periods. While periodic efforts have been made to limit the use of these laws, the overall trajectory since independence has been to maintain the pattern established by the British, which blurred the lines between these categories by periodically seeking to extend the extraordinary powers into non-emergency periods. The result of this pattern has been a tendency to institutionalize or routinize the use of extraordinary powers during non-emergency periods. As new laws have been enacted in response to terrorism and other threats to security in recent years, they have shared a number of continuities with these earlier emergency and security laws, are not merely copied or transplanted” into another legal system). Given space and resource constraints, we also do not purport to address every antiterrorism- or security-related issue that implicates human rights concerns in India. For example, we largely do not consider in this study the particular issues arising in Jammu & Kashmir or the states in the Northeast, where the extensive use of the armed forces and central paramilitary forces raise distinct concerns. For a recent discussion of human rights concerns arising in Jammu & Kashmir, see, for example, Human Rights Watch, “EVERYONE LIVES IN FEAR”: PATTERNS OF IMPUNITY IN JAMMU AND KASHMIR (2006), http://hrw.org/campaigns/kashmir/2006/index.htm.
both before and after independence, and accordingly have raised a num-
ber of the same human rights concerns.

The report then analyzes in detail the principal antiterrorism laws
that India has enacted during the last twenty-five years, drawing exten-
sively from conversations between the project participants and lawyers,
advocates, government officials, and citizens in India. Aspects of these
laws have raised significant concerns under the fundamental rights pro-
visions of the Indian Constitution and international human rights trea-
ties. Continuing the pattern established by the British and maintained after
independence for other emergency and security-related laws, these antiterror-
ism laws have been enacted and repealed in cyclical fashion over the past
twenty-five years. While each subsequent law has incrementally improved
upon its immediate predecessor, the human rights concerns raised by these
laws have been significant and, under POTA and UAPA, persist today.

The report then discusses some specific human rights concerns raised
by the application of these antiterrorism laws, drawing from the project
participants’ meetings with Indian colleagues to learn about the experi-
ences in several different Indian states. Administration of these antiter-
rorism laws has varied widely from state to state, facilitating arbitrary
and selective enforcement against members of Dalit, other lower caste,
tribal, and religious minority communities, violations of protected speech
and associational activities, prosecution of ordinary crimes as terrorism-
related offenses, and severe police misconduct and abuse, including tor-
ture. In each state, however, prolonged detention without charge or trial
appears to have been the norm under these laws, rather than the limited
exception. As a result, to a considerable degree these laws have functioned
more as preventive detention laws than as laws intended to obtain con-
victions for criminal violations—but without heeding even the limited
constitutional protections required for preventive detention laws, much
less the more exacting standards under international law. Additionally,
human rights defenders who have challenged these violations or defended
individuals accused under these antiterrorism laws at times have faced
retaliatory threats and intimidation.

Recognizing that these antiterrorism laws do not operate in a vacuum,
the report also addresses the broader Indian legal and institutional con-
text in which these laws are situated, and particularly the implications of
such special legislation for the system as a whole. Even when they create a
distinct set of mechanisms and procedural rules, antiterrorism laws draw upon
the same institutions—police, prosecution, judiciary—used in fighting any
serious crimes, and to the extent these institutions fail to sufficiently protect
human rights when enforcing ordinary criminal laws, they are no more likely to do so in the high pressure context of investigating and prosecuting terrorism-related crimes. At the same time, the very existence of these special laws stems from real and perceived problems concerning the effectiveness of the regular criminal justice system, which create intense pressures to take particular offenses outside of that system. To fully address the human rights issues arising from India’s special laws against terrorism, therefore, the report considers ways to improve and reform the police and criminal justice system more generally, both to ensure that human rights are better protected and remedied and to alleviate the pressures to enact special laws that result from the underlying weaknesses within the regular criminal justice system.

Finally, the report concludes by discussing the role of Resolution 1373, the mandatory antiterrorism resolution adopted after the September 11, 2001 terrorist attacks by the U.N. Security Council. While debate in India over its antiterrorism laws has been shaped principally by a domestic political context which has evolved over decades, Resolution 1373 has played a significant role in framing that debate. However, invocations of Resolution 1373 have tended to be selective, failing to distinguish carefully between those proposed antiterrorism provisions that may be required by the Security Council and those that are not, and have rarely, if ever, been accompanied by discussion of any countervailing human rights obligations under domestic or international law which also demand compliance. The Security Council and its Counter-Terrorism Committee themselves bear some responsibility for this neglect of human rights concerns, by failing to have been sufficiently attentive to human rights in either the drafting of Resolution 1373 or subsequent efforts to monitor and facilitate states’ compliance. In some instances, the CTC may be enabling human rights violations by pushing states to demonstrate compliance with the resolution without at the same time making any effort to ensure that these compliance efforts are consistent with applicable human rights standards.

II. BACKGROUND

Criminal law matters in India, including antiterrorism initiatives, are governed by a post-independence constitutional and international law framework which includes a strong commitment to fundamental rights. 16

However, that framework has been layered on top of a set of colonial-era laws and institutions that were designed to establish British control and often facilitated infringements of basic rights. Many of these institutions remained largely intact after independence. While institutional continuity has served India well in some respects, in other respects India has struggled to fully reconcile the inherited institutions of colonialism with its post-independence commitment to democracy, fundamental rights, and the rule of law.

A. Police and Criminal Justice Framework

The legal and institutional framework that independent India inherited from the British to govern criminal law, criminal procedure, and policing largely remains in place today. Police matters are governed primarily by the Police Act of 1861, which self-consciously followed the paramilitary model of policing that the British had established in Ireland. Upon independence, the British “bequeathed” to India and Pakistan the laws, institutions, philosophy, and norms of the colonial police. The new government implemented no significant changes in policing, and the police remained principally an instrument of coercive state power and political intelligence. Despite reform proposals in the intervening years, the 1861 statute continues to govern policing throughout India today. In the police institutions of contemporary India, notes a former senior police officer, “the Raj lives on.”

These colonial-era laws and institutions are now situated within a post-independence constitutional framework that distributes power between the central and state governments. Under the Indian Constitution, the states play the predominant day-to-day role in policing and criminal justice matters. However, the central government retains an active, if circumscribed, role in these areas, operating a number of police, investigative, and paramilitary services with jurisdiction over specialized

17. In Pakistan, the Police Act of 1861 similarly governed police matters until 2002, when a new Police Ordinance was promulgated to replace the 1861 statute.


19. Under the Constitution, the central government has exclusive authority over subjects of particular national importance or that require national uniformity, leaving the states with exclusive authority over matters with less national significance or where local variation may be desirable. The central and state governments have concurrent authority over subjects that do not clearly fall into either category, INDIA CONST. art. 246(1)-(3). Conflicts between state and central laws are subject to the central government’s overall supremacy. Unlike in the United States, residual powers rest with the central government, not the states. Compare U.S. Const. amend. X with INDIA CONST. art. 248.
areas. The central government has constitutional authority to deploy the army “in aid of the civil [police] power” and limited authority, under highly constrained circumstances, to investigate and enforce directly some criminal matters that otherwise fall within the ambit of state authority. In more extreme situations, the central government may exercise its emergency power to impose “President’s Rule” in a particular state, placing the entire state government under central control.

B. Fundamental Rights and Criminal Procedure

India is bound by legal obligations that protect fundamental rights under its own Constitution and statutes and under international treaties to which it is a party. The Constitution protects “equality before the law” and “equal protection of the laws” under provisions which embody a broad guarantee against arbitrary or irrational state action more generally. Indian citizens are guaranteed the rights to speech and expression, peaceable assembly, association, free movement, and residence, although Parliament may legislate “reasonable restrictions” on some of these rights in the interests of the “sovereignty and integrity of India,” “security of the state,” or “public order.” The Constitution also authorizes suspension of judicial enforcement of these rights during lawful, formally declared periods of emergency.

In the criminal justice context, the Constitution prohibits ex post facto laws, double jeopardy, and compelled self-incrimination. Individuals arrested and taken into custody must be provided the basis for arrest “as soon as may be” and produced before a magistrate within 24

20. India Const., 7th sched., List I (Union List), § 2A; see also id. art. 355. This authority derives directly from powers granted under successive colonial-era laws to deploy the army to maintain internal security.

21. Id. art. 356. On President’s Rule, see infra section III.B.


23. India Const. art. 14; see also id. arts. 15-16 (prohibiting discrimination on the basis of religion, race, caste, sex, or place of birth and guaranteeing equality of opportunity in public employment; id. art. 17 (explicitly abolishing and forbidding “untouchability”).

24. Id. art. 19(1)(a)-(f); see id. art. 19(2) (qualifications on freedom of speech); id. art. 19(3)-(4) (qualifications on freedom of assembly and association).

25. Id. art. 359; see infra section III.B.

26. India Const. art. 20.
hours. The Constitution also guarantees the right to counsel of the defendant’s choice, and the Supreme Court has held that legal assistance must be provided to indigent defendants at government expense, a right that attaches at the first appearance before a magistrate. These guarantees do not apply to preventive detention laws, which the Constitution subjects to a more limited set of protections.

While the Constitution does not explicitly protect “due process of law,” it does prohibit deprivation of life or personal liberty from any person except according to “procedure established by law,” and the Supreme Court has broadly interpreted this guarantee to encompass a range of rights that approximate the concept of “due process.” The Court has held, based on its broad understanding of the right to life and liberty, that the Constitution guarantees freedom from torture or cruel, inhuman, or degrading treatment. The Court also has recognized the rights to a fair trial and a speedy trial.

The Constitution requires pretrial detention to be as short as possible, and a number of statutory provisions implement this principle. Detention in police custody beyond the constitutional limit of 24 hours must be authorized by a magistrate. When the accused is produced before the magistrate, the magistrate must release the accused on bail unless it “appears that the investigation cannot be completed” within 24 hours and the accusation is well-founded—in which case the accused may be remanded to police custody for up to 15 days, although in principle remand is disfavored. Bail is meant to be the rule and continued detention

27. Id. art. 22(1)-(2). In its landmark case of D.K. Basu v. State of West Bengal, A.I.R. 1997 S.C. 610, 623, the Supreme Court extended the Constitution’s procedural guarantees further by requiring the police to follow detailed guidelines for arrest and interrogation.


29. On preventive detention, see infra section III.B.


31. Francis Coralie Mullin v. Union Territory of Delhi, A.I.R. 1981 S.C. 746. Torture is not, however, expressly criminalized under Indian law, and neither Parliament nor the Supreme Court has defined what constitutes “torture.”


34. INDIA CODE CRIM. PROC., §§ 57, 167. In practice, remand to police custody “is routine” except for individuals who can afford to pay for counsel to appear before the magistrate and for bail
the exception. Before ordering remand to police custody, the magistrate must record the reasons for continued detention. Upon finding “adequate grounds,” the magistrate may order detention beyond the fifteen day period for up to 60 days, or in a case involving a potential prison sentence of at least 10 years or the death penalty, for up to 90 days.35

The police must file with the magistrate a “charge sheet” setting forth the particulars of their allegations “without unnecessary delay.”36 If the charge sheet is not filed upon expiration of the 60- or 90- day extended detention period, the individual must be released on bail, regardless of the seriousness of the offense alleged. However, if the charge sheet is filed before that period expires, and the magistrate decides to charge the accused, the decision to grant bail must be determined based on the contents of the charge sheet.37

Indian law sharply limits the use of statements given to the police or while in police custody. Under the Indian Evidence Act, confessions made to police officers are inadmissible as substantive evidence against the accused, and confessions made to others while in police custody must be made in the immediate presence of a magistrate, and recorded in open court, to be admissible. These rules, which date to the colonial period, are intended to reduce the incentive for police to engage in torture and other coercive interrogation practices, in recognition that torture by the Indian police has been a longstanding problem. However, these limitations are not unqualified. If part of a confession or other statement given to the police leads to the discovery of admissible evidence, that portion of the statement may be admitted as corroborative evidence.38

The Constitution provides, as a Directive Principle of State Policy, that the government “shall endeavour to foster respect for international law and treaty obligations in the dealings of organized people with one another,”39 itself. Human rights advocates have also documented periods of police custody beyond what is legally permissible.

35. This extended period of detention, however, must take place in judicial custody, rather than police custody.
36. Id. § 173(2).
37. The investigation may continue even after filing of the charge sheet, which may subsequently be amended. Once the accused actually has been charged by the court, the court may not drop the charges, but rather must either convict or acquit the accused.
38. Indian Evidence Act, No. 1 of 1872 (as amended), §§ 25-27; see also India Code Crim. Proc., § 164.
39. India Const. arts. 51(c), 253. The Supreme Court of India has frequently emphasized that constitutional and statutory provisions should be interpreted in light of India’s international law obligations.
and India is a party or signatory to several international instruments protecting individuals from arbitrary or improper treatment. As a U.N. member state, India is bound by the U.N. Charter, which pledges member states to “promot[e] and encourag[e] respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion,” and by the Universal Declaration of Human Rights, which protects the rights to liberty, freedom of expression and opinion, peaceful assembly, an effective remedy for acts violating fundamental rights, and a “fair and public hearing by an independent and impartial tribunal.” India also is bound by customary international law norms, to the extent it has not persistently objected to those norms, and is absolutely bound by norms that have attained the status of *jus cogens*. Several non-binding sources of law further clarify the principles underlying these binding international obligations.

The International Covenant on Civil and Political Rights protects the rights to life, liberty and security of the person, and freedom from...
arbitrary arrest or detention. Individuals charged with criminal offenses must be presumed innocent until proven guilty, tried without undue delay, and not compelled to confess their guilt. Criminal offenses must be defined with sufficient precision to prevent arbitrary enforcement, and no one may be criminally punished for conduct not proscribed at the time committed. The ICCPR also protects freedom of opinion, expression, peaceful assembly, and association. Finally, when rights are violated, the ICCPR requires the availability of effective remedies.

States may derogate from some human rights guarantees under limited circumstances, and the threat of terrorism may, potentially, constitute a “public emergency” authorizing derogation. However, derogation must be “strictly required by the exigencies of the situation,” not “inconsistent with other obligations under international law,” not discriminatory on the basis of race, color, sex, language, religion or social origin, tailored to the particular circumstances, and limited in duration. In any event, India has never purported to derogate from any of the ICCPR’s provisions, and many of the ICCPR’s guarantees are nonderogable under any circumstances.

India has not signed the Optional Protocol to the ICCPR, which permits individuals to bring complaints of violations before the Human Rights Committee. While India signed the U.N. Convention Against Torture

43. ICCPR arts. 6, 9. To ensure freedom from arbitrary detention, the ICCPR guarantees the right of any arrested or detained individual to have a court promptly decide the lawfulness of detention and to be released if detention is not lawful. Id. art. 9.
44. Id. arts. 14(3)(c), 15.
45. Id. arts. 19, 21.
46. Id. art. 2; U.N. Basic Principles on the Right to a Remedy, supra note 42, ¶¶ 19-23.
48. ICCPR art. 4(1), (3); OHCHR, Digest of Jurisprudence, supra note 47, at 18.
49. The ICCPR explicitly provides that the rights to life, freedom from torture or cruel, inhuman, or degrading treatment, freedom from prosecution under retroactive legislation, and freedom of thought, conscience, and religion are nonderogable, and the Human Rights Committee has identified other nonderogable standards. See ICCPR art. 4(2); U.N. Human Rights Committee, General Comment 29: States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11, ¶¶ 11-13 (2001).
III. EMERGENCY AND SECURITY LAWS BEFORE 1980

The use of extraordinary laws in India to combat terrorism and other security threats long predates independence, part of the legacy that Britain bequeathed to India and other former colonies. These laws may be placed into three general categories: (1) constitutional provisions and statutes authorizing the declaration of formal states of emergency and the use of special powers during those declared periods, (2) constitutional provisions and statutes authorizing preventive detention during non-emergency periods, and (3) substantive criminal laws, such as TADA, POTA, and UAPA, which define terrorism- and other security-re-

51. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, U.N. Doc. A/RES/39/708, 1465 U.N.T.S. 85. For many years, India also has refused to permit the U.N. Special Rapporteur on Torture to visit India to investigate allegations of torture.


54. To conduct these activities, the NHRC has the powers of a civil court, including the ability to compel appearance of witnesses, examine witnesses under oath, compel discovery and production of documents, and order production of records from courts and government agencies. However, the NHRC only may investigate alleged violations within the previous year and may not investigate allegations against the armed forces.
lated offenses and establish special rules to adjudicate these offenses during non-emergency periods.

While periodic efforts have been made to limit the use of these laws, the overall trajectory since independence has been to maintain the pattern established by the British, which blurred the lines between these categories by maintaining the extraordinary powers initially exercised during periods of emergency during non-emergency periods. This “institutionalization” of emergency powers has become so established that one commentator, discussing preventive detention, has characterized the use of such laws as “a permanent part of India’s democratic experiment.”55 As new laws have been enacted in response to terrorism and other threats to security in recent years, they have shared a number of continuities with these earlier emergency and security laws, adopted both before and after independence, and accordingly have also shared a number of their attendant human rights concerns.

**A. British Colonial Emergency and Security Laws**

Laws authorizing the use of extraordinary powers by the executive during formally declared periods of emergency have existed in India from the earliest days of direct British rule, under both the statutes establishing the overall governance framework for British India and special emergency legislation during the two world wars. But the British never limited use of such extraordinary powers in India to formally declared periods of emergency. During non-emergency periods, the British also relied extensively upon sweeping laws authorizing preventive detention and criminalizing substantive offenses against the state. For example, preventive detention was authorized as early as 1818, and sedition was criminalized as early as 1870. The British also sought to extend extraordinary powers initially justified on the basis of wartime emergency into non-emergency periods. Most notably, the Anarchical and Revolutionary Crimes Act of 1919, also known as the “Rowlatt Act,” extended many of the government’s draconian wartime powers into peacetime.56

Both the substantive provisions of the Rowlatt Act and the circumstances surrounding its enactment and ultimate lapse three years later foreshadowed issues that have arisen in recent years under TADA and POTA.

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56. In addition to authorizing preventive detention and other restraints on free movement, the Rowlatt Act defined particular substantive offenses related to the promotion of anarchical movements and instituted special procedures and courts to adjudicate those offenses.
While the government soon tempered its policies and permitted the statute to lapse in 1922, after it became a focal point of the non-cooperation campaign led by Mahatma Gandhi, the government continued to exercise preventive detention authority throughout the 1920s under other laws and to rely on what one British Prime Minister termed “government by ordinance.” In implementing these measures, the British self-consciously intended to establish what D.A. Low has referred to as “civil martial law.”

The creation of elected, semiautonomous provincial governments under the Government of India Act of 1935 maintained the basic pattern established by the British. Taken together with the extraordinary powers already in place, the broad sweep of the emergency powers conferred by the 1935 Act famously led Winston Churchill to describe them as “likely ‘to rouse Mussolini’s envy.’”

B. Emergency and Security Laws From 1947 to 1975

From 1947 to 1975, independent India followed the same basic pattern established by the British in its use of emergency and security laws. The emergency and security provisions in India’s post-independence constitution incorporate a number of the same basic principles found in the Government of India Act of 1935: extraordinary powers that may be exercised during declared periods of emergency, but supplemented by several layers of preventive detention and other security laws that afford the government multiple options to exercise similar powers outside of formally declared periods of emergency.

First, the Constitution created several sources of formal emergency power similar to those used by the British. As originally written, the Constitution authorized the President to declare a national emergency in circumstances involving a grave threat to the security of India or any part of its territory on account of (1) war, (2) external aggression, or (3) internal disturbance or imminent danger of internal disturbance. Upon proclaiming an emergency, the central government could exercise a broad range of special powers. Some fundamental rights were automatically to be suspended by the declaration of emergency, and the executive had authority

57. D.A. Low, ‘Civil Martial Law’: The Government of India and the Civil Disobedience Movements, 1930-34, in Congress and the Racial Facets of the Indian Struggle, 1917-47, at 165, 170 (D.A. Low ed., 1977). As described by the British home secretary, for example, the provisions in one ordinance were “a species of Martial Law administered by civil officers,” intended to avoid the more frontal imposition that would result from direct use of the military. Id.

58. India Const. art. 352.
to suspend judicial enforcement of any others.\textsuperscript{59} Between 1950 and 1975, the central government exercised this emergency authority twice—in 1962, when Chinese and Indian armed forces clashed along India’s northern border, and in 1971, when war broke out between India and Pakistan.\textsuperscript{60} While war and external aggression provided the grounds for invoking emergency authority in each instance, in each case the government maintained the state of emergency long after armed hostilities had ceased, echoing earlier efforts by the British to extend into peacetime the sweeping emergency powers authorized on account of war.\textsuperscript{61}

The Constitution also preserved a version of the power held by the British Governor-General to legislate by ordinance and supersede state governments. When both houses of Parliament are out of session, the cabinet may direct the President to promulgate an ordinance if satisfied “that circumstances exist which render it necessary ... to take immediate action.” Such ordinances have the force of law, but must be ratified by an act of Parliament within six weeks after the end of its recess, which constitutionally may not be longer than six months.\textsuperscript{62} The central government also may supersede state government authority based on the “failure of constitutional machinery” within a state. Upon determining that the government of a state “cannot be carried on in accordance with the provisions” of the Constitution, the central government may impose “President’s Rule” within that state.\textsuperscript{63} Under such circumstances, the President may assume any or all of the non-legislative functions of the state government, declare that the state’s legislative powers shall be exercised by Parliament rather than the state legislature, or take other steps that might be necessary to deal with the emergency, including suspension of other constitutional provisions.

