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A Portrait of Asian Americans in the Law

ERIC CHUNG
SAMUEL DONG
XIAONAN APRIL HU
CHRISTINE KWON
GOODWIN LIU

YALE LAW SCHOOL
NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION
2017
Cover Images:

Legal staff at Poston Camp No. 1, Jan. 4, 1943. From left to right: Cap Tamura, Franklyn Sugijama, Tom Masuda, Elmer Yamamoto, Saburo Kido. Mr. Kido was the National President of the Japanese American Citizens League. Photographer: Francis Stewart. Poston, Arizona.

Congresswoman Patsy Mink. Photographer: Ralph Crane. © Time Inc.

You Chung Hong in New Chinatown, 1950s. The Huntington Library, Art Collections, and Botanical Gardens.

These images, drawn from a limited historical record, provide a few examples of pathbreaking Asian American lawyers. But they do not represent the full diversity of the forebears of today’s Asian American legal community.

Design: Isometric Studio
A Portrait of Asian Americans in the Law

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Executive Summary

Asian Americans are not new to the legal profession. But as we were reminded in 2015 when the California Supreme Court granted posthumous bar membership to a Chinese applicant denied admission in 1890,\(^1\) Asian Americans long faced exclusion from the legal profession, which rendered them subjects of the law but not its architects or practitioners. Today, Asian Americans make up a significant number in law schools and the legal profession writ large. Within the span of a generation, Asian Americans have become a visible presence in all sectors of the legal profession. They work as big firm lawyers, small firm or solo practitioners, government attorneys, corporate counsel, prosecutors, public defenders, judges, and more. The participation of Asian Americans in the legal profession has reached levels unthinkable just 30 years ago.

*\textit{A Portrait of Asian Americans in the Law} provides a systematic account of how Asian Americans are situated in the legal profession.*

Since 2000, the number of Asian American lawyers has grown from 20,000 to 53,000 today, comprising nearly 5% of all lawyers nationwide. Through wide-ranging data analysis, focus groups, and a national survey, we have assembled a comprehensive portrait documenting the rise of Asian Americans in the law, their distribution across practice settings, and the challenges they face in advancing to the top ranks of the profession. Our key findings include the following:

— Over the past three decades, the number of Asian Americans in law school has quadrupled to roughly 8,000, now comprising nearly 7% of total enrollment—the largest increase of any racial or ethnic group.

— But since 2009, Asian American first-year enrollment has fallen by 43%—the largest decline of any racial or ethnic group. The number of Asian Americans who entered law school in 2016 was the lowest in more than 20 years.

— After law school, Asian Americans are more likely than other racial or ethnic groups to work in law firms or business settings, and they are least likely to work in government. Few Asian Americans report that gaining a pathway into government or politics was a primary reason they attended law school.
Although Asian Americans comprised 10.3% of graduates of top-30 law schools in 2015, they comprised only 6.5% of all federal judicial law clerks.

For nearly two decades, Asian Americans have been the largest minority group in major law firms. But they have the highest attrition rates and the lowest ratio of partners to associates among all groups.

Although a significant number of Asian Americans serve as line prosecutors and government attorneys in some agencies and jurisdictions, their numbers dwindle at the supervisory level. In 2016, there were only 3 Asian Americans serving as United States Attorneys, and in 2014, there were only 4 Asian Americans serving as elected district attorneys nationwide.

Despite recent progress, only 25 Asian Americans serve as active Article III judges, comprising 3% of the federal judiciary. Asian Americans comprise 2% of state judges.

Many Asian American attorneys report experiencing inadequate access to mentors and contacts as a primary barrier to career advancement.

Many Asian American attorneys report implicit bias and stereotyped perceptions as obstacles to promotion and advancement. Among Asian American attorneys, women are more likely than men to report experiencing discrimination on the basis of race.

Asian American attorneys may experience mental health challenges at a higher rate than the legal profession as a whole.

Overall, Asian Americans have penetrated virtually every sector of the legal profession, but they are significantly underrepresented in the leadership ranks of law firms, government, and academia. Our study provides a descriptive account of this central finding, laying the groundwork for future exploration of causal mechanisms and potential solutions. Asian Americans have a firm foot in the door of the legal profession; the question now is how wide the door will swing open.
Background and Purpose of the Study

Over the past three decades, Asian Americans have dramatically increased their presence in the legal profession. In 1983, there were around 2,000 Asian American and Pacific Islander students enrolled across all ABA-accredited law schools, comprising less than 2% of total enrollment. By the mid-2000s, Asian American and Pacific Islander enrollment had increased more than five-fold to over 11,000 students. The number of Asian American lawyers has more than doubled since the year 2000. There are now over 53,000 lawyers who are Asian American, comprising 4.7% of all lawyers in America. The number of Asian American lawyers will keep growing for at least another decade as the size of the cohorts coming into the profession continues to exceed the size of the cohorts aging out.