\textsuperscript{59} \textit{Id.} art. 358-59.

\textsuperscript{60} Under each of the two wartime emergency proclamations, the government exercised sweeping preventive detention authority and other powers. The government also suspended judicial enforcement of rights that may have been violated under the emergency proclamation.

\textsuperscript{61} Although the conflict with China was over within days, the 1962 emergency proclamation remained in effect until 1968. Similarly, the 1971 war with Pakistan ended within weeks, yet the 1971 emergency proclamation remained in effect through 1977.

\textsuperscript{62} \textit{Id.} arts. 123, 213; see \textit{id.} art. 85(1). This authority has been used more often as a matter of executive convenience than on account of any genuine emergency. Many post-independence emergency and security laws, including TADA and POTA, have initially, and controversially, been promulgated as ordinances before being replaced by acts of Parliament.

\textsuperscript{63} \textit{Id.} art. 356.
Second, like the colonial legal framework, the Constitution explicitly authorizes preventive detention during ordinary, non-emergency periods, subject to limited procedural safeguards. Preventive detention ordinarily may not extend beyond three months without approval of an “Advisory Board” consisting of current or former High Court judges (or individuals “qualified to be appointed” as High Court judges). The detainee must be told the basis for detention “as soon as can be” and have an opportunity to challenge the detention order. However, these procedural protections are qualified. Parliament may specify circumstances justifying extended detention without Advisory Board review, and the detaining authority may withhold any information if it deems disclosure against the “public interest.” Preventive detention laws also are explicitly excused from complying with other constitutional protections, such as the right to counsel, to be produced before a magistrate within 24 hours of being taken into custody, or to be informed promptly of the grounds for arrest.64

Within weeks after the Constitution went into force, Parliament enacted the Preventive Detention Act of 1950, which authorized detention for up to 12 months by both the central and state governments if necessary to prevent an individual from acting in a manner prejudicial to the defense or security of India, India’s relations with foreign powers, state security or maintenance of public order, or maintenance of essential supplies and services. The act also implemented the limited procedural protections required by the Constitution.65

The PDA was originally set to expire after one year. Indeed, the Home Minister explicitly stated that the bill was meant as a temporary expedient, intended only to address exigent circumstances in the aftermath of independence and partition, and that any decision to make it permanent demanded closer study. However, as with the use of formal emergency authority, this “temporary expedient” was routinely reenacted each year for almost 20 years. While it finally lapsed in 1969, preventive detention authority returned less than two years later under the Maintenance of Internal Security Act, which largely restored the provisions of the PDA.66

Finally, independent India has continued to define and punish substantive offenses involving crimes against the state and, in some cases, to establish special procedures to adjudicate those offenses. The Constitu-

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64. Id. art. 22(3)-(7).
65. For example, the Act required the detainee to be provided the grounds for detention within five days and required Advisory Board review of all detention orders.
tion explicitly authorizes Parliament to impose “reasonable restrictions” on freedom of speech, expression, peaceable assembly, and association in the “interests of the sovereignty and integrity of India.” Pursuant to this authority, Parliament enacted the Unlawful Activities (Prevention) Act of 1967, which remains in effect today and affords the central government broad power to ban as “unlawful” any association involved with any action, “whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise,” that is intended to express or support any claim to secession or that “disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India.”

When the central government declares an organization unlawful it must provide the grounds for the declaration but does not have to disclose any fact if it deems disclosure against the public interest. The central government’s notification ordinarily becomes effective only upon confirmation by a special judicial tribunal. The central government must refer its notification to the tribunal within 30 days, and after giving the organization notice and an opportunity to respond, the tribunal must either confirm or cancel the notification within six months of the notification’s issuance. If confirmed, the declaration remains in force for two years from the date the notification became effective. Once an organization has been banned as “unlawful,” UAPA provides the central government with broad powers to restrict its activities. The central government may, by written order, prohibit individuals from paying or delivering funds if they are being used for the purposes of an unlawful association. The statute also criminalizes several forms of individual involvement with banned associations and their activities.

C. The Emergency and Its Aftermath

From June 1975 until March 1977, India witnessed one of the darkest moments in the post-independence period, a period now referred to simply as “the Emergency.” The excesses of the Emergency have cast a long shadow on the use of extraordinary laws in the years since then. India’s democratic institutions themselves were suspended and rights were violated on a massive scale, as Prime Minister Indira Gandhi, facing opposition that had been simmering for years, recast those political threats as

67. These qualifications were adopted by Parliament in 1963 amidst anxiety over several movements for regional autonomy and secession.
68. Unlawful Activities (Prevention) Act, No. 37 of 1967 [hereinafter UAPA].
threats against the sovereignty of India itself, and on that basis assumed sweeping powers. Opponents were detained under MISA, and President’s Rule was declared in the two states not ruled by the Congress Party, placing all state governments within her effective control. Freedom of expression was sharply curtailed, if not eliminated altogether. MISA and other preventive detention laws were amended to permit longer periods of detention and to make it easier to exercise detention authority without procedural protections that ordinarily applied. Ultimately, over 111,000 people were detained under MISA and other laws during the Emergency. On such a large scale, these laws were not simply part of a coercive strategy against opposition political movements, although certainly that was a main function. Rather, the use of these laws extended much further, as John Dayal and Ajoy Bose noted soon after the Emergency had ended, to “[become] a way of everyday administration. There was neither criteria nor a basis for the detentions under MISA during the Emergency.”

Mass discontent had been percolating, however, and when Gandhi relaxed some of the Emergency’s political restrictions and called parliamentary elections for March 1977, the public repudiated the Emergency. The Janata Party won a majority of seats in the Lok Sabha, and opposition parties combined claimed more than two-thirds of the seats. In the wake of the Emergency, the Janata-led government amended the Constitution to rein in the government’s authority to exercise extraordinary powers, repealing some of the changes made during the Emergency and adding additional safeguards, including limits on preventive detention authority.

However, the aftermath of the Emergency did not fundamentally break from the pattern initially set by the British. The new limits on preventive detention never went into force, since the post-Emergency amendments conferred discretion upon the government to set their effective date, and neither the Janata government nor any subsequent government has ever set a date for these provisions to enter into force. And while the Janata-led government made an early commitment during the 1977 election campaign to repeal MISA, in light of the discredited use of that law during


70. The amendments reduced the maximum period of detention from three months to two months and made Advisory Board appointments subject to the recommendations of the Chief Justices of the High Courts. The amendments also required all Advisory Board members to be sitting or retired High Court judges (rather than simply individuals “qualified to be appointed” to the High Courts), and eliminated the ability of Parliament to permit the government to dispense with Advisory Board review of detention orders in particular cases.
the Emergency, repeal did not come easily. Upon taking office, the Janata government reversed course and decided that it needed some preventive detention authority to combat economic offences, “anti-social elements,” and threats to national security. In fact, in its first proposal to repeal MISA, the Janata government simultaneously proposed to amend the Code of Criminal Procedure to add a set of provisions permanently conferring similar preventive detention authority.

In the face of tremendous outcry, this proposal was withdrawn, and in 1978, over a year after taking office, the government finally repealed MISA. Despite its repeal, preventive detention authority soon returned. By the fall of 1979, the Janata-led government had issued an ordinance authorizing detention to prevent actions endangering essential supplies, and upon return to power of the Congress Party following elections in early 1980, this ordinance was replaced by an act of Parliament. Later that year, the Congress government issued a sweeping ordinance to replace MISA, which ultimately was replaced by an act of Parliament, the National Security Act of 1980. The NSA, which remains in effect today, restored many of the provisions found in the PDA and the pre-Emergency version of MISA and “presaged years of new repressive legislation,” in including TADA and POTA. The NSA authorizes preventive detention for up to 12 months, and both the permissible grounds to order preventive detention and the procedural requirements under the NSA are essentially the same as under the PDA and MISA.

IV. CONTEMPORARY ANTITERRORISM LAWS

In the early 1980s, India began to face a crisis of politicized violence that prompted the government to enact sweeping criminal antiterrorism laws. Since then, the periodic enactment and repeal of these laws has replicated the pattern established by the British and maintained after independence for preventive detention and other security laws. The major antiterrorism laws that India has enacted since 1980 have raised concerns under the Indian Constitution and human rights treaties. While debate over these laws has been vigorous, and each subsequent law has tended to incrementally improve upon its immediate predecessor as a result,
the concerns raised by these laws have been significant, and a number persist today.

**A. The Terrorist and Disruptive Activities (Prevention) Act**

Criminal laws explicitly designed to combat “terrorism” were enacted during the 1980s in response to an extended period of violence in Punjab. Political grievances between Sikhs in Punjab and the central government had accumulated for years without meaningful resolution. After Indira Gandhi and the Congress Party returned to power in 1980, extensive negotiations for several years between the central government and the Akali Dal, a leading Sikh political party, failed to resolve their differences. In the meantime, both civil disobedience and violence in Punjab escalated sharply, including attacks by militant Sikhs against Hindu and moderate Sikh politicians and civilians and communal violence between Hindus and Sikhs. After negotiations with the Akali Dal broke down, the government banned several Sikh organizations in 1982. Members of some of the banned militant groups soon sought refuge in Amritsar in the complex of Sikhism’s holiest site, the Harmandir Sahib (or “Golden Temple”), which quickly became the main base of operations for the heavily-armed militants.

In June 1984, the central government deployed the military throughout Punjab as part of “Operation Bluestar,” an operation involving a massive offensive against militants in the Harmandir Sahib complex. The overwhelming use of force caused tremendous death and destruction. Unofficial estimates place the numbers of civilians killed in the thousands, including priests, pilgrims, and temple employees and their family members. The offensive also caused extensive damage to the temple complex itself. Thousands more were detained throughout the state in the aftermath of the offensive. Journalists and advocates have extensively documented evidence of rights violations by the security forces, including many arbitrary killings of Sikh civilians. In October 1984, Indira Gandhi was assassinated by two Sikh bodyguards, and in the aftermath of her death, thousands of Sikhs were killed and tens of thousands displaced in targeted violence. 73 In the aftermath of these events, many Sikhs were outraged, including many who had not previously supported the militants.

73. Investigations by advocates and government commissions have concluded that this violence was instigated by and carried out with the assistance of senior Congress Party officials and that the police failed to protect Sikhs from harm, particularly in Delhi. Recently, Prime Minister Manmohan Singh apologized on behalf of the government for that violence. Senior Congress officials accused of complicity have resigned, and the government is considering whether to reopen investigations of some of them.
Militant demands intensified, and both militant violence and draconian
government responses escalated throughout the rest of the decade and
into the early 1990s.

Even before Operation Bluestar, the government relied heavily on its
emergency and preventive detention powers in Punjab. The government
extensively used the NSA throughout the early 1980s, and in October 1983,
the government dismissed the Punjab state government and imposed
President’s Rule. The government also amended the NSA in early 1984 to
permit it to be used more aggressively in Punjab.74 The central government
again imposed President’s Rule in Punjab in 1987, and amended the Con-
stitution to expand the grounds for declaring a national state of emer-
gency to include “internal disturbance” in Punjab. Punjab remained un-
der President’s Rule until 1992.

In addition to using these emergency powers, the government also
enacted new non-emergency laws that defined acts of terrorism as sub-
stantive criminal offenses. In 1984, Parliament enacted the Terrorist Af-
fected Areas (Special Courts) Act, which established special courts to adju-
dicate “scheduled offenses” related to terrorism in areas designated by the
central government, for specified time periods, as “terrorist affected.”75
The law instituted a stringent bail standard under which an individual
accused of a scheduled offense could not be released if the prosecutor
opposed release, absent reasonable grounds to believe the accused was
not guilty, and extended the maximum period of detention pending in-
vestigation from 90 days to one year.

Most of these provisions were incorporated into the more sweeping
Terrorist and Disruptive Activities (Prevention) Act of 1985, which was
enacted in the wake of Indira Gandhi’s assassination.76 Unlike the TAAA,

74. The amendments to the NSA extended the maximum period of detention from one year to
two years, extended the deadline for referral to an Advisory Board from three months to four-
and-a-half months, and permitted the government to dispense with Advisory Board review
under certain circumstances. Subsequent amendments provided the government even greater
latitude in Punjab, permitting it to delay referral of detention orders to Advisory Boards for up
to six months, if the basis for detention was to prevent interference with the government’s
counterterrorism efforts, and to delay informing the detainee of the basis for detention. The
government also authorized the military and police to exercise special powers, including the
use of deadly force against individuals suspected of posing a serious threat to public order.

75. Terrorist Affected Areas (Special Courts) Act, No. 61 of 1984 [hereinafter TAAA]. The
statute required the special courts to hold proceedings in camera unless the prosecutor
requested otherwise, and authorized the courts to take measures to keep witness identities
secret upon a request by either the prosecutor or the witnesses themselves.

76. Terrorist and Disruptive Activities (Prevention) Act, No. 31 of 1985 [hereinafter TADA].
which deemed certain existing substantive offenses terrorist-related only if they were committed in specific geographic areas designated for limited periods of time as “terrorist affected,” TADA explicitly defined a series of new, substantive terrorism-related offenses of general applicability, which could be prosecuted by state governments throughout the country without any central government designation that the area in which the offense took place was “terrorist affected.” Enactment of this powerful, nationwide antiterrorism law without sufficient safeguards to constrain its misuse and ensure national uniformity in its application led to disparate patterns of enforcement.

TADA’s principal provisions made it a crime to (1) commit a “terrorist act,” (2) conspire, attempt to commit, advocate, abet, advise or incite, or knowingly facilitate the commission of a terrorist act or “any act preparatory to a terrorist act,” (3) “harbor or conceal, or attempt to harbor or conceal any person knowing that such person is a terrorist,” or (4) hold property that has been “derived or obtained from commission of any terrorist act” or that “has been acquired through the terrorist funds.”

The statute also made it a crime to commit any “disruptive activity,” defined as any act, speech, or conduct that, “through any other media or in any other manner whatsoever,” either (1) “questions, disrupts, or is intended to disrupt, whether directly or indirectly, the sovereignty and territorial integrity of India,” or (2) “is intended to bring about or supports any claim, whether directly or indirectly, for the cession of any part of India or the secession of any part of India from the Union.”

Procedural rules under TADA departed from ordinary rules of evidence and criminal procedure. While ordinary law precludes admissibility of any confessions made to police officers, TADA provided instead that confessions to police officers could be admitted as substantive evidence as long as the officer’s rank was sufficiently high; the confession was recorded; and the confession was voluntary. As in the TAAA, stringent bail and pretrial detention provisions and the use of special courts also were included in TADA.

77. TADA defined “terrorist act” as one of several specifically enumerated acts of violence if committed “with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people.”

78. TADA also criminalized conspiracy or attempt to commit disruptive activities, abetting, advocating, advising, or knowingly facilitating the commission of any disruptive activities, and harboring, concealing, or attempting to harbor or conceal any “disruptionist.”

79. See supra section II.B.
Advocates sharply criticized the antiterrorism practices of the central and state governments throughout the late 1980s and early 1990s. In Punjab, much of this criticism focused on the many thousands of civilian deaths and extensive evidence that the security forces engaged in arbitrary arrests and detentions, extortion, torture, extrajudicial killings, and disappearances. As in other parts of India, extrajudicial killings in Punjab frequently took the form of “false encounters,” a longstanding, well-documented practice by which the police simply execute someone extrajudicially and then falsely claim that the killing took place in response to an attack.

However, laws such as TADA also have been a focal point of these criticisms, since they purported to provide both the legal and symbolic authority for many of these rights violations. Critics frequently noted the facial inconsistency of many of TADA’s provisions with human rights norms under international law and the Constitution. Considerable evidence suggests that in its application, TADA’s sweeping powers were predominantly used not to prosecute and punish actual terrorists, but rather as a tool that enabled pervasive use of preventive detention and a variety of abuses by the police, including extortion and torture.80

Human rights violations associated with TADA were not limited to Punjab. To the contrary, police often committed similar abuses even in states that lacked the acknowledged problem of violence found in Punjab. For example, of the 67,507 individuals detained under TADA as of August 1994, 19,263 of them were in Gujarat—more than in Punjab, and in a state without any significant terrorism problem. As in Punjab, advocates presented considerable evidence that in other states TADA was similarly used to facilitate extortion, illegal arrests and detentions, torture, and other human rights violations. While the precise contours of this pattern varied from state to state, depending on the local social and political context, TADA’s provisions consistently were used in an arbitrary and discriminatory manner to target political opponents, religious minorities, or Dalits and other lower caste groups, or to prosecute ordinary criminal offenses with no connection to terrorism.

80. In Punjab, advocates extensively documented evidence that thousands of individuals, virtually all Sikh, were arbitrarily arrested under TADA and detained for prolonged periods without being told the charges against them. The availability of TADA’s provisions as a means of coercion also helped facilitate many of the other well-documented human rights violations by the police. For example, the police frequently would eschew use of the ordinary criminal laws when TADA’s more powerful provisions also were available. The use of TADA as a substitute for ordinary criminal law become so widespread that the government eventually directed officials explicitly not to use TADA when regular criminal law provisions might apply.
Statistics documenting detention and conviction rates under TADA provided further evidence suggesting the law’s misuse. While precise numbers have varied, the overall picture is clear and consistent: large numbers of individuals were detained under TADA, but only a miniscule fraction of them were ultimately convicted of anything. Statistics reported by the government in October 1993 showed that only 0.81 percent of the 52,268 individuals detained under TADA since its enactment had been convicted. In Punjab, the conviction rate was even lower: only 0.37 percent of the 14,557 individuals detained under TADA in Punjab were convicted. In August 1994 the Minister of State for Home Affairs reported that of the 67,059 individuals reported to have been detained under TADA since its enactment, only 8,000 individuals had been tried, of whom 725 individuals were convicted.\textsuperscript{81} For individuals arrested under ordinary criminal laws, by contrast, the conviction rate in 1991 was 47.8 percent.

Together with qualitative evidence concerning TADA’s application, these data suggest that TADA functioned more as a tool to enable preventive detention and police abuse than as a meaningful and effective criminal law. Indeed, in 1987 the Punjab director-general of police implicitly conceded that the police frequently used TADA primarily as a preventive detention law, describing a common practice by which the police would first detain at least some individuals for the maximum two years available under the NSA’s preventive detention authority before then charging and detaining the same individuals under TADA, in order to extend their overall period of custody. Even when the laws were not used sequentially, TADA’s onerous pretrial detention and bail provisions made it almost impossible for defendants to obtain release if the prosecution opposed bail.

The Supreme Court of India ultimately upheld the constitutionality of TADA in almost all respects, although it did seek to rein in its potential misuse by requiring relatively modest safeguards.\textsuperscript{82} However, political opposition to the law continued. By the early 1990s, the overall level of violence had declined sharply in Punjab, the state which originally had been the impetus for TADA’s enactment. TADA contained a sunset provision requiring Parliament to reconsider and renew the legislation every two years, and by the mid-1990s political pressure had mounted on Par-

\textsuperscript{81} According to one estimate, of these approximately 76,000 individuals, 25 percent were released without ever being charged at all. Of the cases that proceeded to trial, trials were completed in only 35 percent of the cases, with 95 percent of those trials resulting in acquittals.

lament not to renew the Act when it expired.\textsuperscript{83} Lacking sufficient support when it came up for renewal in 1995, the Congress-led government ultimately permitted TADA to lapse.

Despite TADA's lapse, the law has cast a long shadow. Cases initiated while TADA was in force were not automatically dismissed, and even today the central and state governments still have authority to institute new cases based on allegations arising from the period when TADA was in effect. As of 1996, over 14,000 TADA cases were pending, and by 1999, almost 5,000 trials under TADA remained to be completed and over 1,300 cases were still being investigated. While many of the accused were released on bail, many remained in detention for years. According to government statistics, in 1995 approximately 6,000 individuals were in detention under TADA, and as of 1997, the number of TADA detainees was approximately 1,500. Today, the number of TADA detainees appears to be fewer, but some cases instituted under the law are still pending before TADA's special courts.\textsuperscript{84}

\textbf{B. The Prevention of Terrorism Act of 2002 and the Aftermath of Its Repeal}

Just as successive governments in the late 1970s had difficulty letting go of the extraordinary powers conferred by MISA, both the Congress-led government in 1995 and the Bharatiya Janata Party-led government elected in 1999 had difficulty relinquishing the authority conferred by TADA. In 1995, almost immediately after permitting TADA to lapse, the Congress-led government introduced the Criminal Law Amendment Bill, which would have reenacted many of the same provisions found in TADA. No action ultimately was taken on the bill. In 2000, the Law Commission of India proposed a new Prevention of Terrorism Bill based largely on the Criminal Law Amendment Bill of 1995, following a request by the new BJP-led government to determine whether new antiterrorism legislation was necessary. Throughout 2000 and 2001, the government sought to enact a new antiterrorism law based on this proposal. These efforts were met with vigorous resistance not only from Indian human rights advocates, but also from the NHRC, opposition parties including the Congress Party,\textsuperscript{83} in February 1995, the chairperson of the NHRC urged members of Parliament not to renew TADA. Even the Supreme Court, in \textit{upholding} TADA's constitutionality, noted with concern the “sheer misuse and abuse of the Act by the police.” \textit{Id.} (1994) 2 S.C.R. 375, 1994 Indlaw SC 525, ¶ 352.

\textsuperscript{84} Evidence suggests that in some instances wholly new proceedings under TADA have been instituted through fraudulent backdating of factual allegations.
and even some of the BJP’s coalition partners. Opponents cited the abuses that occurred under TADA, fearing that the new proposal’s virtually identical provisions would cause similar abuses and would be similarly ineffective in combating terrorism.

As in other countries, however, the terrorist attacks on September 11, 2001, affected the political dynamics in India. Within days, the Prime Minister asserted that India needed to review its “hobbled laws” and “dilatory procedures.” Within weeks, the government ushered its preexisting proposal into law as an ordinance, temporarily deferring full parliamentary consideration of the proposal. In the midst of the debate over the proposed bill, the government’s proposal gained further momentum from two significant terrorist attacks—an attack on the legislative assembly complex in the state of Jammu & Kashmir in October 2001 and an assault on the Indian Parliament building in Delhi in December 2001. The debate over the proposed legislation was highly charged. Soon after the Prevention of Terrorism Ordinance was promulgated, the Home Minister asserted that POTO’s opponents “would be wittingly or unwittingly pleasing the terrorists by blocking it in Parliament.” Despite vigorous opposition, Parliament ultimately affirmed the government’s ordinance, enacting the Prevention of Terrorism Act into law in March 2002.

POTA quickly became highly controversial for many of the same reasons that made TADA controversial years earlier, and as a result, the law became a significant political issue during the election campaign in 2004. When the Congress-led coalition won that election, it proceeded to fulfill its pledge to repeal POTA, given its “gross[] misuse[],” and to ensure instead that “existing laws are enforced strictly.” While human rights advocates have commended the new government for repealing POTA and thereby eliminating several of the statute’s more troubling features, several important concerns remain even in the aftermath of POTA’s formal repeal.

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85. Ironically, the BJP and some of its allies previously had been strongly critical of the Congress’s use of TADA, which differed very little from the BJP’s own proposed law.


87. Prevention of Terrorism Act, No. 15 of 2002 [hereinafter POTA].

First, POTA continues to apply to many individuals notwithstanding its formal repeal. Like both the Rowlatt Act, which preserved orders issued under the lapsed Defence of India Act of 1915, and TADA, which continued to be applied throughout the country long after its formal repeal, the repeal of POTA was not made fully retroactive. In contrast to the experience under TADA, however, the government sought to cabin the extent to which POTA would continue to apply after repeal by (1) prohibiting any court from taking jurisdiction of new POTA cases any later than one year following repeal, and (2) requiring each case to be reviewed by a central “review committee” before permitting any pending POTA investigation or prosecution to proceed. The review committees were required to complete their review within one year.

Second, when the new government repealed POTA, it simultaneously reenacted and thereby preserved several of its provisions as amendments to the Unlawful Activities (Prevention) Act of 1967.89 These provisions continue to raise some of the same human rights issues that arose under POTA. Moreover, several states already have laws conferring authority similar to that available under POTA, and some state governments have suggested that they will enact new laws to provide additional antiterrorism authority. While laws on the same subject by the central government, such as UAPA and its 2004 amendments, have supremacy under the Indian Constitution, the existence of these state laws nevertheless means that the same human rights concerns arising under POTA might well arise in those particular states.

Third, the issue of special, national antiterrorism legislation has remained a controversial issue. Opposition parties continue to criticize the government for repealing POTA and periodically propose that it be reenacted, often most sharply in the immediate aftermath of significant terrorist incidents.90 Indeed, not long before POTA’s repeal, a government

89. Unlawful Activities (Prevention) Amendment Ordinance, No. 2 of 2004 (promulgated Sep. 21, 2004); Unlawful Activities (Prevention) Amendment Act, No. 29 of 2004 (enacted Dec. 21, 2004) [hereinafter UAPA Amendment Act]; see supra section III.B.

commission considering broader reforms to the criminal justice system proposed that many of POTA’s provisions be extended to all criminal cases.91 Just as MISA’s provisions were reenacted in the form of the NSA, and TADA’s provisions were reenacted in the form of POTA, serious proposals may yet emerge to reenact POTA’s repealed provisions in some future law.

The discussion that follows therefore considers the issues arising under both POTA and the amendments to UAPA, since the provisions in POTA that have been incorporated into UAPA continue to apply prospectively to all Indian citizens and the provisions in POTA that have been repealed continue to apply directly to many individuals under POTA’s savings clause.

1. Definitions of “Terrorist Acts” and “Terrorist Organizations”

While governments and the United Nations have extensively legislated against “terrorism” and “terrorist acts,” defining these terms precisely has been a major challenge. Most governments, including the United States, have found workable and consistent definitions of “terrorism” elusive, and with POTA the Indian government has continued to struggle with the same issues.92 The result is a set of open-ended definitions that fail to give sufficient notice of what conduct is being criminalized and are susceptible to arbitrary and discriminatory application.

POTA’s substantive provisions expand upon the similar provisions in TADA and may be placed into three broad categories. First, POTA directly criminalizes (1) commission of a “terrorist act,” (2) conspiring, attempting to commit, advocating, abetting, advising or inciting, or knowingly facilitating the commission of a terrorist act or “any act preparatory to a terrorist act,” (3) “voluntarily harbor[ing] or conceal[ing], or attempt[ing] to harbor or conceal any person knowing that such person is a terrorist,” (4) “possession of any proceeds of terrorism,” and (5) knowingly holding any property that has been “derived or obtained from commission of any terrorist act” or that “has been acquired through the terrorist funds.” Like TADA, the statute defines “terrorist act” to include (a) any one of several enumerated acts of violence if committed “with intent to strike terror in the people or any section of the people” or with intent to “threaten the unity, integrity, security and sovereignty of India” or (b) commission of any act “resulting in loss of human life or grievous injury to any per-

91. See infra section VI.B.

son,” or causing “significant damage to any property,” if the defendant is a member of, or voluntarily aids or promotes the objects, of an association declared unlawful under UAPA and in possession of unlicensed firearms, ammunition, explosives, or other instruments or substances “capable of causing mass destruction.” 93

Many of these core offenses in POTA duplicate provisions found in TADA and, as such, raise the same concerns. While human rights advocates praised the government for excluding TADA’s vague provisions criminalizing “disruptive activities,” POTA’s definition of “terrorist act” remains vague and overly broad. The definition broadly encompasses many ordinary criminal law offenses with little relationship to terrorist activity, creating tremendous potential for arbitrary or selective application. Several provisions fail to specify the mental state required for conviction, raising the same concerns of adequate notice identified by the Supreme Court in its review of similar provisions under TADA. As such, POTA’s definition may run afoul of the principle of legality, a nonderogable obligation under the ICCPR that requires the law to define criminal offenses before they are committed and with “sufficient precision” to prevent arbitrary enforcement. 94 As discussed below, the open-ended nature of these provisions has enabled violations of the rights to equality and to freedom of association and expression by facilitating selective enforcement on the basis of religion, caste, tribal status, and political opinion, and prosecution for activities solely involving speech and association. 95

Second, POTA goes beyond TADA’s original provisions to target several forms of association with terrorism. 96 The law authorizes the government to ban any “terrorist organisation” 97 and criminalizes a host of actions associated with these banned entities, including:

- “belong[ing] or profess[ing]” to belong to a terrorist organisation, unless the defendant can prove (a) “that the organisation was not declared as a terrorist organisation at the time

93. POTA § 3.
94. ICCPR arts. 4, 15; OHCHR, Digest of Jurisprudence, supra note 47, at 63-65.
95. ICCPR arts. 19, 21; OHCHR, Digest of Jurisprudence, supra note 47, at 70-74; see infra Part V.
96. While TADA did not originally include any provisions addressing “terrorist gangs” and “terrorist organizations,” Parliament amended TADA in 1993 to criminalize membership in a “terrorists gang or a terrorist organisation, which is involved in terrorist acts”—although in doing so it did not define either term. Act No. 43 of 1993, § 4 (amending TADA § 3).
97. POTA § 18.
when he became or began to profess to be a member” and (b) “that he has not taken part in the activities of the organization at any time” since its having been banned by the government,

- “inviting support” for a terrorist organization, not limited to the provision of money or other property,
- arranging or managing, or assisting in arranging or managing, a meeting that the defendant knows is (a) to support or further a terrorist organization’s activities or (b) to be addressed by a person who belongs to a terrorist organization,
- raising, receiving, or providing money or other property when either intending or having “reasonable cause to suspect” it will be used “for the purposes of terrorism.”

The statute does not define “terrorist organisation” in substantive terms, providing instead that (1) the central government may designate and ban a “terrorist organisation” if it believes that entity is “involved in terrorism,” and (2) an organization shall be deemed to be “involved in terrorism” if it commits or participates in acts of terrorism, prepares for terrorism, promotes or encourages terrorism, or is otherwise involved in terrorism. While the definition of “terrorist act” provides some interpretive guidance, the statute defines no additional substantive criteria to guide the government’s determinations, and does not provide for judicial review of those decisions. The statute confuses matters further by defining a separate criminal offense, for membership in a “terrorist gang or a terrorist organisation, which is involved in terrorist acts,” which relies upon a completely different definition of “terrorist organisation”—namely, any “organisation which is concerned or involved with terrorism,” apparently without regard to whether the organization has been officially banned by the government.

To the extent that these provisions fail to specify the requisite intent to establish criminality or define any criteria for designating an association to be a “terrorist organisation”—much less to define those criteria with clarity—they, too, fail to satisfy the principle of legality. As written, these provisions criminalize mere “membership,” “belonging,” or “professing” to belong to an association deemed to be involved in terrorism without either defining those terms substantively or requiring the accused to have knowledge of the organization’s activities. The provisions directly

98. Id. §§ 20-22.
99. Id. §§ 3(5), 18.
target protected speech and associational activities, and their application has in fact infringed upon these rights under the Constitution and the ICCPR.100

Third, POTA defines a handful of other offenses deemed terrorism-related. The statute criminalizes violent threats, wrongful restraints or confinements, or “any other unlawful act with the said intent” against any person who is a witness or “in whom such witness may be interested,” although by failing to define what the “said intent” in this provision actually means, this vague provision also is susceptible to arbitrary application. In addition, POTA criminalizes unauthorized possession of certain categories of arms and ammunition in a “notified area”—defined as any area that the state government so designates, without any substantive criteria to guide that determination—and unauthorized possession of a broad range of other specifically identified weapons and hazardous substances in any area, whether “notified” or not. Finally, POTA enhances the penalties for several other criminal law offenses if committed “with intent to aid any terrorist.”101

The UAPA amendments retain most of POTA’s substantive terrorism-related offenses without significant modification. The law continues to provide limited substantive criteria to guide the government’s designations of “terrorist organizations” and no opportunity for judicial review—which is particularly anomalous given that under the existing provisions of UAPA, designations of “unlawful associations” are guided by statutory definitions and are subject to full review by a tribunal which has the powers of a civil court.102

2. Pretrial Investigation and Detention Procedures

Like TADA, POTA relaxes many of the ordinary procedural rules that otherwise would apply during pretrial investigations and, at the same time, establishes substantive and procedural requirements for bail that are much more stringent than the standards under ordinary law.103 After

100. OHCHR, Digest of Jurisprudence, supra note 47, at 70-74; ICCPR art. 21.
101. POTA §§ 3(7), 4, 5.
102. Compare UAPA §§ 2(1)(o)-(p), 3-5 (defining “unlawful activity” and “unlawful association” and providing for judicial review of designations of unlawful associations) with UAPA §§ 35-40 (incorporating “terrorist organisation” provisions from POTA).
103. POTA also added provisions not present in TADA that authorize senior police officers to intercept wire, electronic, or oral communications evidence through a relatively detailed administrative authorization and review scheme. POTA §§ 36-48. While the amendments to UAPA continue authorize interception and admission of such evidence, the amendments eliminate altogether the oversight and review mechanisms found in POTA.
the police initially produce an accused individual before a magistrate, the magistrate may then remand the individual to police custody for up to 30 days, rather than fifteen days, and thereafter may order judicial custody for up to 90 days. The POTA special court may order additional detention in judicial custody for up to 180 days if the prosecutor informs the court that the additional time is necessary to complete the investigation. The availability of this extended period of detention thereby extends the period within which the police must file a charge sheet to as long as 180 days. While POTA requires the police to inform individuals of their right to counsel upon arrest and to permit the accused to meet with counsel during the course of the interrogation, the law provides explicitly that the accused is not entitled to have counsel present “throughout the period of interrogation.” This failure to ensure access to counsel throughout the period of detention is inconsistent with the ICCPR.

As under TADA, the substantive bail standard under POTA presents a nearly insurmountable burden. If the prosecutor opposes bail, then for one year the court only may release the accused if there are reasonable grounds to believe that the accused is not guilty of the alleged offense and not likely to commit any offense while on bail. But since the charge sheet itself need not be filed for up to 180 days after the accused has been detained, the two provisions together effectively permit the prosecutor, rather than the court, to determine whether an individual will remain in detention. If the prosecutor opposes bail before the charge sheet is filed, the accused will have trouble showing grounds supporting their innocence since they will know neither the allegations against them nor the basis for the prosecutor’s opposition. Even after the accused receives notice of the prosecution’s allegations when the charge sheet is filed, the standard for bail under POTA remains exceedingly high, in effect requiring the defendant to show that the prosecution lacks any substantial basis for its charges.

These provisions are among the most severe in POTA and the most clearly

104. POTA § 49(2)(a)-(b).

105. Id. § 52(4). According to the Human Rights Committee, antiterrorism regimes that fail to ensure access to counsel during pretrial and administrative detention raise concerns under articles 9 and 14 of the ICCPR. OHCHR, Digest of Jurisprudence, supra note 47, at 66-68 (discussing conclusions by U.N. Human Rights Committee); see also U.N. Basic Principles on the Role of Lawyers, supra note 42, ¶¶ 1, 5-8, 22.

inconsistent with the ICCPR.\textsuperscript{107} According to the Supreme Court, POTA affords the prosecution greater latitude in pretrial investigation and detention because POTA offenses “are more complex” than ordinary criminal offenses and therefore demand greater time to fully investigate.\textsuperscript{108} However, the possibility that continued detention might be necessary in a complex investigation does not justify a blanket rule making bail a virtual impossibility, since the normal, case-by-case bail standard fully accounts for that possibility when circumstances warrant. By contrast, POTA’s bail provisions permit prosecutors—at their discretion, and without any evidentiary showing—to reverse the general rule that accused individuals awaiting trial should not be detained pending trial unless necessary to ensure their appearance.\textsuperscript{109}

Taken together with the provisions providing the government with up to six months to file a charge sheet, POTA’s bail provisions fail to ensure that individuals are given prompt notice of the charges against them or that they be tried within a reasonable period of time or released from custody. The bail standard deprives accused individuals of meaningful judicial review of their custody, and undermines the presumption of innocence guaranteed by the ICCPR, since it requires the accused to provide reasonable grounds to establish their innocence—before any trial has taken place, and in many cases before a charge sheet even has been filed—in order to obtain bail.\textsuperscript{110}

The UAPA amendments temper these human rights concerns by eliminating POTA’s stringent bail standard and extended time limits for pretrial investigations.\textsuperscript{111} While the restoration of the normal bail standard constitutes a step forward, the period of time before an individual must be charged under ordinary law—90 days—remains quite lengthy. Still, the repeal of POTA’s bail and detention provisions eliminates a key incentive for the government to charge individuals under POTA for offenses that more appropriately should be charged under ordinary criminal laws and restores to the court, rather than the prosecutor, ultimate responsibility to determine whether an accused individual should remain in custody.

\textsuperscript{107} See OHCHR, Digest of Jurisprudence, supra note 47, at 39-52.

\textsuperscript{108} People’s Union for Civil Liberties, A.I.R. 2004 S.C. at 479.

\textsuperscript{109} ICCPR art. 9(3).

\textsuperscript{110} Id. art. 14.

\textsuperscript{111} Thus, rather than the 180 day period that was available under POTA, the maximum period of time that an accused person may remain in custody before a charge sheet is filed is 90 days, and even before that charging deadline, the accused may apply for bail under the normal standard that applies in any ordinary criminal case. See supra section II.B.
3. Admissibility of Confessions to Police Officers

Like TADA, POTA makes confessions to police officers admissible as substantive evidence, reversing the normal rule that confessions to police officers are flatly inadmissible. This provision is of tremendous importance, especially since the Supreme Court has made clear that a voluntary and truthful confession— which, in ordinary criminal cases, must be given before a magistrate— can be sufficient to sustain conviction without any further corroboration. For confessions to police officers to be admissible under POTA, several statutory criteria must be satisfied, most of which codify the procedural requirements imposed by the Supreme Court in upholding the analogous provisions in TADA.

As with TADA, the Supreme Court upheld POTA’s provisions authorizing confessions to police officers against constitutional challenge. While POTA is silent on whether confessions obtained under these provisions may be used to prosecute non-POTA offenses, whether charged together with the POTA violation or in a separate prosecution, the Supreme Court resolved a similar ambiguity under TADA in favor of permitting such confessions to be admitted in non-TADA offenses. As commentators have noted, permitting such confessions to be admitted in ordinary criminal cases creates a risk that the police might circumvent the ordinary law prohibition on the admissibility of confessions to the police by initially investigating an individual for an alleged violation of POTA, obtaining a confession under its provisions, and then using that confession to obtain a conviction for a non-POTA offense for which such confessions ordinarily cannot be used.

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112. POTA § 32; see supra section II.B.
113. POTA § 32; see People’s Union for Civil Liberties v. Union of India, A.I.R. 2004 S.C. 456, 478. While POTA, unlike TADA, does not explicitly require the confession to be voluntary, the Supreme Court has clarified that a non-voluntary confession would be a “nullity.” People’s Union for Civil Liberties, A.I.R. 2004 S.C. at 478.
The UAPA amendments eliminate POTA’s rules authorizing confessions to police officers, which, along with the rules governing bail and pretrial investigations, were among the provisions in POTA that most troubled advocates as facilitating violations of the rights to be free from torture, cruel, inhuman, or degrading treatment or punishment, and compelled self-incrimination. While neither the Constitution nor international law per se requires the preclusion of voluntary confessions to the police, advocates have raised concerns that given the extensive, longstanding, and widely acknowledged problems in India with police torture and other violations of fundamental rights, relaxing the traditional rule increases the likelihood of torture, coerced confessions, and other abuses in violation of international human rights norms.

4. Special Courts and Procedural Rules

Like TADA, POTA authorizes the central and state governments to establish “special courts” to adjudicate offenses punishable under the statute. These courts may be established by either the central or state governments to adjudicate a single case, a category or group of cases, or cases arising from particular geographic areas, and are presided over by sitting sessions judges appointed by the central government or, if applicable, the state governments with concurrence of the Chief Justice of that state’s High Court.

The modified procedural rules governing cases before the special courts are essentially the same that applied before TADA’s “designated courts.” POTA affords the special courts discretion to conduct proceedings wherever they deem “expedient or desirable,” including potentially prejudicial or intimidating locations such as the prison facility where the accused is detained. Upon an application by the prosecutor or a witness, or on its own motion, the court may conduct its proceedings in camera or take other steps to keep the witnesses’ identities secret so long as it records its reasons in writing. The court also may try the accused in absentia and record the evidence of witnesses, subject to the right of the accused to recall witnesses for cross-examination. While the Supreme Court has sustained these witness identity procedures in both TADA and POTA against

117. ICCPR arts. 7, 14(3)(g); see U.N. Code of Conduct for Law Enforcement Officials, supra note 42, ¶¶ 2-3.
118. POTA § 23(4). When trying an offense arising under POTA, a special court may also try any “connected” offenses, and the central government, rather than the court itself, has “final” authority to determine the court’s jurisdiction. Id. §§ 23(3), 26(1).
119. Id. §§ 24, 29(5), 30.
constitutional attack, it also has expressed concern that accused persons
may be “put to disadvantage to effective cross-examining and exposing
the previous conduct and character of the witnesses.”

The use of special courts, and the procedural rules that apply in their
proceedings, infringes upon judicial independence and violates the right
to a fair trial guaranteed by both the Constitution and the ICCPR. Structurally, the very use of special courts in this context might be inherently prejudicial to anyone charged, at least absent mechanisms to minimize the potential prejudice. Permitting the executive to constitute and appoint judges to the special courts and to determine their jurisdiction creates the risk of political influence over particular cases and violates the principles of judicial independence and separation of powers guaranteed by both the Constitution and international law. This encroachment upon judicial independence is particularly pernicious in antiterrorism cases, which are more likely to be politically charged than others. As one Indian lawyer has argued based on his experiences representing individuals accused under POTA, “[a] Judge of the Special Court firmly believes that he is a one-man army against terrorism. … [T]he Special Judge convinces himself so much that he is on an anti-terrorist mission that he refuses to see anything else.” While an equally prejudicial sense of being on an antiterrorism mission certainly could develop with a generalist judge presiding over a single terrorism-related case, the manner in which the POTA special courts are constituted exacerbates the risk.