FIGURE 1.
NUMBER OF ASIAN AMERICAN LAWYERS, 2000–2015

Although the American Bar Association and other groups regularly publish data on diversity in the legal profession, there has not yet been a comprehensive study of the career paths of Asian American law students and lawyers. Perhaps the closest effort is the wide-ranging longitudinal study, *After the JD*, which examines the career paths of a national cohort of nearly 4,000 lawyers, including more than 200 Asian Americans. Building on that study and others, this project—*A Portrait of Asian Americans in the Law* (the Portrait Project)—is an initial effort toward a systematic understanding of how Asian Americans are situated in the legal profession. We aim to describe the rise of Asian Americans in the law as well as the incentives and choices that influence their career paths. This information is intended to provide an empirical grounding for broader conversation within and beyond the Asian American community about the unique challenges and opportunities Asian Americans face in the legal profession and possible directions for reform.

We address five broad sets of questions:

1. How are Asian Americans distributed across law schools and the legal profession? In what sectors and positions are they overrepresented or underrepresented?

2. What factors influence how Asian Americans are distributed in the legal profession? What motivations or aspirations do Asian Americans have when they decide to attend law school? What incentives and obstacles—familial, societal, financial, or professional—affect the career decisions of Asian American law students and lawyers? What stereotypes do they face in navigating the legal profession? In what ways do they seek to counter or assimilate to those stereotypes?

3. Are Asian American lawyers satisfied with their careers? With what aspects of their careers are they most satisfied? Least satisfied? Does their career satisfaction vary over the course of their career?

4. To what extent have Asian Americans achieved positions of leadership that enable them not only to practice and implement the law, but also to shape the law and the legal profession?

5. To what extent do Asian American lawyers experience mental health challenges? How do they compare on this dimension to the profession as a whole? How often do Asian American lawyers seek treatment?
Study Design

Our study has three main components.

First, we canvassed and synthesized a broad array of existing information on Asian Americans in the law as well as literature on diversity in law schools and the legal profession. We also collected data through specific requests to government agencies and other organizations. This wide-ranging effort enabled us to assemble comprehensive statistics on Asian Americans in law schools and various sectors of the legal profession.

Second, we conducted 12 focus groups with 77 Asian American attorneys at the November 2015 convention of the National Asian Pacific American Bar Association (NAPABA) in New Orleans. We organized the focus groups by practice setting (large law firms, mid-size law firms, small firms, solo practitioners, nonprofit, government, corporate counsel, judges, prosecutors/public defenders, and students), with 4 to 12 participants in each group. The focus groups, each lasting one hour, used a standard script examining motivations for pursuing a legal career, experiences in law school, influences affecting career choices, obstacles to professional advancement, perceptions of discrimination, and the role of Asian American identity and affinity groups. Through the focus groups, we gained qualitative insights that informed our statistical findings and guided our construction of a survey instrument.

Third, we disseminated a 68-item survey (Portrait Project Survey or PPS) through NAPABA and affiliated networks to collect information from a larger population of Asian American lawyers. From each respondent, the survey gathered data on basic demographics, political participation, law school experiences, career choices and experiences in the legal profession, and future aspirations. Throughout this report, we have included quotes from both our focus group sessions and responses to our survey’s open-ended questions.
We received completed surveys from 606 respondents comprising:

— 57% women and 43% men;

— 11% under age 30, 41% ages 30–39, 30% ages 40–49, 12% ages 50–59, and 7% ages 60 and above;

— 66% born in the United States and 34% born abroad;

— 35% Chinese, 22% Korean, 11% Filipino, 11% Japanese, 10% Taiwanese, 8.3% Vietnamese, 7.8% Indian, and 6.5% other ethnicities;¹

— 26% with neither parent having a bachelor’s degree, 21% with both parents having graduate degrees, and 5.5% with at least one parent having a law degree;

— 61% Democrat, 9% Republican, 12% Independent, and 12% with no political party registration;² and

— 46% in law firm or solo practice, 25% in government, 20% corporate counsel, and 6% in nonprofit organizations or academia.

Fifteen respondents reported graduation dates of 2017 or later, indicating that they were law students at the time of the survey. We have omitted their responses to questions on current employment.¹⁰

Because there are no population-wide data on many of the characteristics above, it is unclear whether the survey respondents comprise a representative sample of all Asian American lawyers. But it is significant that our sample comprises roughly 1% of Asian American lawyers nationwide and generally reflects Asian American enrollment trends over the past four decades.¹¹ Given the size of our sample, we are able to make valid comparisons among survey respondents on a variety of dimensions. Our sample is likely skewed in one obvious way: Because we administered our survey through NAPABA and affiliated networks, and because respondents filled out the survey on a voluntary basis, it is likely that the respondents have a stronger interest in Asian American identity or more strongly value the opportunities afforded by Asian American affinity groups than the overall population of Asian American lawyers.

A brief word about terminology: We use the term “Asian American” and “Asian” in accordance with their usage by cited sources. The terms are not necessarily interchangeable and may reflect variation in the included subgroups. For example, the term “Asian” may include foreign nationals, and “Asian American” sometimes but not always includes Pacific Islanders. We also use the terms “Hispanic” and “Latino,” as well as “Black” and “African American,” in accordance with their usage by cited sources.
Over the past three decades, the enrollment of Asian Americans in law school has increased more than the enrollment of any other racial or ethnic group.