The rules available in the special courts are in tension with the rights

121. ICCPR art. 14; see OHCHR, Digest of Jurisprudence, supra note 47, at 54-61; Jayanth K. Krishnan, India’s Patriot Act: POTA and the Impact on Civil Liberties in the World’s Largest Democracy, 22 LAW & INEQ. 265, 281-82, 286-87 (2004). In the United States, analogous issues have arisen in slightly different contexts concerning the use of special tribunals or special procedural rules when adjudicating terrorism and national security-based cases. See Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006); see also Charles Lane, In Terror War, 2nd Track for Suspects, WASH. POST, Dec. 1, 2002, at A1 (noting criticisms of “parallel legal system” established for terrorism suspects).
122. INDIA CONST. art. 50; ICCPR art. 14(1); U.N. Basic Principles on the Independence of the Judiciary, supra note 42, ¶¶ 3, 5, 14.
123. TERROR OF POTA, supra note 9, at 63 (statement by K. Chandru); see also id. at 113 (statement by Nitya Ramakrishnan) (discussing “crusading spirit that institutions adopt” and “halo of patriotic warriors” with which “officers are clothed” when prosecuting antiterrorism cases, which causes “a slow but sure closing of the Indian mind on issues of investigative accountability”); infra notes 219-220 and accompanying text (discussing prejudicial climate associated with Parliament attack prosecution under POTA).
to be tried in a public hearing before an impartial tribunal, to be present during one’s trial, and to examine the state’s witnesses against the accused. Moreover, the procedures for the protection of witnesses are not evenhanded. While the prosecution or its witnesses may seek protection of their identities from the court, the defendant does not have the right to seek protection of its witnesses—even though defense witnesses themselves might be just as likely to fear intimidation or coercion by the police as prosecution witnesses might be to fear intimidation by the defendant.

The UAPA amendments temper the potential infringement of these provisions upon judicial independence by eliminating the special courts altogether, providing instead that alleged violations of the terrorism-related offenses in UAPA shall be tried in the same courts as any other criminal offenses, without any special executive control over jurisdiction or judicial administration. The amendments also eliminate the ability of the courts to try defendants in absentia. However, the amendments retain for the regular courts the discretion to hold in camera proceedings, potentially in prejudicial settings, or take other steps to protect the identity of prosecution witnesses, but not defense witnesses. To this extent, the UAPA amendments raise the same concerns as POTA itself about potential violations of the right to fair trial.

5. Adverse Inferences and Presumptions of Guilt

POTA also permits the court to draw adverse inferences against the accused, and in some circumstances affords state governments broad, unilateral power to create presumptions of involvement with terrorist activities. The statute authorizes the police to request an order from a magistrate to obtain bodily samples from anyone accused under POTA, but without explicitly requiring the police to establish that they have obtained informed consent from the accused. Rather, for the sample to be admissible, the police need only testify that the individual provided it voluntarily, and if the individual refuses to provide it, POTA requires the special court to draw an adverse inference. POTA also requires the court to draw an adverse inference in prosecutions for commission of “terrorist acts” if (1) arms, explosives, or other specified substances are recovered from the accused, and there is reason to believe similar items were used in the offense, or (2) the accused’s fingerprints are found at the site of the offense or on anything used in connection with the offense. In prosecu-

124. ICCPR art. 14(1), (3)(d).
125. POTA § 27.
tions for conspiring or attempting to commit a terrorist act, or for advocating, abetting, advising, inciting, or knowingly facilitating the commission of a terrorist act, the court must draw an adverse inference if the prosecution proves that the accused provided financial assistance to a person with knowledge that they are accused or reasonably suspected of an offense under POTA.\textsuperscript{126}

Two of POTA’s criminal provisions permit state governments to presume involvement in terrorist activity in the absence of any individualized basis. First, if a state government designates a particular region as a “notified area,” then any offense in that area involving unauthorized possession of arms or ammunition in violation of the Arms Act of 1959 will, irrefutably, constitute a violation of POTA as well. While this provision does not technically reverse the burden of proof, it confers sweeping power upon state governments to arbitrarily charge alleged violators of the Arms Act as “terrorists” instead, without any criteria to guide the state government’s decision either to designate notified areas or to prosecute offenses under POTA rather than the Arms Act. Indeed, the government of Tamil Nadu went so far as to designate the entire state a notified area, and since the statute does not require the government’s designation to be supported with any reasons, it offered none. While the Supreme Court reversed this determination on the ground that the state government had failed actually to exercise any discretion by “applying its mind” to the decision, the court did not disturb the state’s underlying authority to designate notified areas at whim.\textsuperscript{127}

Second, POTA’s provision criminalizing an individual’s knowing, active membership in an entity designated as a “terrorist organisation” similarly presumes mere membership in such an organization is sufficient to constitute a terrorist offense unless the individual proves that (1) the organization was not banned at the time he became a member and (2) he has not taken part in the organization’s activities since it had been banned.\textsuperscript{128}

The UAPA amendments retain this burden-shifting aspect of the offense for membership in a designated “terrorist organization,” but repeal the rest of these provisions, which undermine the presumption of innocence protected by the Constitution and the ICCPR.\textsuperscript{129} Accused individu-

\textsuperscript{126. Id. § 53.}
\textsuperscript{128. POTA § 20.}
\textsuperscript{129. UAPA § 38.}
als might refuse to give a bodily sample for any number of innocent reasons. Moreover, given widespread concerns in India about the police, arms and other items might be found in the possession of accused individuals, or their fingerprints discovered at the scene of a crime, for reasons that are either (1) completely innocent, or (2) completely nefarious, but not their doing.130

6. Judicial and Administrative Oversight

Actions taken under POTA are subject to limited judicial and administrative scrutiny. Final judgments, sentences, and orders of the special courts may be appealed to the High Courts on issues of both fact and law, and while most interlocutory orders are not appealable, orders granting or denying bail may be appealed to the High Courts.131 Most other decisions under POTA, however, are not subject to judicial review. Instead, POTA authorizes the central and state governments to establish administrative “review committees” appointed by the central or state governments themselves.132

As originally enacted, POTA formally defined only two responsibilities for the review committees—review of the central government’s designations of entities as “terrorist organizations” and review of orders authorizing interception of electronic communication.133 Neither function is directly related to individual prosecutions, and POTA did not specify other functions for the committees to perform. However, after concerns emerged about misuse of POTA, the central government constituted a review committee in 2003 to assess how the law was being applied in particular states and make findings and recommendations for improvement.134

In the aftermath of that evaluation, the government attempted to

130. See Krishnan, supra note 121, at 283.
131. POTA § 34.
132. The chairs of these review committees must be current or former High Court judges. Id. § 60. The review committees trace their origin to the directions of the Supreme Court when adjudicating the constitutionality of TADA. Without specifying precisely the form that these entities should take, the court directed both the central and state governments to establish review committees to oversee, evaluate, and make recommendations concerning the implementation and application of TADA, in order to ensure that its provisions were not being misused. Kartar Singh v. State of Punjab, (1994) 2 S.C.R. 375, 1994 Indlaw SC 525, ¶ 265.
133. POTA §§ 19, 40.
134. The decision to initiate this review process came in the aftermath of widespread public attention to an extensive study of misuse of the law in Jharkhand and the use of the law by several state government bodies to target political opponents. See infra section V.A.
strengthen oversight of POTA’s implementation in late 2003 by amending the law to permit any “aggrieved party” to seek review by a central or state review committee of whether a prima facie case exists for a particular prosecution. If the review committee was to determine that no prima facie case exists, then the proceedings would be deemed withdrawn. These decisions were binding. The amendment provided no further criteria for the exercise of this review authority, no procedural rules, and no time limits for decisions.

Prominent Indian lawyers dismissed this iteration of the administrative review mechanism as a “gimmick,” arguing that the review committees had not been conferred with enough power to exercise meaningful oversight over the states and that the fundamental problem was permitting the states to arrest and charge individuals under POTA at all. Perhaps confirming these criticisms, very few POTA accused—by one count, only 39 out of 514, or 7 percent—actually filed complaints with the review committees before the law’s repeal. Moreover, states have consistently resisted efforts to constrain their discretion. In the months immediately after POTA’s enactment, some states lagged even in merely coordinating with and reporting to the central government on how the law was being implemented. After the central government strengthened the power of the central POTA review committee, several states resisted central authority even more vigorously.

While the repeal of POTA does not apply retroactively, as noted above the repeal statute strengthened the review committee mechanism to mandate central review of all investigations and prosecutions pending at the time of POTA’s repeal. Under this scheme, a central government review committee was required to review each pending prosecution under POTA—regardless of whether the accused had affirmatively sought review—to independently determine whether a prima facie case for prosecution exists and, if not, to automatically deem the case withdrawn and any investigation closed. The review committees themselves have afforded defen-

137. Krishnan, supra note 121, at 289-90.
139. According to government statistics, as of May 2005 investigations were pending in 216 POTA cases involving 2,492 accused persons, of whom 566 individuals had been arrested.
dants great latitude in their proceedings, permitting representation by counsel (appointed counsel, if necessary) and submission of whatever information they deem appropriate, without regard to formal rules of evidence, to refute the government’s claim that a prima case exists for prosecution.

Conceptually, the use of this administrative review mechanism is a promising innovation insofar as it attempts to interpose an independent check on the highly politicized prosecutorial discretion exercised by state governments. Such a mechanism permits the central government to avoid the extreme option of imposing President’s Rule, which has proven highly susceptible to misuse for many years and frequently would be disproportionately intrusive, since it displaces state governance altogether, rather than merely exercising control over a particular prosecution.140 However, states have continued to vigorously resist and challenge the legality of this review mechanism, and the ultimate validity and effectiveness of the central review committees remains unclear. While the review committees themselves have moved aggressively and seriously to consider whether pending prosecutions under POTA should go forward, in some instances the central government has hesitated to implement recommendations by the committees as a result of the legal and political uncertainty caused by the states’ resistance.141

Moreover, these sorts of review mechanisms may place an onerous burden upon defendants and their lawyers to seek withdrawal of cases that never should have been instituted at all. Many detainees are not aware of their right to seek administrative review, especially given their limited access to counsel. And because counsel themselves have limited resources, administrative review might not be vigorously pursued even if the detainee does have meaningful access to counsel.142 Indeed, the Rowlatt Act provided even greater judicial oversight of prosecutorial decisions, since—

and 341 had been released on bail. Rajya Sabha Debate, May 11, 2005, http://rajyasabha.nic.in/rsdebate/deb_nro/204/11032005/11to12.htm (statement of Home Minister Shivraj V. Patil). As noted above, the repeal statute required the review committees to complete their review of pending cases within one year and permitted the central government to constitute more than one review committee to complete this process. POTA Repeal Act § 3.

140. See supra section III.B.


142. Krishnan, supra note 121, at 289; see Gautam Navlakha, POTA: Freedom to Terrorise, ECON. & POL. Wkly., July 19, 2002 (“In POTA trials family and friends of the accused spend enormous amount of time and resources (to the point where some become insolvent) in inhospitable and forbidding circumstances to organise legal defence.”).
before a special court even was constituted, rather than after the accused was arrested and charged—the Chief Justice of the High Court was required to review the government’s allegations, and could request further information, before deciding whether to constitute a special court. While it may be desirable, in the interests of justice and nationwide uniformity, to create mechanisms short of President’s Rule for the central government to monitor and oversee specific prosecutorial decisions, it may be appropriate to consider more efficient and effective means of doing so before (or very soon after) individuals are subject to the coercive power of arrest, detention, and prosecution.

7. Official Immunity

Unlike TADA, POTA authorizes prosecution of police officers for actions taken under POTA “corruptly or maliciously, knowing that there are no reasonable grounds for proceeding.” Such officers may be punished with two years’ imprisonment or a fine. As advocates noted at the time, the provisions were never particularly consequential, since malicious prosecution already may be prosecuted under the Indian Penal Code. Perhaps realizing these provisions added little, the government dropped them in its amendments to UAPA.

At the same time, however, POTA confers broad immunity upon government officials for actions taken under the statute “in good faith” or “purported to be done in pursuance of the Act,” a provision almost identical to a similar provision contained in TADA and other security laws and one now maintained in the amendments to UAPA. This provision effectively precludes the ability to hold officials accountable for rights violations in the investigation or prosecution of terrorism-related offenses and thereby violates the right under the ICCPR to effective remedies. Individuals whose rights have been violated typically will find it difficult to prove lack of good faith, particularly given the time and effort necessary to bring claims to court or persuade government officials to prosecute their colleagues criminally. In any event, fundamental rights are

143. See supra section III.A.

144. POTA § 58(1). POTA also authorizes the special courts to order compensation, to be paid in the court’s discretion either by the government or the offending police officers in their individual capacity, to any individual who the court concludes has been corruptly or maliciously subjected to prosecution or detention under the act. Id. § 58(2).

145. POTA § 57; TADA § 26; UAPA § 49(a).

146. ICCPR art. 2(3).
not only violated by actions taken in bad faith, and to deny individuals whose rights have been violated avenues to remedy those violations fails to comply with the requirements of international law.

V. HUMAN RIGHTS CONCERNS IN THE ADMINISTRATION OF POTA

The human rights concerns arising from POTA go beyond the problems apparent on the face of the statutory text itself. Rather, the application and enforcement of those statutory provisions have facilitated a host of rights violations. Administration of POTA has varied widely across the country, resulting in arbitrary and selective enforcement against members of Dalit, other lower caste, tribal, and religious minority communities, violations of protected speech and associational activities, prosecution of ordinary crimes as terrorism-related offenses, and police misconduct and abuse, including torture. To a considerable degree, POTA, like TADA before it, has functioned more as a preventive detention law than as a law intended to obtain convictions for criminal violations—but without heeding even the limited constitutional protections required for preventive detention laws, much less the exacting standards of international law. And at times, human rights defenders who have challenged these violations or defended individuals targeted under POTA have faced retaliatory threats and intimidation.

A. Arbitrary, Selective, and Non-Uniform Enforcement By State Governments

While TADA and POTA have been central government statutes that apply nationwide, the states have played the leading role in the application and use of their provisions given their leading role under the Constitution in matters involving public order and policing. As with TADA, the states have accordingly exercised broad discretion to implement POTA and similar laws as they have seen fit. While the Supreme Court has held that a state government must obtain the central government’s permission before withdrawing criminal charges filed under a central government law, state governments do not need such permission before instituting criminal proceedings in the first place. The resulting pattern of implementation has been disuniform. In many states, including some with signifi-

147. See supra section II.A.

148. The amendments to UAPA appear to preserve state autonomy to prosecute terrorism-related offenses unless the terrorist activities are directed against a foreign government. UAPA § 45(ii).
significant levels of political violence, POTA was never implemented at all, owing to the opposition of those particular state governments to the legislation. At the same time, the states in which POTA has been used most aggressively have not necessarily been those facing the most grievous threats within India of politicized, anti-national violence. At least one state government ceased enforcing POTA when elections brought new political parties to power.

The states, therefore, bear considerable responsibility for many of the human rights concerns that have arisen from POTA's implementation. It was therefore particularly useful for the project participants to visit several Indian states and to learn from Indian colleagues in some detail about the different ways in which POTA has been applied throughout the country. Perhaps not surprisingly, given POTA's open-ended definition of its terrorism-related offenses and the broad constitutional latitude that state governments have in policing and criminal justice matters, these discussions revealed significant diversity in the specific issues that have arisen in different states. The diversity of examples in the four locations to which the project participants visited—Andhra Pradesh, Tamil Nadu, Gujarat, and Delhi—reflects a broader lack of national uniformity in the application of laws such as POTA and TADA.

1. Discrimination Against Dalit, Other “Lower Caste,” and Tribal Communities

In at least two states, Jharkhand and Andhra Pradesh, POTA has been widely used against individuals from Dalit, other lower caste, and tribal communities who ostensibly have been suspected of involvement with suspected insurgents, but who in fact appear to have been innocent of any terrorist involvement or, in many cases, even of any criminal wrongdoing at all. Like many Indian states, both states suffer from severe in-


150. For example, the state with the highest number of POTA arrests before the law’s repeal was Jharkhand, a state that had not traditionally been understood to face a significant or sustained problem with terrorism or insurgent violence. See George Iype & Ehtasham Khan, Caught in the POTA Trap, REDIFF, Mar. 11, 2004, http://in.rediff.com/news/2004/mar/11spec1.htm.

151. See Cherian, supra note 149 (discussing 2003 decision by government of Jammu & Kashmir no longer to invoke POTA within the state).

152. POTA similarly has been used against lower caste and tribal communities in other states, such as Uttar Pradesh. See TERROR OF POTA, supra note 9, at 275-312.
equality between semi-feudal “upper caste” interests and Dalit, other lower caste, and tribal communities. As a result, activists in both states have advocated intensely, but peacefully, for land reform and greater equality more generally. At the same time, so-called “Naxalite” groups who also advocate land reform have engaged in violent insurgencies against upper caste interests, who themselves have resorted to using private militias and violence against Dalit, other lower caste, and tribal communities in response.153

Amidst this intense conflict, government responses often have been discriminatory and disproportionate. Police and other security forces have frequently violated the human rights of people from Dalit, other lower caste, and tribal communities in the name of their efforts to combat the Naxalites, raiding villages and engaging in extortion, looting, and arrests of individuals falsely accused of harboring Naxalites. The police also have frequently staged “false encounter” killings, shooting unnamed prisoners and sometimes photographing the corpses alongside planted weapons. At the same time, police and other officials not only have failed to prosecute the private militias of upper caste landlords, leaving them to engage in violence with impunity, but also at times have directly colluded with them—for example, by disrupting peasant organizing, training private militias, and accompanying militias during their raids on Dalit, other lower caste, and tribal villages.

In this context, POTA has served as a potent additional tool for the police to deploy in this social conflict. The use of POTA in Jharkhand was the object of sustained examination in early 2003 by a factfinding team of advocates from across the country and the news media. The team found that approximately 3,200 individuals had been accused under POTA within the state as of February 2003—far more than in any other state in the country, including states with much higher incidences of terrorism such as Jammu and Kashmir.154 Approximately 202 individuals had been arrested, including approximately ten minors; most of those arrested were farmers, students, or day laborers.155 As a result of these reports, formal concerns about


the use of POTA in Jharkhand were raised by the NHRC and in Parliament, and upon further review by senior state officials in the wake of the outcry, 83 of the pending cases were withdrawn for lack of sufficient evidence.\(^{156}\)

In Andhra Pradesh, POTA was not invoked at all in the first year after its enactment, but after that, approximately 50 cases were initiated, allegedly involving between 300 and 400 individuals as of March 2004. Many of the individuals charged appear not to have been involved in any criminal activity at all, but rather have been targeted simply for their caste or tribal status alone. In other cases, the allegations against these Dalit, other lower caste, and tribal individuals under POTA appear to bear little relationship to terrorist or insurgent violence. Indeed, in Andhra Pradesh, the sheer number of individuals killed in police “encounters”—approximately 1,200 individuals between 1996 and 2004—casts doubt on the notion that the police have resorted to legal mechanisms, rather than counterinsurgency operations and encounter killings, to any significant degree at all when targeting suspected Naxalites.\(^{157}\) While Naxalite insurgents have engaged in violence against civilians and security forces, there are few indications that POTA has played a significant role in apprehending individuals who legitimately have been suspected of involvement in Naxalite violence, much less in actually curbing that violence.

2. Discrimination Against Religious Minorities

A similar pattern can be seen in the discriminatory use of POTA by particular state governments against religious minorities, particularly Muslims. This pattern, which also was found in the application of TADA, has taken on increased significance given rising communalism in India throughout the past several decades, especially since the 1990s and in states, such as Gujarat, where Hindu nationalist organizations have been ascendant. The more extreme and militant among these organizations have sought to reconstitute post-independence Indian politics and society on the basis of a narrowly defined “Hindutva” identity and, in certain circumstances, have used violence against religious minorities in a highly organized and systematic manner.\(^{158}\) Perhaps unsurprisingly, in some states these comm-

\(^{156}\) See, e.g., Freedom for 83 Terror Law Accused, The Telegraph (Kolkata), Apr. 2, 2003, http://www.telegraphindia.com/1030402/asp/jamshedpur/story_1831252.asp; see also Terror of POTA, supra note 9, at 301-03 (statement by Ramesh) (discussing similar instance in which state of Uttar Pradesh withdrew POTA cases against 28 poor Dalits and tribals after public attention was drawn to their cases).

\(^{157}\) Id. at 66-70 (statement by K. Balagopal).

\(^{158}\) Christophe Jaffrelot, The Hindu Nationalist Movement and Indian Politics, 1925 To 1990s, at
nal influences in society at large have become institutionally embedded within the police and other government institutions, especially as the police have become increasingly subject to political interference. One result of this “institutionalized communalism” has been a well-documented pattern in which the police have either failed to protect religious minorities from communal violence or, in some cases, become directly complicit in that violence.  

In this context, POTA has been wielded as a communalist instrument in several states. Project participants learned about this dynamic most vividly in Gujarat, a state that has witnessed some of India’s most extensive episodes of communal violence in recent years. In 2002, a train carrying a large number of Hindutva activists returning from the city of Ayodhya caught fire at the train station in the city of Godhra. At least 59 people were killed, including 15 children. Gujarat had not previously been considered a major center of terrorist activity, and despite several detailed investigations, to this day it remains unclear whether the Godhra fire was an intentional act or an accident. However, almost immediately, before any significant investigation had taken place, leading Hindu nationalists, including the state’s chief minister, incited Hindutva groups within the community, spreading the theory that the fire had been an act of terrorism. In the violence that followed throughout the entire state, thousands of Muslims were killed and tens of thousands of others displaced. Human rights advocates, the media, and the NHRC have extensively documented the organized and systematic nature of the violence, the complicity of police and other officials, the failure to protect Muslims, and the unwillingness or inability to hold perpetrators of that violence accountable.

Hundreds of Muslims have been formally arrested or illegally detained for extensive periods in connection with cases pending under POTA. In the immediate aftermath of the violence, the state government filed POTO charges against as many as 62 Muslims, including at least seven boys below the age of sixteen, who it accused of involvement with the Godhra fire.  


160. By official counts approximately 98,000 individuals, the overwhelming majority of them Muslim, were living in over relief camps throughout Gujarat in the wake of the violence.
fire, and illegally detained as many as 400 others without charge. While the POTO charges were quickly withdrawn in the face of sharp public criticism, ordinary criminal charges remained in place against these individuals, and approximately one year later the government retroactively filed charges under POTA against 121 individuals suspected of involvement in the Godhra incident. Subsequently, the Gujarat police initiated as many as nine additional POTA cases alleging wide-ranging conspiracies by Muslims against Hindus in explicit retaliation for the post-Godhra violence. These conspiracy prosecutions typically have been vague and open-ended, permitting the police to add charges against additional persons over time and thereby to subject them to POTA’s severe provisions for pretrial investigation and detention. Despite the disproportionately high number of Muslim victims in the post-Godhra violence, no Hindus responsible for the post-Godhra violence have been charged under POTA at all—even though POTA’s broad and malleable definition of terrorism could have been applied to much of that anti-Muslim violence—and few have been charged under ordinary criminal laws.

Gujarat presents some of the most extreme examples of human rights concerns arising from POTA. Evidence suggests that in initiating cases under POTA, the Gujarat police often have not simply applied POTA selectively against Muslims, but also have used the law to intimidate Muslim citizens from coming forward with evidence of police complicity in the organized post-Godhra violence. It has been reported that the police have unlawfully detained hundreds of young Muslims and threatened them with false charges under POTA if they did come forward. Indeed, after one key witness to a post-Godhra massacre came forward, not only did the state fail to bring charges against the perpetrators of that massacre, but they charged the witness himself under POTA. In this context, as one community leader put it, POTA became “a sword hanging over every Muslim in Gujarat.”


163. The practice of filing open-ended POTA cases, to which more individuals may be added over an extended period of time, has not been limited to Gujarat. See id. at 66 (statement by K. Balagopal) (discussing use of POTA in Andhra Pradesh).

By March 2004, over 280 individuals had been charged under POTA in Gujarat, all but one of whom were Muslim. These charges resulted in the detention of at least 189 individuals, the vast majority of whom were denied bail. Muslims accused under POTA in Gujarat have tended to be young men, below the age of thirty, without any prior criminal history either individually or among their family members. Most are from relatively modest income backgrounds and are employed, for example, as electricians, radio/TV repairpersons, drivers, and religious teachers. Several had been active community members and had performed extensive service to victims of the Gujarat earthquake in 2001, without regard to the victims’ religious backgrounds. As a result of being formally or illegally arrested for allegations involving terrorism, many have had difficulty obtaining work upon release, as even their own communities have hesitated to associate with them for fear of guilt by association. Family members of POTA detainees also have suffered. Wives of men detained under POTA have experienced not only the emotional trauma of not knowing when their spouses might be released, but also the stigma of being associated with men accused of terrorism, the practical demands associated with sudden single parenthood, and the need to assume responsibility for their husbands’ businesses or find other sources of income.

The communalized use of POTA has not been limited to Gujarat. POTA also has been used in Andhra Pradesh to target Muslims accused of terrorism in Gujarat and other parts of the country. While the Andhra Pradesh police, based on their own investigations, have questioned the extent to which local residents have been involved in terrorism, at least 30 people from Andhra Pradesh have been arrested and transferred to Gujarat in connection with some of the POTA conspiracies alleged in that state. Individuals taken into custody in Andhra Pradesh have generally feared transfer to Gujarat, given the perception that the degree of comm-

165. TERROR OF POTA, supra note 9, at 189-90 (statement by Zakia Jowher).
166. Id. at 172, 184-85 (statements by family members of individuals accused under POTA). Family business of individuals detained under POTA have suffered not only from the lack of business skills of those family members suddenly forced to take over the business, but also from the hesitance of many patrons to return to the store, for fear that they might taint their own reputations and encounter trouble with the police as a result, and even in some cases on account of organized boycotts by Hindutva groups. In one instance, the wife of an individual accused under POTA lost their home, as the landlord evicted her after police ransacked her apartment at the time of her husband’s arrest.
167. TERROR OF POTA, supra note 9, at 66-72 (statement by K. Balagopal).
168. Id. at 70 (statement by K. Balagopal).
munalism in Gujarat causes courts and officials to turn a blind eye to allegations of mistreatment.

3. Violations of Political Speech and Associational Rights

POTA has also been used to target political speech and associational activities protected by the Indian Constitution and international law. Indeed, in some instances, the bases for prosecution have involved no conduct other than the disfavored speech and associational activities themselves—even though then-Attorney General Soli Sorabjee issued a written opinion in January 2003 (with which the Supreme Court of India ultimately agreed) concluding that “[m]ere expression of opinion or expression of moral support per se does not tantamount to a breach of Section 21 of POTA.” 169 Several of these cases have garnered considerable attention, since they have involved high-profile journalists and leaders of opposition political parties:

- In 2002, the government of Tamil Nadu detained several leaders of the Tamil Nationalist Movement, an officially-recognized opposition political party, in connection with their participation at a public meeting near Madurai. As widely reported in the media, several speakers at the meeting, including members of Parliament and senior members of various political parties, including the TNM and the Marumalarchi Dravida Munnetra Kazhagam, expressed support for a cease fire and proposed peace talks between the government of Sri Lanka and the Liberation Tigers of Tamil Eelam, which is banned in India as a terrorist organization. None of the participants advocated support for terrorism by the LTTE or anyone else, and when the Chief Minister of Tamil Nadu, J. Jayalalithaa, was publicly asked about the meeting soon thereafter, she stated that nothing improper had occurred. Nevertheless, four months after the meeting, the speakers and others were detained under POTA on grounds that they had expressed support for the LTTE. 170

- In Tamil Nadu, Vaiko, a member of Parliament and leader of

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170. TERROR OF POTA, supra note 9, at 41-45 (statement by individual accused under POTA); id. at 49-50 (statement by K. Chandru).
the MDMK—which was part of the BJP-led coalition in the central government but in the opposition in Tamil Nadu—was charged under POTA for remarks he made concerning the LTTE at a public gathering of his party’s members in 2002. In his speech, Vaiko described his participation in recent debates in Parliament concerning the LTTE and Sri Lanka, in which he expressed support for the banned organization. Ironically, although he enjoyed immunity for his statements before Parliament, Vaiko’s repetition of those remarks at the constituent gathering prompted the charges under POTA.171

- In 2003, Jayalalithaa publicly called for the Prime Minister to dismiss one of the cabinet ministers from the MDMK, M. Kannappan, for public remarks about the LTTE. Jayalalithaa asserted that these remarks violated POTA and threatened to prosecute Kannappan if he were not dismissed from the cabinet—raising the unprecedented prospect of state prosecution of a central government minister for alleged violations of a central statute concerning national security.172 Jayalalithaa made this demand in the face of the written opinion by the Attorney General, which specifically concluded that similar public statements by Kannappan the previous year were not actionable.173

- R.R. Gopal, the editor of Nakkheeran, a weekly magazine with a history of conflict with the ruling party in Tamil Nadu, was charged under POTA in 2003. Gopal later was granted bail by the Madras High Court, which noted that the police had given three contradictory descriptions of the firearm he allegedly possessed and concluded that the weapon might not have been in Gopal’s possession at all.174

- In 2002, Nagendra Sharma, a reporter for Hindustan, a Hindi-

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173. Nambath, supra note 169.

language daily newspaper, was arrested under POTA in Jharkhand because of his regular coverage of the activities of certain banned organizations.\footnote{175. \textit{Terror of POTA}, supra note 9, at 206 (excerpt from Preliminary Report of All India Fact Finding Team on POTA Cases in Jharkhand).}

POTA also has been used to target less prominent individuals holding disfavored political and ideological viewpoints:

- In February 2003, Valeti Aravind Kumar, a member of the Revolutionary Writers Association who wrote under the pen name “Rivera,” was arrested by Andhra Pradesh police under POTA and kept in solitary confinement while the police raided his parents’ house. The police did not inform them of his arrest or the reasons for the raid, and Kumar was forced to sign a confession stating he was a member of and had recruited people into the Naxalite insurgency. The police cited cassettes, compact discs, and banned revolutionary material found in his personal library as the basis for the charges under POTA.\footnote{176. \textit{Id.} at 74 (statements by M.A. Vanaja and M.A. Shakeel). Rivera spent eight months in jail, where he was assaulted by police and prevented from attending a court hearing after threatening to inform the court of the police’s actions. He was finally released on bail in 2003 after his family’s second petition, as the court determined that contrary to the prosecution’s assertions, no charge sheet had ever been filed in the case. \textit{Id.} at 77.}

- In Delhi, police detained and charged under POTA a 56-year old man who previously had been associated with Students Islamic Movement of India, an organization banned as a terrorist organization, on the ground that he had pasted political posters along a city street. The man was arrested at his home, not at the scene; while the police claimed they received information about the man after reaching the scene, a prosecution witness later admitted to having picked up the same posters during a raid of SIMI itself.\footnote{177. \textit{Id.} at 118 (statement by R.M. Tufail).}

- In Jharkhand, a police official openly acknowledged that the police identified suspected Naxalites based on whether they possessed certain political publications.\footnote{178. Akshaya Mukul, \textit{12-Year-Old Held Under Pota in Jharkhand}, \textit{Times of India}, Feb. 20, 2003, http://timesofindia.indiatimes.com/articleshow/msid-38800159,page-1.cms (quoting police statement that “[a]nyone caught with a copy of the Communist Manifesto or Mao’s Red Book becomes a suspicious character. We then watch him and often find clinching evidence.”).}
4. Malicious Prosecution and Prosecution of Ordinary Crimes

As with TADA, the police have been able to stretch POTA’s broad definitions of terrorism-related offenses to prosecute ordinary criminal cases with little, if any, connection to terrorism and, more simply, to engage in intimidation and extortion. Similar concerns have arisen since 2001 in the United States, where many of the prosecutions initially touted by the government as victories in the war on terrorism have, upon closer inspection, involved garden-variety offenses with no apparent connection to terrorism.179 The use of POTA in this fashion has intersected with the discriminatory use of the law against disfavored social groups—for example, as noted above, in Gujarat, the police have threatened Muslims with charges under POTA in some instances simply to intimidate them from coming forward with information concerning police complicity with the post-Godhra violence. In other instances, POTA provides a powerful weapon for the police to wield when enlisted to intervene on behalf of particular parties in private disputes or to engage in extortion or other forms of corruption.180 For example:

- In Gujarat, one of the POTA cases involves allegations of a conspiracy by Muslim men to kill a Hindu doctor. Beyond alleging that the conspiracy was hatched in retaliation for the post-Godhra violence, which appears verbatim as boilerplate language in each POTA conspiracy charge sheet in Gujarat, nothing supports the characterization of this alleged conspiracy as terrorism-related.181

- In Tamil Nadu, 26 individuals, including at least two minors and several young women, were detained under POTA soon after the murder of an individual who had come forward as a witness to a police encounter killing. The murder occurred under suspicious circumstances that may have involved the police themselves, and while the 26 individuals purportedly were detained for connections to Naxalite groups and holding an ille-
gal meeting, the arrests more likely took place to draw attention away from the alleged police misconduct. The individuals ultimately were charged for illegal possession of arms in a notified area, but evidence suggests that the weapons (pipe guns and crude revolvers) may have been planted by the police.\textsuperscript{182}

- In Jharkhand, a case was initiated under POTA against a 30-year-old tribal man after a complaint was filed against him in connection with a private land dispute. While this case, like others in Jharkhand, was premised on the accused’s alleged support for Naxalite groups, neither the accused nor his family had knowledge of these groups.\textsuperscript{183}

- Also in Jharkhand, POTA charges were brought against a 17-year-old young woman, Ropni Kharia, the only woman in her village to pass matriculation. The charges were brought in apparent retaliation for her resistance to patriarchal norms in her village and her work educating and encouraging others to do the same; complaints were brought to the police about her supposed involvement with a banned organization by men in the community who were “worried about her knowledge and activities.” Despite no evidence linking her to the organization, the police intimidated and beat her father and other family members and ultimately filed POTA charges against her.\textsuperscript{184}

In several states, POTA charges have been filed against other youths below age eighteen, including some as young as ten. In some cases, these charges were brought to intimidate or retaliate against parents who were the real subjects of interest.\textsuperscript{185} In others, the charges have involved arbitrary police action that intersects with efforts to intimidate particular social groups. Since another statutory regime exclusively governs offenses by minors, the Madras High Court ultimately held that POTA charges could not be brought against minors and ordered two youths in Tamil Nadu to be released. The stigma of having been charged under POTA remains for these youths, however, and in other states several of the cases against youths have proceeded.\textsuperscript{186}

\textsuperscript{182} Id. at 53-54 (statement by K. Chandru).
\textsuperscript{183} Id. at 204 (excerpt from the Preliminary Report of the All India Fact Finding Team on POTA Cases in Jharkhand).
\textsuperscript{184} Id.
\textsuperscript{185} See infra section V.B.
\textsuperscript{186} Many of these youths have come from lower caste, tribal, and religious minority commu-
Special laws like POTA create tremendous incentives and opportunities for overreaching, owing to both the relaxed procedural rules available and the police’s understandable desire to be perceived as actively responding to terrorism.\textsuperscript{187} To the credit of each of them, the BJP-led government recognized and attempted to respond to this problem in its initial efforts to strengthen the review committee mechanism in 2003, and the current Congress-led government openly acknowledged this problem when it decided to repeal POTA altogether.\textsuperscript{188} While POTA’s repeal eliminates this problem for now, it appears likely that \textit{any} legislative scheme conferring extraordinary powers and relaxing the normal procedural rules in particular categories of cases will risk being misused in the absence of prompt, effective, and transparent mechanisms to exercise meaningful oversight of investigative and prosecutorial decisions.

B. Police Misconduct and Abuse

Human rights advocates have documented significant evidence of police misconduct in connection with the application of POTA, including violations of procedural rights, corruption, intimidation and extortion, torture, and staged encounter killings. These allegations are consistent with well-documented patterns of police misconduct and abuse outside the antiterrorism context, deriving from structural problems with the police more generally, and the abuses themselves intersect with the selective and discriminatory applications of the law discussed above.\textsuperscript{189}


\textsuperscript{187} Charu Sudan Kasturi, \textit{Under the Shadow of a Dead Act, The Telegraph} (Kolkata), July 13, 2005, http://www.telegraphindia.com/1050713/asp/pleisure/story_4981971.asp (noting suggestion that number of accused in Gujarat and Maharashtra is disproportionately high because police are “keen to be seen at the forefront of the fight against terror [and] often failed to distinguish between conspirators and normal criminals”).


\textsuperscript{189} \textit{E.g.,} Arvind Verma, \textit{A Uniform Betrayal, India Together,} June 2004, http://www.india together.org/2004/jun/gov-betray.htm; \textit{see infra} section VI.A.
due, and the detailed guidelines for police conduct articulated by the Supreme Court of India and the NHRC, human rights groups have reported widespread disregard of the procedural rights afforded to individuals subjected to criminal investigation and prosecution. For example, the rights guaranteed at the time of arrest routinely have been violated for individuals being investigated under POTA. In Gujarat, the police have detained and taken many individuals into custody—in some cases for days or weeks—in connection with pending POTA investigations without formally arresting them, disclosing the basis for detention, or even documenting their custody or interrogation. In fact, the Gujarat police have implicitly acknowledged this practice, noting that they “do not arrest a person as soon as he is detained. We first question him and after we have established his prima facie involvement in the crime, he is arrested.” Individuals frequently have been taken into custody from their homes at night, with overwhelming force and large numbers of officers, and these detentions often have been accompanied by the ransacking of detainees’ homes and intimidation of their family members. When the individuals sought by the police have not been available, the police have instead often taken family members (including minor children and elderly parents) into custody essentially as “hostages,” to induce the individuals of interest to submit to police custody. This practice appears to have been particularly common in Gujarat, but individuals have been detained on similar bases in other states.

Even when individuals have been formally arrested, the rights and guidelines for arrest required by law have routinely been violated. With some frequency, custody memos and other documents recording the arrest have not been prepared, detainees have not been produced before

190. TERROR OF POTA, supra note 9, at 33, 36-38, 79-83, 169, 171, 182-83, 200 (statements by individuals accused under POTA and family members of accused individuals); id. at 75 (statement by M.A. Vanaja and M.A. Shakeel); id. at 157-66 (statement by Bharat Jhala); id. at 189-90 (statement by Zakia Jowher).


192. AMNESTY INT’L, ABUSE OF THE LAW, supra note 191, at 7. While the police claim to have power under the Code of Criminal Procedure to engage in this practice, no such authority exists. Id. at 7-8.

193. I.G., TERROR OF POTA, supra note 9, at 20; id. at 33-40 (statements by individuals accused under POTA), 159-66 (statement by Bharat Jhala), 188-91 (statement by Zakia Jowher).
magistrates within 24 hours, and family members or friends of the detainees have not been informed of the fact and location of detention, in some cases, for many days. Detainees also have not been given access to counsel or medical examinations—even in the face of court orders requiring such access.194

Considerable evidence also suggests that individuals detained under POTA have been tortured and subjected to cruel, inhuman, or degrading treatment while in custody. These reports are consistent with the longstanding and well-documented concern that even in cases unrelated to allegations of terrorism, police in India routinely resort to torture, which has been described as the “principal forensic tool” of the Indian police.195 Reports of torture have been documented throughout India, and have been particularly severe in connection with the POTA cases pending in Gujarat.196 Although individuals have feared retaliation for coming forward with allegations against the police, examples of torture and cruel, inhuman, and degrading treatment have been extensively documented, including severe beatings, use of narcoanalysis or “truth serum,” use of electric shocks to the genitals and other parts of the body, and various forms of psychological abuse.

These forms of abuse appear to have been intended in many instances to coerce detainees into confessing or implicating others. In every state which the project participants visited, evidence suggests that the police have often coerced detainees (or in some cases their family members) to sign blank sheets of paper, which later could be filled by the police with a statement confessing or implicating someone else. Some have been forced to read statements while being audiorecorded or to memorize false statements to be recited later before a magistrate. Detainees also have been

194. E.g., AMNESTY INT’L, ABUSE OF THE LAW, supra note 191, at 13-14; TERROR OF POTA, supra note 9, at 172, 175 (statements by individuals accused under POTA and family members of accused individuals).


196. AMNESTY INT’L, ABUSE OF THE LAW, supra note 191, at 11-13; TERROR OF POTA, supra note 9, at 134 (statement by Mukul Sinha); id. at 159-66 (statement by Bharat Jhala).
forced to cooperate in the creation of fabricated evidence, such as videos of the accused holding weapons in poses directed by the police. If detainees refused to cooperate, the police have threatened further detention or mistreatment of the detainees or their family members—and even have threatened that the detainees or their family members might be killed in staged encounters.\textsuperscript{197}

Oversight by magistrates of police detention and interrogation practices under POTA appears to have been ineffectual in many cases. When detainees have appeared before magistrates, the magistrates have not always scrutinized the circumstances of the individuals’ arrest and detention closely.\textsuperscript{198} In one instance, a magistrate ordered the police to take a detainee who had been severely tortured to the hospital, but the police ignored that order and returned him to the jail without consequence.\textsuperscript{199} In other instances, magistrates have been complicit in the mistreatment, either directly intimidating detainees into confessing or, in at least one case, all but explicitly giving the police the green light to torture detainees further to obtain their confession.\textsuperscript{200}

These reports of human rights violations in cases under POTA are consistent with violations that long have been documented by advocates, journalists, and government institutions outside the antiterrorism context. Government institutions have extensively documented torture and other human rights violations by the police, and both the Supreme Court of India and the NHRC have noted with concern the frequency of encounter killings by the police and the evidence that many of these killings have been staged or the result of other police misconduct. In response, both the Court and the NHRC have issued guidelines to be followed by the police to document and properly investigate all such deaths.


\textsuperscript{198} \textit{Terror of POTA}, supra note 9, at 34, 37 (statements by individuals accused under POTA); \textit{id.} at 88 (statement by R. Mahadevani); Haksar & Singh, supra note 197 (discussing prosecution of A.R. Geelani, which ultimately led to acquittal by Delhi High Court and Supreme Court of India, for conspiracy in 2001 Parliament attack case).

\textsuperscript{199} \textit{Terror of POTA}, supra note 9, at 172 (statement by family member of individual accused under POTA).

\textsuperscript{200} \textit{id.} at 178-79 (statement by individual accused under POTA); \textit{id.} at 190 (statement by Zakia Jowher); Azim Khan, \textit{Gujarat: Four Years After the Genocide}, \textsc{CounterCurrents.org}, Feb. 25, 2006, http://www.countercurrents.org/comm-azimkhan250206.htm.
C. “Back Door” Preventive Detention

While India has several different laws explicitly and directly authorizing preventive detention, in some respects both TADA and POTA, too, have functioned primarily as preventive detention laws. In each state visited by the project participants, prolonged detention without charge or trial appeared to be the norm, rather than the carefully limited exception. Indeed, as discussed above, both TADA and POTA explicitly facilitated this pattern with their exceedingly stringent standards for obtaining bail, on the one hand, and their relaxed procedural rules and time limits governing pretrial police investigations, on the other. Accordingly, many individuals have been detained under POTA throughout the six month period within which the police may conduct its investigation and then simply released without charge upon the deadline for filing a charge sheet.201 For individuals who ultimately have been charged, examples of prolonged detention without bail beyond the six month period have been found throughout the country.

• In the Tamil Nadu cases involving leaders of the TNM, each defendant was detained without bail for at least 16 months. Although arrested in Chennai, and despite a judge’s order to the contrary, some defendants were separately jailed in other cities. The defendants eventually were granted bail on the condition that they surrender their passports and not leave Chennai, speak to the media, or address public meetings.202

• Vaiko, the MDMK member of Parliament charged in Tamil Nadu, was detained without bail for approximately 19 months. His appeals for bail, which were opposed by the state prosecutor, were finally granted by the Madras High Court in 2004.203

• Among those individuals formally arrested in Gujarat under POTA, a large number have been refused bail, even after becoming eligible for the normal bail standard after one year in jail.

201. For example, approximately 25 percent of the 76,000 individuals arrested under TADA were released by the police without ever being charged. See supra note 81.

202. Terror of POTA, supra note 9, at 51 (statement by K. Chandru); see supra subsections V.A.3. Ironically, the bail conditions were more stringent than the circumstances of their detention, which permitted them to give interviews while in transit to and from court and to write letters from jail. Terror of POTA, supra note 9, at 51.

203. Id. at 42-45 (statement by individual accused under POTA). During his detention, Vaiko, who actually had voted in Parliament to enact POTA, was denied a request for an adjournment by the trial and appellate courts to travel to Delhi to participate in parliamentary debates on amending POTA. Id.
As of August 2004, 172 individuals charged under POTA were in jail, while only 17 had been released on bail. Detention for close to two years appears to have been routine.

- In other states, the percentages of POTA defendants released on bail also have been low. For example, as of August 2004, only 11 of the 88 POTA accused in Maharashtra, 5 of the 36 POTA accused in Andhra Pradesh, 1 of the 29 POTA accused in Uttar Pradesh, and none of the 48 POTA accused in Delhi had been released on bail.

The use of criminal antiterrorism laws in this fashion is simultaneously troubling and counterintuitive. Over forty years ago, David Bayley noted that the availability of preventive detention under Indian law was a tempting potential source of government abuse, since at least conceptually, it usually would be easier to obtain a preventive detention order, with its lower evidentiary standard and burden of proof, than a criminal conviction, which requires a full-blown trial and proof of guilt beyond a reasonable doubt. “Preventive detention is sure,” noted Bayley, while “conviction is uncertain and time-consuming.”

In practice, however, the experience under both TADA and POTA show that if the police are not primarily concerned with obtaining convictions—and in the absence of meaningful oversight and scrutiny at the outset of an investigation and throughout its duration—pretrial detention under criminal antiterrorism laws can serve as a “back door,” functional equivalent to preventive detention, but without even the limited procedural protections that the Constitution requires for preventive detention laws. The limited statistics available concerning POTA’s use suggest a pattern similar to the patterns that prevailed under TADA. Conviction rates under POTA have been very low, and the number of cases withdrawn for lack of evidence has been quite high.

204. Tikku, supra note 188; see also Terror of POTA, supra note 9, at 151 (statement by Mukul Sinha) (noting that only one of the 75 accused in Godhra case was released on bail, while most of those accused of post-Godhra anti-Muslim violence were released on bail).

205. Tikku, supra note 188.


207. See Kasturi, supra note 187 (noting high rate of withdrawal of POTA cases for lack of evidence and low numbers of cases that actually have gone to trial). There are indications that
Indeed, some officials have candidly acknowledged the role played by TADA and POTA in enabling preventive detention. As noted above, one senior police official openly described the police’s sequential use of the NSA and TADA in Punjab during the 1980s, which effectively extended the overall period of preventive detention beyond what the law authorized.\footnote{See supra section IV.A.}

More recently, R.K. Raghavan, a former senior police officer, has argued that

\[\text{the impact of laws such as TADA is more on prevention than on detection. It will be unfair to go merely by statistics of failures in court. We will never know, even in a setting of high terrorist crime, how many offences have in fact been deterred by the greater discretion and freedom of field operations that the police enjoy under enactments such as POTO.}\footnote{R.K. Raghavan, Column, \textit{Old Wine in a New Bottle?}, \textsc{Frontline}, Oct. 27-Nov. 9, 2001, http://www.flonnet.com/fl1822/18221140.htm.}

In Gujarat, where very few individuals accused under POTA have been released, a police official admitted that POTA in part had been used against the Godhra accused “to forestall the possibility of more of the accused obtaining bail,” as would have been possible under ordinary criminal laws.\footnote{Stavan Desai, \textit{In Gujarat, Only Godhra Case is Fit Enough for POTA}, \textsc{Indian Express}, Apr. 3, 2003, http://www.indianexpress.com/res/web/ple/full_story.php?content_id=21360. The official “hastened to add that that wasn’t the main reason.”}

The near-certainty of pretrial detention under TADA and POTA has been aided by what one Indian lawyer terms the “fear psychosis” surrounding antiterrorism legislation. The stigma associated with “terrorism”-related charges often is enough to intimidate some judges from sufficiently protecting the rights of the accused, particularly when it comes to release from detention. This phenomenon may be particularly pronounced in bail applications presented to the special courts, whose independence is compromised by the manner in which they are constituted. But as this same lawyer has suggested, even bail applications before the High Courts have been prejudiced in this fashion:

\begin{quote}
Today the judiciary is under extreme tension to deal with any
\end{quote}

\begin{flushright}
similar patterns have prevailed under antiterrorism laws in countries. See Craig Murray, \textit{The UK Terror Plot: What’s Really Going On?}, Aug. 14, 2006, available at http://www.craigmurray.co.uk/archives/2006/08/the_uk_terror_p.html (noting that only two percent of British Muslims arrested under antiterrorism legislation have been convicted, mostly for minor crimes rather than terrorism-related offenses).
\end{flushright}
POTA case. In fact, our bail applications went before at least three Division Benches [of the Madras High Court]. Each Division Bench excused itself from hearing the case. They thought hearing the case also amounted to supporting POTA or POTA detenues. We have put in a great deal of effort to persuade the High Court judges to hear the case. It took six months to hear ordinary bail applications. With every case of POTA, there is greater amount of reluctance on the part of the members of the judiciary even to hear them. ... So while the Act must be repealed we have to deal with the fear psychosis surrounding such legislation.211

Given the susceptibility of laws like TADA and POTA to misuse, Fali Nariman, a prominent Indian lawyer and member of Parliament, has gone so far as to suggest that even the limited safeguards available under Indian preventive detention laws might be “better” than criminal laws like POTA, at least if the post-Emergency constitutional amendments concerning preventive detention are implemented. Nariman argues that with preventive detention, the police have fewer incentives to torture detainees than in criminal investigations, since they need not “secure a confession to be proved at a trial,” and that because the post-Emergency amendments require Advisory Board members to be current High Court judges, “[t]he confidence of the public in the established courts [would be] a safeguard against abuse.”212

Nariman’s comments are striking, since India’s preventive detention laws have been widely abused—most obviously during the Emergency, but also during non-emergency periods—and have continued to be criticized as inconsistent with international human rights norms.213 Absent proper

211. Terror of POTA, supra note 9, at 56-57, 63 (statement by K. Chandru).

212. Nariman, supra note 206. On the post-Emergency constitutional amendments concerning preventive detention, see supra section III.C.

213. See, e.g., SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, PREVENTIVE DETENTION AND INDIVIDUAL LIBERTY 7-14 (2000) [hereinafter SAHRDC, PREVENTIVE DETENTION] (arguing that preventive detention provisions in Constitution are inconsistent with international law and that preventive detention only should be permitted during formally declared periods of emergency; Lal, supra note 7 (noting misuse of NSA against “ordinary criminals [who are] difficult to punish under normal [criminal] laws”).

derogation from applicable treaties and sufficient procedural protections, India's use of preventive detention may not be appropriate or consistent with human rights norms. As discussed earlier, India neither has purported to derogate from its obligations under the ICCPR nor explained its failure to do so, and a number of fundamental rights implicated by preventive detention are nonderogable in any event. However, as Nariman's comments suggest, and as the documented experience in India confirms, the conventional view favoring criminal antiterrorism laws over preventive detention laws may not be warranted unless there are sufficient safeguards against prolonged—and effectively preventive—pretrial detention pending trial. As with TADA, for the vast majority of people detained under POTA no conviction may be necessary for the objectives of the police to be realized. In the words of Rajeev Dhavan, “[t]he process is the punishment.”

The restoration with POTA's repeal of the normal bail standard under ordinary law is an important step in limiting the potential for pretrial detention under the criminal laws from being used as an end run around the constitutional limits on preventive detention. However, several central and state laws, including the NSA, continue to authorize preventive detention, and these laws should be scrutinized closely to assess whether reforms might be necessary to address the human rights concerns that critics have identified.

D. Threats and Intimidation Against Lawyers

There also has been evidence of threats and intimidation against lawyers and human rights defenders who have sought to document human rights violations under POTA and defend individuals who have been detained or charged under the law. Under the U.N. Basic Principles on the Role of Lawyers, states have an obligation to ensure lawyers are able to perform their professional roles free from intimidation or other improper interference and to “adequately safeguard[]” them when their security is threatened. While lawyers with whom the project participants met disagreed on the extent to which they or their colleagues have been threatened or abused, in Gujarat, in particular, several lawyers agreed with the assessment of one human rights organization that “harassment and intimidation of human rights defenders working with members of the Muslim

214. SAHRDC, Preventive Detention, supra note 213, at 7-14; see supra section II.B.


216. U.N. Basic Principles on the Role of Lawyers, supra note 42, ¶¶ 16-17.
community in the state appears to be widespread." 217 Lawyers representing Muslims accused in the Godhra case have faced threats and intimidation for doing so, and Muslim lawyers in Gujarat have largely withdrawn altogether from representing individuals accused under POTA because of these threats. Intimidation and pressure also has come from other lawyers. In Gujarat, a resolution considered by one of the lower court bar associations strongly discouraged attorneys from representing any Muslims charged in the Godhra case. As a result of these formal and informal pressures, the same small handful of lawyers—including lawyers from outside the state altogether—have tended to represent almost all of individuals accused under POTA in Gujarat. 218

Similarly, in the prosecution under POTA of four individuals charged with involvement in the 2001 attack on the Indian Parliament building—the first major prosecution under POTA—many lawyers were initially reluctant to represent the defendants at all, out of an unwillingness to be associated with the case. 219 While an All-India Defense Committee to support one defendant, S.A.R. Geelani, ultimately drew support from many prominent Indian citizens, the level of intimidation and prejudicial media coverage associated with the case was very high. Indeed, Geelani, who was acquitted by the Delhi High Court, was shot and seriously injured in February 2005 outside his lawyer’s home and office, as he arrived to meet with her to discuss the government’s then-pending appeal of his acquittal to the Supreme Court of India. 220

These accounts are consistent with reports documenting similar and

217. Amnesty Int’l’s, Abuse of the Law, supra note 191, at 3 & n.6.


219. Haksar & Singh, supra note 197. While all four defendants were convicted by the POTA special court, two were acquitted by the Delhi High Court. The Supreme Court sustained those acquittals and reduced the death sentence of a third defendant to 10 years’ imprisonment. See generally 13 December: The Strange Case of the Attack on the Indian Parliament—a Reader (Penguin Books ed. 2006).

worse incidents. While human rights defenders generally operate freely in India, there also have regularly been serious incidents in which particular human rights defenders have been threatened, intimidated, and in some cases even killed for their work, particularly in areas where social conflict has been intense.221 However, as it has with other special representatives and rapporteurs within the U.N. system, India has tended to avoid international engagement on the subject of human rights defenders, repeatedly declining to invite the U.N. Secretary General’s Special Representative on Human Rights Defenders to visit the country or to respond to most of her inquiries for information about alleged incidents involving human rights defenders.222

VI. STRUCTURAL CONSIDERATIONS

As in any country, full protection of human rights in India’s campaign against terrorism cannot be realized by focusing exclusively on “special” laws, like TADA and POTA, without attention to the broader legal and institutional context in which those laws are situated. Even when special laws create a distinct set of mechanisms and procedural rules, those regimes typically do not operate in a complete vacuum, but rather draw upon the same institutions—police, prosecution, judiciary—used to fight any serious crimes. Accordingly, to the extent that these institutions fail to sufficiently protect human rights when enforcing the ordinary criminal laws, they are certainly no more likely to protect those rights in the


high pressure and high stakes context of investigating and prosecuting terrorism-related crimes.223

Moreover, the very existence of these special laws stems from real and perceived problems concerning the effectiveness of the regular criminal justice system itself, which create intense pressures to take particular offenses outside of that system. At one level, these pressures are understandable, for there is no question that India faces challenges in its criminal justice system that, in the words of one observer, rise to a “crisis of legitimacy.”224 By removing offenses deemed “too important” to relegate to the regular criminal justice system—including, but not limited to, terrorism-related offenses—special laws seek to ensure that these offenses will be investigated, prosecuted, and adjudicated more effectively and attempt to restore a sense of legitimacy in their adjudication. For terrorism-related offenses, in particular, the use of special courts and procedural rules ostensibly bypasses the inefficiencies and backlogs in the regular judiciary and provides a set of procedural rules designed specifically to deal with the distinctive problems presumed to exist in terrorism-related cases. In the process, the use of special laws also conveys a social and political message about the importance of those offenses.225

At the same time, however, these special laws have invariably constituted an incomplete response to this crisis of legitimacy, focusing exclusively on procedural efficiency, in the form of relaxed rules for the government, without also ensuring that human rights are adequately protected and violations meaningfully remedied—which also are vital to restoring and maintaining the legitimacy of criminal law adjudication.226 As both the low conviction rates under TADA and POTA and the persistence of terrorism suggest, the relaxation of procedural rules in the government’s favor has not necessarily ensured that the system operate more effectively in prosecuting and bringing individuals involved with terrorism to justice.

223. See, e.g., TERROR OF POTA, supra note 9, at 113 (statement by Nitya Ramakrishnan) (noting the “crusading spirit that institutions adopt” when prosecuting antiterrorism cases, which causes “a slow but sure closing of the Indian mind on issues of investigative accountability”).


225. See Ramanathan, supra note 224; Krishnan, supra note 121, at 280-81. As the Law Commission noted when proposing POTA, the sole reason for the creation of special courts was the “anxiety to have these cases disposed of expeditiously.” LAW COMM’N OF INDIA, 173RD REPORT ON PREVENTION OF TERRORISM BILL, 2000, ch. 6 (2000).

226. See supra notes 4-5.
The use of special laws in India, therefore, presents a dilemma. Without efforts to reform the police and criminal justice system more generally, the pressures to bypass the regular system of justice through the enactment of special laws will persist in any category of cases deemed sufficiently “important.” At the same time, the use of special laws may itself reduce the political will to engage in the arduous, long-term effort to realize broader reforms, which are necessary to increase both the effectiveness of the criminal justice system and the overall level of human rights protection. Moreover, in most instances these special laws have replicated or intensified the human rights concerns that are present within the regular system, thereby compromising the system’s legitimacy. To fully address the human rights issues arising from India’s special laws against terrorism, therefore, it is essential also to consider ways to improve and reform the police and criminal justice system more generally, both to ensure that human rights are more adequately protected and remedied and to alleviate the pressures to enact special laws that result from the underlying weaknesses within the regular criminal justice system.

A. Police Reform

Individuals and organizations across a broad spectrum—including citizens groups, members of the public, nongovernmental organizations, government commissions, police officials themselves, and even senior members of both the BJP and the Congress Party—have recognized the need to reform the Indian police, which is still governed by the 145-year-old framework established by the British. Indeed, while the need for reform has only become more acute, as the police have become more powerful, more politicized, and less accountable, meaningful reform has proven complicated and elusive. Although central and state police commissions were established soon after independence to study possible changes to the inherited colonial institutions, the work of these commissions did not lead to meaningful reforms. Only in the aftermath of the Emergency did police reform enter the political agenda in any serious way, as two government commissions, the Shah Commission and National Police Commission, documented and examined abuses by the police in some detail. Though its deliberations took place largely in private, the NPC issued eight reports between 1979 and 1981 proposing an extensive array of reforms.

The NPC’s work quickly was brought to an end after the return of Indira Gandhi to power in 1980, and more recent reform efforts have
moved haltingly. Because police matters are a state subject, the ability of the central government to realize meaningful reform invariably faces significant structural and political challenges. Nevertheless, during the past year the central government has initiated what appears to be a serious effort to replace the Police Act of 1861 and implement significant reform to the police in India.228 Despite the failure as yet of many recent reform efforts to take hold, the work of these many government commissions and of various NGOs has generated some consensus on the ways in which policing in India today falls short of sufficiently embodying democratic principles.

1. Arbitrary, Politicized, and Discriminatory Police Decision-Making

Police decision-making in India has long been arbitrary and politicized and has become more deeply so since independence. Under the 1861 act, the state executive is responsible for “superintendence” of the police. The director of the state police serves at the pleasure of the chief minister and rank and file officers are subject to extensive political pressure. Through this politicized superintendence, political actors have frequently interfered with the police’s functional operations, including basic investigative decisions. For example, politicians frequently have pressured the police to target political opponents in their investigations while simultaneously protecting their friends and allies. In other instances, politicians have pressured the police to make functional decisions designed to manipulate crime statistics in favorable ways. Police officials who resist these political pressures routinely face arbitrary and punitive transfers, disciplinary actions, or even fabricated legal proceedings.229

Observers have long regarded this politicization of decision-making as the fundamental issue to be addressed in seeking to reform the police. Accordingly, the most widely invoked of the NPC’s proposals in the years since they were first proposed have tended to be those elements intended to eliminate this improper political interference. These proposals include

228. See Madhav Godbole, Police Reforms: Pandora’s Box No One Wants to Open, ECON. & POL. WALK., Mar. 25, 2006.
229. MAJA DAWALWA, ET AL., COMMONWEALTH HUMAN RIGHTS INITIATIVE, POLICE ACT, 1861: WHY WE NEED TO REPLACE IT?, at 4-5 (2005), http://www.indianngos.com/government/advocacy_paper_police_act.pdf (discussing problem of illegitimate political interference with police decision-making); R.K. Raghavan, An Insider’s View—From the Outside, FRONTLINE, Dec. 8-21, 2001, http://www.flonnet.com/fl1825/18251060.htm (arguing that the “enormous discretion [of] the political executive . . . in planning an IPS officer’s career progression” contributes to “lack of courage and a readiness to buckle under political pressure.”). As discussed earlier, corruption and communalism are significant problems within the police forces as well. See supra Part V.
the establishment of a statutory, state security commission in each state to exercise superintendence over the police and the establishment of a fixed, four-year tenure of office for the state director-general of police, who would be selected from a panel of three senior police officials from within the state police force. Eliminating political interference in functional decision-making is indeed a critically important objective. In implementing measures to advance that goal, however, it will be important to ensure that democratic accountability of the police is preserved—that the police bureaucracy does not become so insulated and autonomous that it is able to act with impunity. 230

In addition to political interference, the police also suffer from the distinct, longstanding problem of corruption at both the subordinate and senior levels. 231 While corruption is a problem that plagues many institutions in India, research by one NGO has concluded that the Indian public regards the police as the most corrupt institution in the country. 232 At the lower and intermediate levels of the police hierarchy, officers frequently abuse their power by extorting money from complainants, witnesses, defendants, and other members of the public. While corruption traditionally has been less prevalent at more senior levels, bribery and extortion among senior officers nevertheless remains an increasing problem. As one former senior police official has suggested, the widespread acceptance within the Indian police of the notion that significant personal “perks” may legitimately be conferred upon senior police officials at public expense. This legacy of the colonial period has institutionally embedded and reinforced corruption as part of the organizational culture and supervision practices of the Indian police. 233

In many contexts, Dalit, other lower caste, tribal, and religious minority communities disproportionately suffer the effects of this polit-

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cized and corrupt police decision-making. As advocates have long noted, police institutions frequently embody the same religious and caste-based inequalities found in society at-large, failing to protect vulnerable communities from abuses at the hands of private actors, failing to investigate or prosecute those private actors, and in some cases directly perpetrating abuses against those communities. To help overcome this increasingly institutionalized communalism and casteism, further steps may be necessary to end discrimination and increase diversity within the police forces, as the NPC recommended.234

2. Accountability for Human Rights Violations

Few effective mechanisms exist to ensure police accountability for human rights violations and other misconduct. Internal oversight and accountability mechanisms tend not to be effective. Under state and central police laws, senior officers may dismiss, suspend, or reduce the rank of lower-ranked police officers who are negligent or unfit in the exercise of their duties or have committed one of several enumerated offenses.235 However, the offenses that subject officers to discipline tend to involve violations of superior officers’ command authority, rather than violations of human rights standards.236 Disciplinary procedures are complicated, time-consuming, and subject to political interference. Moreover, police are often loath to investigate vigorously allegations of misconduct by their colleagues, seeking to avoid drawing negative attention to the police as an institution.237

External remedies are also difficult to pursue. Human rights violations often are not actionable under the criminal law, and in any event, the Code of Criminal Procedure requires prior government authorization, which is rarely forthcoming, before criminal proceedings may be initiated against any government official. In the few instances in which criminal


236. See Police Act of 1861, § 33; Joshi, supra note 235, at 11. This command authority-oriented approach to internal discipline derives in part from the colonial decision to make police officers accountable to local district magistrates, who in turn were accountable to the British. Verma, supra note 18.

237. JOSHI, supra note 235, at 12.
charges have been brought, convictions have been few and sentences short.\footnote{238} Individuals whose fundamental rights under the Constitution have been violated may seek compensation and prospective relief from the Supreme Court or a High Court by filing a writ petition.\footnote{239} While the Supreme Court and the High Courts have ordered compensation in many cases and repeatedly criticized law enforcement officials for failing to take appropriate steps to curb human rights abuses by the government, these remedies have proven largely ineffectual.\footnote{240} When the Supreme Court and High Courts have ordered investigations of alleged abuses arising in cases already before them, investigators and prosecutors have frequently disregarded those orders.\footnote{241} This reluctance to investigate and prosecute appears to result in part from embedded conflicts of interest, since police and prosecutors in effect are expected to investigate and prosecute their colleagues, and in part from an attitude among law enforcement and security officials that torture, illegal detention, and related practices are tolerable and indeed necessary tools in combating crime and terrorism.\footnote{242}

The process of seeking remedies from the Supreme Court and High Courts is also beyond the means of many victims. Even with the assistance of counsel, the time and travel necessary limit the ability to seek recourse from the higher judiciary. When combined with the prevalence of attacks on and violent intimidation of victims, witnesses, and human rights attorneys and activists, many victims are unable or unwilling to pursue these remedies.\footnote{243}

Finally, the NHRC and state human rights commissions offer limited recourse for victims of human rights abuses.\footnote{244} While the NHRC has lobb

\footnote{238}\textit{India Code Crim. Proc.} \textsection{} 197; see \textit{Darawala, et al., supra} note 229, at 6 (2005), http://www.indiangos.com/government/advocacy_paper_police_act.pdf.\footnote{239} \textit{India Const.} \textsection{} arts. 32, 226.\footnote{240} \textit{Redress Trust, supra} note 31, at 10.\footnote{241} \textit{Id.} at 21-22. The subordinate courts, which handle the majority of cases and are thus more likely to encounter allegations of abuse, are unlikely to order investigations at all. \textit{Id.}\footnote{242} See, e.g., Jupinderjit Singh, \textit{Cops Accused of Extra Judicial Killings To Be Protected: Singla, The Tribune} (Chandigarh), Mar. 22, 2006, http://www.tribuneindia.com/2006/20060322/punjab1.htm#1.\footnote{243} \textit{Redress Trust, India Country Report, in Reparation for Torture: A Survey of Law and Practice in 30 Selected Countries} at 31 (2003), http://www.redress.org/studies/India.pdf.\footnote{244} In addition to establishing the NHRC, the PHRA contemplates the creation of state human rights commissions and district-level human rights courts to adjudicate cases arising from alleged human rights violations. While human rights commissions have been created in many states, little progress has been made towards the creation of effective human rights courts.
bied the government and suggested reforms to end torture by police and security forces, ensure accountability for violations, and encourage reparation and compensation for victims in individual cases, its recommendations often have been disregarded, particularly when it has recommended prosecution of government officials. Moreover, the NHRC and state human rights commissions have many competing human rights responsibilities other than police oversight.

The NPC’s recommendations did not directly address the issue of accountability—the state security commissions proposed by the NPC instead emphasized oversight of police functioning and performance. Any current reform proposals should seek to upgrade the full range of mechanisms by which the police and other government officials may be held accountable, in order to fulfill the obligation under the ICCPR to provide meaningful and effective remedies for rights violations.

B. Effectiveness and Professional Capacity of the Criminal Justice System

Structural reform efforts also must seek to upgrade the overall capacity of the criminal justice system. Conviction rates for individuals arrested by the state police forces have been consistently and dramatically falling since independence. While the conviction rate in ordinary cases under the Indian Penal Code was 64.8 percent in 1961, it has subsequently fallen to 62.0 percent in 1971, 52.5 percent in 1981, 47.8 percent in 1991, and 42.5 percent in 2004. Certainly, reforms should seek to improve these conviction rates, since the government should not prosecute individuals without sufficient evidence to support a conviction. At the same time, simply increasing conviction rates will not ensure the overall effectiveness of reform. Rather, reformers must also seek to improve the reliability of the criminal process, so that the public may be confident that individuals who are investigated, prosecuted, and convicted are, in fact, guilty of the offenses with which they have been charged.

245. Redress Trust, supra note 243, at 5.

246. ICCPR art. 2; see U.N. Basic Principles on the Right to a Remedy, supra note 42, ¶¶ 19-23.

247. Ministry of Home Affairs, National Crime Records Bureau, Crime in India 2004, at 192 (2005). As noted above, the conviction rates under special antiterrorism laws such as TADA and POTA have been considerably lower. See supra sections IV.A & V.C.

248. Cf. Shantonu Sen, A System In Need of Change, Seminar, June 1995, at 35 (while police are “results-oriented” and therefore focused on obtaining convictions, “police chiefs have a greater responsibility to scrutinize the way results are achieved”). In the United States, these
As the NHRC and others frequently have noted, improving the overall effectiveness of the criminal justice system to prosecute terrorism and other serious crimes requires attention to all three stages of the criminal justice process: investigation, prosecution, and adjudication. First, improving the effectiveness of police investigation requires a serious investment and commitment to strengthen their overall professionalism and capacity to do their jobs. Especially when fighting serious crime, the police endure tremendous burdens and serious dangers in their work, and are not particularly well compensated. At the same time, as discussed above, the police are frequently hindered in their work by political interference. As a result, morale among the police is low, and this low morale is exacerbated by the wide mistrust of the police within the Indian public at large.

Investigative procedures and mechanisms under Indian law have not significantly changed since the 19th century. With limited ability to collect, preserve, and analyze physical evidence, investigations proceed very slowly. The police rely disproportionately on witness statements, which increases the incentive to engage in coercive interrogation practices. As Indian observers have noted, attention needs to be devoted to training, the development of advanced forensic skills and facilities, and the separation within the police of responsibility for conducting investigations from the day-to-day responsibilities for maintaining law and order.

Second, the quality and independence of the prosecution needs to be enhanced. The NHRC has expressed concern that for terrorism cases, in particular, more experienced prosecutors need to be appointed in order to ensure that cases are prosecuted more effectively, and the quality of the prosecution may indeed be one factor contributing to the failure to successfully obtain convictions in many cases. There also are indications

principles are advanced in part through guidelines for federal prosecutors providing that, “as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact,” based on a reasonable belief that admissible evidence “sufficient to obtain and sustain a conviction” is available. U.S. Dep’t of Justice, United States Attorneys’ Manual § 9-27.220(B) (2006), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.220.


that the numbers of prosecutors are insufficient to handle the large volume of pending cases. But the need to reform the prosecution extends much further, requiring more effective guarantees of prosecutorial independence from the police and politicians in all criminal cases.252 During the colonial period and for many years after independence, criminal cases generally were prosecuted by the police, not an independent cadre of lawyers. As Arvind Verma, a professor and former senior police official, has noted, this lack of prosecutorial independence is itself a vestige of colonialism, under which most prosecuting attorneys, who were Indian, were subordinate to senior police officers, who were British.253

Since independence, the Law Commission and Supreme Court have repeatedly emphasized the importance of ensuring prosecutorial independence from the police. However, in many states this separation does not exist, at least in practice if not formally.254 Recent amendments to the Code of Criminal Procedure now formally authorize the states to establish separate Directorates of Prosecution within their home departments. However, the states are not required to do so, and the new provisions do not specify any guidelines to ensure the independence of these directorates. Indeed, some Indian observers have raised concerns that by placing the prosecution under the aegis of the home departments, the amendments might further compromise, rather than enhance, prosecutorial independence from the police.255 Especially given the vital potential role that prosecutors can play in either resisting or exacerbating police abuses, further reforms likely will be necessary to ensure both meaningful independence and accountability for prosecutors.256

251. NHRC, Opinion Regarding Prevention of Terrorism Bill, supra note 250. In cases involving terrorism and other serious crimes, the inability to protect witnesses from intimidation may be another factor.


254. Id. at 268 (“[T]he decision to send any case for trial is . . . that of the superintendent [of police] and prosecutors have little control over the cases sent for trial.”).


256. I.e., Sen, supra note 248, at 35; see generally Bikram Jeet Batra, Public Prosecution – In
Finally, reform efforts must seek to improve the capacity of the Indian judiciary itself. Without question, the Indian judiciary has played a critical role since independence in advancing and defending India’s commitment to the rule of law and its constitutional values. However, it has done so under tremendous pressures and resource constraints, particularly at the subordinate court levels. In 1986, Justice P.N. Bhagwati of the Supreme Court of India declared that the Indian judiciary was “on the verge of collapse,” crushed by a backlog of cases that was undermining the legitimacy of the justice system. Twenty years later, the situation has only become more severe.

One dimension of the problem involves basic numbers. The Indian judiciary has only 10.5 judges per million citizens, compared to 41.6 per million in Australia, 50.9 per million in the United Kingdom, 75.2 per million in Canada, and 107.0 per million in the United States. Case load statistics reflect these disparities. At the end of 2005, the subordinate courts had over 25 million pending cases, of which approximately 18 million were criminal cases.258 Large backlogs contribute to extensive delays in adjudication, increases in litigation costs, loss or diminished reliability of evidence by the time of trial, unevenness and inconsistency in the verdicts that ultimately are reached at trial, and an attendant reduction of faith in the justice system among members of the public. The consequences are particularly severe for the large numbers of “undertrials” who languish in prolonged periods of detention while awaiting trial—in some

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258. Quoted in Ramanathan, supra note 224.


260. Chief Justice Y.K. Sabharwal, Justice Sobhagmal Jain Memorial Lecture on Delayed Justice 5-6 (New Delhi, July 25, 2006), http://www.supremecourtofindia.nic.in/new_links/Delayed%20Justice.pdf. In the High Courts, the there were approximately 3.5 million pending cases at the end of 2005, of which approximately 650,000 were criminal cases. Id. at 4-5.

cases, even beyond the maximum periods to which they could be sentenced if convicted.262

Perhaps to an even greater extent than with police reform, both the government and the Supreme Court have been active in recent years in raising the profile of judicial reform as an issue.263 Meaningful reform will require significant investments to increase the numbers of judges, upgrade and expand courtrooms and other facilities, and implement methods to improve judicial efficiency and productivity through, for example, increased use of technology and improved case management techniques.

Some initiatives already are being implemented. For example, recent legislation has provided for the potential release of thousands of individuals who have subject to prolonged detention pending trial and, for the first time, has introduced the concept of plea bargaining into the Indian criminal justice system for certain offenses carrying maximum potential sentences of less than seven years.264 Other proposals would expand the use of “fast track” courts and alternative tribunals for certain offenses, hire ad hoc judges and establish “double shifts” for sitting judges, and implement various procedural mechanisms to reduce delays, such as limits on interlocutory appeals and the use of pretrial hearings to narrow issues to be litigated. Senior government officials and members of the higher judiciary also have recognized the need to address the problem of corruption and to improve training for judges and judicial staff and the quality of adjudication, particularly in the subordinate courts—in part by considering the establishment of an all-India judicial service to staff the subordinate courts.265

These efforts to find ways to promote greater efficiency in adjudication are entirely appropriate given the challenges faced by the Indian


265. Sabharwal, supra note 260; Singh, Sep. 18, 2004 Speech, supra note 263.
judicial system. At the same time, the challenge of managing this burgeoning caseload simultaneously heightens the need for caution and attentiveness to procedural protections. As we have witnessed in the United States, in the context of the Justice Department’s recent efforts to clear heavy backlogs in administrative adjudication of immigration cases, streamlined justice can compromise the quality of adjudication and create opportunities for improper political influence—indeed, one prominent federal judge has criticized the quality of adjudication as having “fallen below the minimum standards of legal justice.” Similar risks appear present in India’s initiatives to streamline the administration of justice. While plea bargaining can help to reduce delays by facilitating earlier disposition of criminal cases in which the defendants do not contest their guilt and, in some instances, cooperation against more culpable defendants, it is important that any system of plea bargaining be regulated and subject to procedural safeguards. Past efforts to use alternative or informal adjudication in India also have not been entirely successful either in ensuring efficiency or fully protecting the legal rights of Indian citizens, and it will be important to understand the limitations of those efforts when more broadly seeking to rely upon institutions such as “fast track” courts to adjudicate criminal cases.


267. See, e.g., Human Rights Documentation Centre, In the Name of Malimath: Bill On Plea-Bargaining Seeks to Subvert Justice, HUMAN RIGHTS FEATURES, HRF/88/03, http://www.hrdc.net/sahrhc/hrfeatures/HRF88.htm (Nov. 30, 2003) [hereinafter HRF, In the Name of Malimath]. Under federal law in the United States, acceptance of guilty pleas is regulated by the Constitution’s due process guarantees and by provisions of the Federal Rules of Criminal Procedure which require the judge to ensure that the plea is voluntary and has a sufficient factual basis and confers broad discretion upon the judge to accept or reject the plea. See Fed. R. Crim. P. 11.

While some prominent proposals—most notably those suggested by the committee chaired by Justice V.S. Malimath—would seek to streamline the administration of criminal justice simply by making it easier for the police and prosecution to obtain convictions, such an approach would be mistaken. 269 It fails to recognize that the limitations in the current system stem from a comprehensive set of challenges involving the very capacity of India’s institutions to investigate, prosecute and adjudicate criminal cases effectively. As such, real progress likely will come not through procedural “short cuts” designed to help the police obtain more convictions in the short term, but rather through a comprehensive approach to institutional capacity-building. While this approach may take an extended period of time to realize, it is an approach to which many Indian officials and other citizens appear sincerely committed.

VII. ROLE OF THE INTERNATIONAL COMMUNITY

While recent debate over India’s antiterrorism laws has been shaped principally by a domestic political context which has evolved over many decades, that debate has not taken place in an international vacuum. Rather, especially in the aftermath of the September 2001 terrorist attacks, the debate in India has been influenced significantly by the antiterrorism initiatives of other countries, including the United States, and the U.N. Security Council, for which the United States and United Kingdom have been driving forces.

A. Resolution 1373 and the Counter-Terrorism Committee

Within weeks after the September 2001 terrorist attacks, the Security Council adopted Resolution 1373 pursuant to Chapter VII of the U.N. Charter, which authorizes the Council to take measures “to maintain or restore international peace and security” in response to any “threat[s] to the peace, breach[es] of the peace, or act[s] of aggression”—and to mandate, rather than simply to call for, compliance by member states. 270 Resolution 1373, which was sponsored by the United States, represents a sweeping use of the Council’s


Chapter VII authority, an unprecedented initiative that does not simply respond to the particular events of September 2001 or require compliance with existing treaty obligations, but instead legislates new, binding rules of international law that are neither explicitly nor implicitly limited in time.\footnote{271}{Eric Rosand, Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism, 97 Am. J. Int'l L. 333, 334 (2003); Jane E. Stromseth, Imperial Security Council—Implementing Security Council Resolutions 1373 and 1390, 97 Am. Soc'y Int'l L. Proc. 41 (2003); Paul C. Szasz, The Security Council Starts Legislating, 96 Am. J. Int'l L. 901, 902 (2002).}

Finding that the September 2001 terrorist attacks constituted “a threat to international peace and security,” Resolution 1373 requires member states, among other things, to prevent and criminalize the financing or collection of funds for “terrorist acts,” to freeze assets or resources of persons who commit or are involved in the commission of terrorist acts, to prohibit the making of any assets, resources, or services available to persons who commit or are involved in the commission of terrorist acts, to bring to justice any persons who commit or are involved in financing, planning, preparing, or supporting “terrorist acts,” and to legislate separate, “serious criminal offenses” proscribing “terrorist acts” under domestic law.\footnote{272}{Resolution 1373 also “calls upon” states to become parties to the twelve existing international conventions and protocols concerning terrorism, to fully implement those agreements and previous Security Council resolutions addressing terrorism, to improve border security, and to exchange information with and provide judicial assistance to other member states in terrorism-related criminal proceedings.}


To monitor states’ implementation and compliance, Resolution 1373 established the Counter-Terrorism Committee, a standing committee composed of all fifteen Council members. The resolution called upon states to report their progress towards implementation to the CTC within 90 days and periodically thereafter. The resolution did not elaborate further upon the CTC’s mandate, leaving the CTC itself to define its agenda and approach to implementation.\footnote{274}{To date, the CTC has emphasized cooperation with states to build their capacity and infrastructure to combat terrorism, rather than singling out countries for non-compliance. Rosand, \textit{supra} note 271, at 335.}
resolution seriously. Compliance with the resolution’s reporting requirements has been higher than with previous Security Council mandates, and states also have responded positively to the CTC’s effort to encourage ratification of existing international antiterrorism conventions and protocols.275

B. Indian Antiterrorism Laws and Resolution 1373

Since its adoption, Resolution 1373 has played a significant role in helping to frame the debate over antiterrorism laws in India. In the earliest debates in 2001 and 2002 over the bill that ultimately became POTA, proponents repeatedly invoked the resolution to argue that the bill was not simply justified, but required under international law. After POTO was promulgated in 2001, for example, the Home Secretary publicly stated that the ordinance “implements in part the obligation on member states imposed” by Resolution 1373.276

News reports and commentary also were attuned to the obligatory nature of Resolution 1373’s Chapter VII requirements, at times incorrectly suggesting that all of POTA’s provisions were necessary to comply with the Security Council’s mandate. Some media reports stated that because the resolution “makes it mandatory” for member states to help combat terrorism, enactment of comprehensive antiterrorism legislation would be “vital for the government to fulfill its international commitments.”277 Editorial commentators asserted this imperative even more strongly. A retired army officer, for example, asserted that because all states are “required by ... Resolution 1373 to promulgate anti-terrorism laws within 90 days and report completion to the secretary general[,] POTO need not ... be made such a big political issue.”278

275. All 191 U.N. member states submitted initial reports documenting their efforts to comply with the resolution, with 160 states doing so within nine months of the resolution’s adoption. States have responded positively to the CTC’s requests for follow-up reports, submitting a total of well over 600 reports as of 2006.


Resolution 1373 also played a prominent role in parliamentary debates leading to the enactment of POTA. Upon introducing the bill in Parliament, the Home Minister, L.K. Advani, asserted that the Council's adoption of the resolution prompted the government to conclude it was India's "duty to the international community ... to pass [POTA]." 279 Similarly, former Law Minister Ram Jethmalani—who later repudiated his support of POTA altogether—suggested that the government had been obliged to promulgate POTO in order to comply with the Security Council's mandate to enact "suitable legislation" to combat terrorism. 281 If Parliament failed to enact POTA, Jethmalani continued, India "would stand exposed before the comity of Nations" and would be "guilty of breach of [its] international obligations." 282

Other members of Parliament made similar suggestions. 283 Indeed, at least one of the bill's opponents accepted the contention that POTA was required by Resolution 1373, arguing that the bill should be rejected in spite of any such obligation. 284 The NHRC also has been acutely aware of India's obligation to comply with the resolution, noting the "complexity


281. Rajya Sabha Debate, Mar. 21, 2002, http://rajyasabha.nic.in/rsdebate/deb_ndx/195/21032002/4to5.htm (statement of Ram Jethmalani) ("[W]hen [POTO] was issued it was in compliance with our obligations under international law and ... our obligations as a Member of the [United Nations]"; see also Lok Sabha Debate, Mar. 18, 2002 (statement of L.K. Advani), supra note 279 ("When the Security Council passed this Resolution in September 2001, shortly after that, the Government thought it proper to bring an Ordinance, which we call POTO.").


of protecting human rights in the new international climate prevailing since 11 September 2001 and the adoption of [Resolution 1373]." 285

This public discourse within India about the significance of Resolution 1373 also affected the later adjudication of POTA's legality before the courts. In upholding POTA against challenges under the Indian Constitution and applicable international human rights treaties, the Supreme Court of India noted, almost in passing, that because of the resolution, “it has become [India's] international obligation ... to pass necessary laws to fight terrorism.” 286 The Court did not elaborate on this assertion or identify any specific provisions in POTA it deemed necessary to fulfill this obligation.

Resolution 1373 even cast a shadow over the debates in 2004 over POTA's repeal. In Parliament, supporters of POTA asserted that the statute had been enacted because India “had committed to the enactment of an anti-terror law” upon the Security Council's adoption of Resolution 1373, and suggested that repeal might violate the resolution. 287 Editorials similarly suggested that POTA's repeal might “compromise India's obligation under [Resolution 1373] to take special measures against terrorism in the wake of [the September 2001 attacks],” and that it was “very doubtful” that the repealed POTA provisions that were simultaneously reenacted as amendments to UAPA would sufficiently comply with the resolution. 288 At the same time, some government officials have stated that these amendments to UAPA, including the provisions defining “terrorism,” self-consciously were designed in part to ensure that India fulfilled its obligations under the resolution. 289

These invocations of Resolution 1373 have tended to be selective or opportunistic. They fail to distinguish carefully between those legal pro-

288. Editorial, In the Name of Muslims’ Safety, UPA Plays Into Sangh’s Hands, INdIAN ExpRESs, May 28, 2004; Prakash Singh, Op-Ed, Hello Mr. Terrorist, Please Come In, INdIAN ExpRESs, Sep. 24, 2004 (op-ed by former director-general of Indian Border Security Force).
289. See Tikku, supra note 188.
visions that are required by the Council and those that are not, suggest-
ing instead that POTA or other omnibus antiterrorism measures are re-
quired in their entirety to comply with the Security Council’s dictates.
Advocates of POTA have rarely, if ever, noted any countervailing human
rights obligations, whether under domestic or international law, that also
person that POTO represented “misapplication of U.N. Resolution 1373” and failed to heed
fundamental rights guarantees under Indian Constitution).}

\section*{C. Human Rights Concerns}

The CTC’s own legal expert has acknowledged that inevitably, as-

However, the Security Council and CTC have not been sufficiently atten-
tive to these inevitable human rights concerns, in either the initial draft-
ing of the resolution or subsequent efforts to monitor and facilitate states’
compliance. At best, the CTC has failed to make consistency with human
rights norms a sufficient priority, essentially disclaiming responsibility to be attentive to human rights standards when monitoring and facilitating states’ efforts to implement Resolution 1373’s antiterrorism requirements.

At worst, the CTC may in some instances be enabling human rights vio-
lations by “push[ing] governments to show results without at the same
time explicitly raising relevant and empirically well-founded human rights

Perhaps in part because Resolution 1373 does not affirmatively refer
to any international human rights, humanitarian, or refugee law obliga-
tions to be heeded when implementing its antiterrorism requirements,
the CTC initially took the position that its mandate did not encompass any human rights concerns at all. Soon after the CTC was established, its first chair, Jeremy Greenstock, explicitly disclaimed any obligation to en-
sure that states implemented Resolution 1373 in a manner consistent with human rights norms. While pledging to “remain aware of the interaction with human rights concerns,” Greenstock stated that “[m]onitoring performance against other international conventions, including human rights law, is outside the scope of the [CTC’s] mandate,” and that instead, “[i]t is ... open to other organizations to study States’ reports and take up their content in other forums.” 293

These statements reflect a cramped view of Resolution 1373’s mandate and, more generally, the importance of adhering to human rights norms when fighting terrorism. Far from falling outside the scope of the resolution, human rights considerations are well within the CTC’s mandate, as the Secretary General has noted in recent years.294 Terrorism is highly correlated with the presence of human rights abuses, weaknesses in the rule of law, and major political grievances.295 When governments violate human rights in their efforts to combat terrorism, they effectively “cede to [terrorists] the moral high ground” and “provok[e] tension, hatred and mistrust of government among precisely those parts of the population where [terrorists are] most likely to find recruits.”296 In this context, respect for human rights is not merely an independent moral or legal obligation, to be compartmentalized and relegated to institutions dedicated exclusively to “human rights” as a freestanding set of concerns. Rather, respect for human rights is itself a strategic imperative, an integral element of any “comprehensive strategy” to combat terrorism.297


296. Secretary-General, Global Strategy, supra note 294, at 5; see HRW, HEAR NO EVIL, supra note 292, at 2.

297. High Level Panel Report, supra note 295, ¶¶ 147-48; see Secretary-General, In Larger Freedom, supra note 294, ¶ 144.
Despite the centrality of human rights to any successful antiterrorism campaign, the CTC has not sufficiently incorporated human rights norms into its operations. In its general guidance to states preparing their compliance reports, the CTC does not request any information concerning states’ efforts to protect human rights when implementing antiterrorism initiatives. Nor has the CTC appeared to identify and consider human rights concerns when reviewing states’ reports. As one organization has concluded, the CTC has typically failed to question or respond to states’ descriptions of antiterrorism laws or other actions that manifestly implicate human rights concerns, either on their face or as applied in states with known human rights problems, or to scrutinize assertions by states that are “demonstrably inaccurate.”

In some instances, these human rights concerns have been foreseeable and apparent. For example, because the resolution requires states to take a series of actions targeting “terrorism” and “terrorist acts” without defining those terms, states have exercised tremendous discretion to rely on their own definitions without any guidance on how to ensure that those definitions do not sweep in activities protected under international human rights law. Absent such standards, no consensus definition has emerged from the many definitions of “terrorism” that states have promulgated. While the CTC has required states to report their definitions of “terrorism,” and has facilitated technical assistance to states in drafting new antiterrorism laws, the CTC has failed to scrutinize or inquire about those aspects of these definitions that may be problematic from a human rights perspective. India’s definition of terrorism in POTA and UAPA illustrates the problem. As discussed above, the open-endedness of that definition has facilitated a wide range of abuses. Yet, while India reported its enactment of this definition to demonstrate its compliance with Resolution 1373, the CTC appears not to have raised any rights-based concerns about this definition with the Indian government.

The CTC also appears not to have “regularly raise[d] human rights

299. HRW, Hear No Evil, supra note 292, at 3.
301. See supra subsection IV.B.1. and part V.
on its own initiative or ... consistently use[d] information coming from
human rights treaty bodies or U.N. monitoring mechanisms in its follow-
up questions to member states.” For example, in each of the reports that
India has submitted to the CTC, it has implied that its antiterrorism laws
are required by Resolution 1373. The first two reports characterize and
extensively discuss POTO and POTA as fundamental pieces of legislation
implementing India’s obligations under the resolution to criminalize and
suppress acts of terrorism. Neither report, however, makes any effort to
distinguish between those provisions in POTO and POTA that are required
by Resolution 1373 and those that are not. India’s second report exten-
sively discusses many of POTA’s provisions, including those governing the
definition of “terrorist acts,” establishment of special courts, admissibil-
ity of confessions to police officers and other evidence, and requirements
for bail, as if all were required by Resolution 1373, but without explaining
why it considered any of those provisions obligatory. Nor do these re-
ports discuss in any comparable detail India’s domestic or international
human rights obligations, or any measures that India may have taken to
ensure that its antiterrorism laws comply with those obligations.

Similarly, when inquiring about the training programs that India
has in place to ensure the effectiveness of the “executive machinery” to
prevent and suppress the financing of terrorist acts, the CTC seem not to
have shown interest in whether such training programs also address the
need to monitor and ensure compliance by these entities with human
rights norms. In providing this information to the CTC in its fourth
report, India accordingly offered no details about the steps it takes to
train its personnel to protect human rights in the use of this “executive
machinery.”

More recently, the Security Council has clarified, in Resolutions 1456,
1566, and 1624, that attention to human rights must indeed play a cen-
tral role in the antiterrorism initiatives required by Resolution 1373. To
its credit, the CTC has made a sustained effort since its creation to engage
in dialogue with OHCHR and other international institutions charged
with ensuring compliance with human rights obligations. Successive High
Commissioners for Human Rights and others with expertise in human
rights issues have met with the CTC to convey their perspectives on how
the CTC should increase its attentiveness to human rights issues. In addi-

302. HRW, H.EAR No EVIL, supra note 292, at 8.
303. S.C. Res. 1456, supra note 273, ¶ 5 (Jan. 20, 2003); S.C. Res. 1566, supra note 273,
tion, the U.N. Human Rights Committee has been briefed by the CTC’s legal expert and has been afforded an opportunity to convey its perspectives directly to the CTC. Since its earliest days the CTC also has made efforts to ensure that its work is sufficiently transparent to permit outside institutions both to monitor and critique the compliance reports submitted by member states as well as to evaluate the work processes of the CTC itself.

The CTC also has taken additional measures to incorporate the human rights mandate of Resolution 1456 into its work more directly than it had previously. Letters sent by the CTC to states since May 2003 have incorporated the language in Resolution 1456 reminding states that they must ensure that their antiterrorism measures comply with international human rights, refugee, and humanitarian law. And the CTC has committed to establish a regular liaison between the Counter-Terrorism Executive Directorate, which was newly established by Resolution 1566, and OHCHR.

At least to date, however, these efforts have failed to address the fundamental barrier to sufficient incorporation of human rights considerations into the CTC’s work—namely, the CTC’s own failure to take sufficient ownership of international human rights obligations as an integral part of its mandate under Resolution 1373. As the Secretary General and others have frequently noted, “[u]pholding human rights is not merely compatible with a successful counterterrorism strategy,” but rather is an “essential element” in any successful effort to combat terrorism.304 As it continues to monitor states’ compliance with Resolution 1373, and the Council’s subsequent clarifications of that resolution in Resolutions 1456, 1566, and 1624, the CTC should ensure not simply that those efforts do not interfere with fundamental rights, but rather that they affirmatively integrate human rights standards as a central element necessary to ensure success in the campaign against terrorism.

VIII. CONCLUSION AND RECOMMENDATIONS

Terrorism, which itself represents an attack on human rights that governments have an obligation to combat, is a complicated, serious, and difficult problem to address. When responding to terrorism, however, democratic governments must fully protect human rights to advance both the rule of law and long-term security itself, since violations of human rights often plant the seeds for future acts of terrorist violence. Unfortunately, in much of the former British empire, including India,

304. Secretary-General, Global Strategy, supra note 294, at 5; see also Secretary-General, In Larger Freedom, supra note 294, ¶ 140.
postcolonial governments have all too often instead maintained and built upon the more authoritarian aspects of the colonial legacy in their emergency, antiterrorism, and other security laws. Especially in recent years, the U.N. Security Council has to some extent facilitated this disregard for human rights by failing to require states to take their international human rights obligations seriously when implementing their antiterrorism obligations under Resolution 1373.

In recent years, however, India has taken several positive steps, repealing POTA and seeking to transform the police and criminal justice institutions that it inherited from the British. Following the recent bomb blasts in Mumbai, the Indian government wisely chose not to reenact new draconian legislation to replace POTA. We welcome and urge the Indian government to maintain this position, even as it seeks to upgrade its intelligence and investigative capacity to more effectively prevent acts of terrorism and hold perpetrators accountable. Independent India’s constitutional tradition is a proud one, and in combating a threat of terrorism that is among the most serious in the world, a durable, enduring, and ever-improving commitment by India to protecting fundamental rights can serve as an important international example. In order to protect human rights and advance both the rule of law and long-term security even more effectively, we offer a number of recommendations as the basis for ongoing, continued dialogue.

A. To the Government of India

1. Repeal all provisions in UAPA raising human rights concerns, and ensure that all antiterrorism and other security laws contain provisions for tighter administrative and judicial oversight of investigative and prosecutorial decision-making, and transparency in that decision-making, to ensure nationwide uniformity and adherence to fundamental rights:

   • Fully implement and enforce all decisions by the central POTA review committees that pending POTA cases which lack prima facie evidence for prosecution should be deemed withdrawn.

   • Establish central government review committees similar to those established upon repeal of POTA to review and dispose of all pending TADA prosecutions, and with a comparable, one-year deadline to dispose of those cases.

   • Establish mandatory nationwide guidelines and standards for investigative and prosecutorial decisions under central security laws by both the central and state governments.
Consider eliminating or restricting the authority of state governments to independently investigate and prosecute violations of central government security laws, limiting enforcement of those laws to the central government or to state government institutions subject to central government oversight and control.

If state authority to enforce central security laws remains, ensure greater central government oversight and review of state prosecution decision-making under those laws, through requirements such as central government authorization before investigations or prosecutions are initiated and authority for the central government to terminate or take over state investigations and prosecutions that are not proceeding in a manner consistent with central government guidelines and standards.

Narrow the definitions of substantive terrorism-related offenses under UAPA to eliminate vagueness and ensure adequate notice of the conduct being criminalized.

Ensure full judicial review of all executive decisions, including the decision to designate “terrorist organisations” under UAPA.

Compile, maintain, and publicly disclose statistics concerning prosecution and detention under all central and state security laws that are disaggregated by religion, caste, and tribal status, in order to facilitate accountability and oversight for arbitrary and selective enforcement.

2. Improve the mechanisms available for citizens to seek redress and hold government officials accountable for human rights abuses:

- Protect and provide security to lawyers and other human rights defenders from threats and intimidation, and prosecute all officials and other individuals making such threats or harm to human rights defenders.
- Eliminate provisions for official immunity in UAPA and other security laws, and eliminate the requirement of prior government consent before prosecution of government officials.
- Remove the restrictions upon the NHRC’s authority to investigate directly complaints of human rights violations by the armed forces and complaints of violations that arise prior to the current one-year limitations period.
- Encourage full implementation of the Protection of Human Rights Act of 1993 with the establishment of state-level hu-
man rights commissions and district-level human rights courts in all states.

3. Work with state governments, international institutions, and civil society to develop and implement reforms to the state police forces, including as appropriate the recommendations of the National Police Commission, and immediately implement such reforms in the centrally-controlled police forces of Delhi and other union territories:

- Ensure independence of the police in their functional decision-making from improper political influence.
- Ensure that effective mechanisms are in place to hold police accountable for corruption and violations of fundamental rights.
- Work to eliminate discrimination within the police on the basis of religion, caste, or tribal status and to increase diversity within the police forces.
- Establish independent review mechanisms involving judges, lawyers and other citizens to monitor and fully implement the guidelines for arrest and detention articulated by the NHRC and required by the Supreme Court in *D.K. Basu v. State of West Bengal*, A.I.R. 1997 S.C. 610, 623:
  - Police officers who arrest and interrogate suspects should wear clear identification;
  - Arresting officers should prepare an arrest memo signed by the suspect and a witness providing the time and date of arrest;
  - Since arrested individuals are entitled to have a friend or relative informed of the place of detention as soon as practicable, arrested persons should be informed of this right immediately;
  - Details of the arrest, including the arresting officers, should be kept in a diary at the place of detention;
  - The arrested person should be examined for injuries at the time of the arrest on request and have the injuries recorded;
  - The arrested person should be examined by a doctor every 48 hours during detention;
  - Copies of all arrest memos and inspection memos should be sent to the magistrate;
  - The arrested person should be permitted to meet with his or her lawyer during interrogation; and
A police control room should be established at all headquarters with a display showing the details of all arrested persons and their place of detention.

Establish independent review mechanisms involving civilians or judge and lawyers to monitor and fully implement the NHRC’s guidelines for investigating encounter killings by the police, and ensure that officials are prosecuted for encounter killings that are not committed in self-defense.

4. Work with state governments, international institutions, and civil society to develop and implement appropriate reforms to the criminal justice system:

- Improve the investigative capacity of the police, including training to improve the collection and analysis of physical evidence and investments in more effective facilities to analyze that evidence.
- Separate the prosecutorial function from the police, to ensure the independence and functional autonomy of prosecutorial decision-making.
- Expand the subordinate judiciary to include more judges.
- Implement administrative reforms to improve case management.
- Upgrade the capacity and experience levels of the subordinate judiciary.

5. Establish a commission, modeled on the National Police Commission, to review and recommend reforms to central and state preventive detention laws and the constitutional provisions governing preventive detention to ensure consistency with human rights standards.

6. Cooperate more fully with institutions responsible for monitoring and implementing compliance with international human rights standards:

- Ratify and withdraw reservations to the U.N. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment, ratify the First Optional Protocol to the International Covenant on Civil and Political Rights, and ensure that domestic legislation fully implements these and other international law obligations.
- Invite and encourage U.N. human rights bodies and experts to visit India and make recommendations to improve the com-
pliance of India’s antiterrorism laws and institutions with international human rights norms, including:

- Working Group on Arbitrary Detention,
- Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment,
- Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance
- Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions, and
- Special Rapporteur on the Independence of the Judiciary.

Include information on the practical application of India’s antiterrorism and security laws and institutions and their compliance with international human rights standards in India’s future reports to:

- the Human Rights Committee, on compliance with the International Covenant on Civil and Political Rights (fourth report overdue as of December 31, 2001),
- the U.N. Human Rights Council, as part of its universal periodic review process, and
- the Counter-Terrorism Committee of the U.N. Security Council, on compliance with Resolution 1373.

B. To the State Governments in India

1. Fully implement the central government legislation repealing POTA:

   - Comply promptly and fully with all decisions by the central POTA review committees that pending POTA cases lack of prima facie evidence to prosecute and should be deemed withdrawn.
   - Dismiss all remaining POTA charges, and if there is prima facie evidence against any defendants under ordinary criminal law, prosecute those individuals under ordinary criminal law instead of POTA.

2. Fully investigate and, as appropriate, prosecute or take disciplinary action against all state government officials who may be responsible for fundamental rights abuses, including:

   - Torture, cruel, inhuman, or degrading treatment, arbitrary or
false arrest, and arbitrary or illegal detention by law enforce-
ment officials, and

- Encounter killings by the police and other security forces and
  prosecute officials for any killings not justified by self-defense.

3. Repeal all state laws conferring extraordinary powers akin to those
in TADA and POTA in violation of domestic and international human
rights standards.

4. Work with central government, international institutions, and civil
society to develop and implement reforms to the state police forces, in-
cluding as appropriate the recommendations of the National Police
Commission, as discussed above.

5. Work with central government, international institutions, and civil
society to develop and implement appropriate reforms to the criminal
justice system, as discussed above.

C. To the United Nations

1. To the Security Council, Counter-Terrorism Committee, and Counter-
Terrorism Executive Directorate:

- Incorporate human rights considerations more openly and
directly into the process of monitoring member states’ compli-
ance with Resolutions 1373 and 1456:

  o Issue human rights-based detailed guidelines for states to
    follow when attempting to comply with Resolutions 1373
    and 1456.
  
  o Explicitly require states to submit information concerning
    the practical application of the antiterrorism laws and insti-
tutions covered by Resolution 1373 and their compliance with
    international human rights law obligations.
  
  o Recruit specialized personnel with human rights expertise
    and coordinate with OHCHR to evaluate states’ reports to
    the CTC to determine whether their laws and institutions
    comply with international human rights law obligations.
  
  o Incorporate human rights considerations into the process
    of facilitating technical assistance for states implementing
    the requirements of Resolution 1373.

- Build upon the CTC’s existing efforts to promote transpar-
ency concerning states’ compliance with Resolutions 1373 and 1456 by making public the CTC’s substantive follow-up communications and inquiries to states about their reports to the CTC.

2. To the Office of the High Commission for Human Rights
   • Coordinate with the CTC to incorporate human rights considerations into the CTC’s efforts to monitor states’ compliance with the requirements of Resolutions 1373 and 1456.

3. To the Human Rights Council
   • As part of the universal periodic review process, evaluate the consistency of states’ antiterrorism laws and institutions with international human rights law obligations.

September 2006
APPENDIX

Acknowledgments and Chronology of Meetings

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Thursday, October 23, 2003

New York

- Colin Gonsalves, Senior Advocate and Convenor, Human Rights Law Network
- Jean Berman, International Senior Lawyers Project

Thursday, January 22, 2004

Delhi

- Colin Gonsalves, Senior Advocate and Convenor, Human Rights Law Network
- Preeti Verma, Advocate and Director, Human Rights Law Network

Thursday, March 31, 2004

Delhi

- Colin Gonsalves, Senior Advocate and Convenor, Human Rights Law Network
Monday, January 17, 2005
Delhi
• Colin Gonsalves, Senior Advocate and Convenor, Human Rights Law Network
• Amarjit Singh Chandhiok, Senior Advocate and President, Delhi High Court Bar Association
• Members of the Delhi High Court Bar Association

Tuesday, January 18, 2005
Hyderabad
• Jeevan Kumar, Human Rights Forum
• Members of the Hyderabad Criminal Court Bar Association
• K.G. Kannabiran, Senior Advocate and President, People’s Union for Civil Liberties
• K. Balagopal, Senior Advocate and Member of Human Rights Forum
• Members of Human Rights Forum

Wednesday, January 19, 2005
Hyderabad
• G. Haragopal, Professor and Coordinator, Human Rights Programme, Department of Political Science, University of Hyderabad

Thursday, January 20, 2005
Chennai
• John Vincent, Advocate and State Law Officer, People’s Watch Tamil Nadu
• D. Geetha, Advocate, Human Rights Law Network–Chennai
• R. Diwakaran, Advocate, Human Rights Law Network–Chennai
• K. Chandru, Senior Advocate

Delhi
• Sushil Kumar, Senior Advocate
• Nitya Ramakrishnan, Senior Advocate
• S. Muralidar, Senior Advocate and Member, Bar Council of India
HUMAN RIGHTS, TERRORISM AND SECURITY LAWS IN INDIA

Friday, January 21, 2005
Chennai
- P.T. Perumal, Advocate
- S. Jayakumar, Special Public Prosecutor for POTA Cases, Government of Tamil Nadu
- V. Suresh, Advocate, People’s Union for Civil Liberties
- D. Nagasaila, Advocate, People’s Union for Civil Liberties

Delhi
- Indira Jaising, Senior Advocate and Director, Women’s Rights Initiative, Lawyer’s Collective

Saturday, January 22, 2005
Ahmedabad
- Mukul Sinha, Senior Advocate and Founder of Jan Sangharsh Manch
- Zakia Jowher, Senior Fellow, Action Aid International-India
- Members of Jan Sangharsh Manch
- Members of Jan Andolan

Monday, January 24, 2005
Delhi
- Ashok Chand, Deputy Commissioner, Special Cell, Delhi Police
- Rajindar Sachar, Chief Justice (retired), Delhi High Court, and former President, People’s Union for Civil Liberties
- Gopal Subramanium, Senior Advocate and Special Public Prosecutor
- Shanti Bhushan, Senior Advocate and Former Law Minister of India
- Ram Jethmalani, Senior Advocate, Member of Parliament, and former Law Minister of India

Tuesday, January 25, 2005
Delhi
- Usha Mehra, Chief Justice (retired), Delhi High Court, and Chair, POTA Review Committee
- Ravi Nair, Executive Director, South Asia Human Rights Documentation Centre (with his colleagues, Ateesh Chanda, Rineeta Naik, Adam Smith, and Gareth Sweeney)
Thursday, January 27, 2005
Delhi
• P.C. Sharma, Member, National Human Rights Commission, and former Director, Central Bureau of Investigation
• Ajit Bharihoke, Registrar (Law), National Human Rights Commission
• Soli Sorabjee, Senior Advocate and former Attorney General of India

Friday, January 28, 2005
Delhi
• Shivraj Patil, Home Minister of India
• H.R. Bharadwaj, Law Minister of India
• Y. K. Sabharwal, Justice, Supreme Court of India

Tuesday, February 1, 2005
Delhi
• Nitya Ramakrishnan, Senior Advocate

Friday, June 10, 2005
New York
• V. Suresh, Advocate, People’s Union for Civil Liberties