From a mere 1,962 students in 1983, Asian American enrollment rose to a peak of 11,327 in 2009 before declining to 8,975 in 2013. Whereas African American enrollment nearly doubled and Hispanic enrollment tripled from 1983 to 2013, Asian American enrollment more than quadrupled over that time. From 2003 to 2010, Asian Americans were the largest minority group attending law school, comprising 7% to 8% of total enrollment.12

“My parents were immigrant farmers; they got ripped off by people saying ‘the law didn’t allow this or that.’ I had to write documents for my parents, but I didn’t understand what I was doing. I felt motivated to understand this ‘thing’ that could be used against or for people.”

FIGURE 2.
ASIAN OR PACIFIC ISLANDER J.D. ENROLLMENT, 1971–2015

SOURCE: American Bar Association
But since 2009, the enrollment of Asian Americans has declined more than the enrollment of any other racial or ethnic group, and the number of Asian Americans who entered law school in 2016 was the lowest in more than 20 years.

From 2009 to 2016, whereas total first-year enrollment declined by 28%, Asian American first-year enrollment declined by 43%, from 3,987 to 2,263. The Asian American share of first-year enrollment in 2016, at 6.1%, was the lowest since 1997. Meanwhile, since 2009, first-year enrollment has declined by 34% among whites and by 14% among African Americans, while it has increased by 29% among Hispanics.\(^1\)

We found no simple relationship between the extent of Asian American enrollment decline and law school tier. It is possible that the 2008–2009 recession and instability in the legal employment market, together with the relative attractiveness of other professions, have disproportionately deterred qualified Asian Americans from pursuing law school. One recent study suggests that some schools are combating enrollment declines by recruiting more African American and Hispanic students,\(^1\) which may help account for the decline of Asian American enrollment relative to other minority enrollment (but does not explain why Asian American enrollment has declined more steeply than white enrollment). Notably, the decline in Asian American enrollment since 2009 has not yet reached a plateau. This recent trendline deserves attention and further research.

Asian Americans are disproportionately enrolled in higher-ranked schools.

In 2015, 34% of Asian American law students were enrolled in the top quintile of schools (the top 30 schools) ranked by *U.S. News & World Report*, compared to 21% of white students, 15% of African American students, and 14% of Hispanic students. More than half of Asian American law students in 2015 attended a law school in the top two quintiles.\(^1\)
FIGURE 3.
MINORITY PERCENTAGE OF TOTAL J.D. ENROLLMENT BY TIER, 2015

SOURCE: American Bar Association; U.S. News & World Report

FIGURE 4.
DISTRIBUTION OF EACH RACIAL OR ETHNIC GROUP ACROSS TIERS, 2015

Very few Asian Americans report that one of their primary motivations for attending law school was to become influential or to gain a pathway into government or politics.

The motivations for attending law school that PPS respondents ranked as most significant were to develop a satisfying career, to challenge themselves intellectually, and to help individuals. Only 11% of PPS respondents indicated that one of their top three motivations for attending law school was to become influential; only 4.7% indicated that one of their top three motivations was to gain a pathway into government or politics. This is consistent with After the JD’s findings that Asians were less likely than other groups to indicate that an important reason they attended law school was to become influential and that Asians were far less likely than other groups to have considered politics as an alternative to a legal career. Only 14% of Asian respondents in the After the JD survey considered politics as an alternative career to law, compared to 34% of whites, 32% of blacks, and 27% of Hispanics.16

**FIGURE 5. TOP 3 REASONS FOR ATTENDING LAW SCHOOL**

Respondents were asked to rank how significant each of the ten listed factors was in motivating their decision to attend law school. This figure shows how many respondents ranked each factor as one of their top three motivators for choosing law school.

**SOURCE:** Portrait Project Survey
The percentage of Asian Americans serving as judicial clerks has been stagnant over the past two decades. In 1995, Asian Americans comprised 6.4% of federal clerks and 4.5% of state clerks. Twenty years later, that percentage is only up 0.1% for both federal and state clerks. Other minority groups have fared little better. African Americans made up 5.5% of federal clerks and 5.4% of state clerks in 1995 compared to 4.2% of federal clerks and 6.4% of state clerks in 2015. Hispanics comprised 3.4% of federal clerks and 2.1% of state clerks in 1995 compared to 3.5% of federal clerks and 4.6% of state clerks in 2015.

The share of judicial law clerks who are Asian American is markedly lower than the share of graduates from top schools who are Asian American. In 2015, Asian Americans comprised 10.3% of graduates from the top 30 schools ranked in the *U.S. News & World Report*. However, they accounted for only 6.5% of federal law clerks and 4.6% of state law clerks. The shares of federal clerkships going to African Americans as well as the shares of federal and state clerkships going to Hispanics likewise trail their respective shares among top-30 law school graduates. By contrast, whereas 58.2% of students from top-30 schools were white, they obtained 82.4% of all federal clerkships and 80.2% of all state clerkships.17

“I wish I could have found one or two people who would commit to mentoring me through law school, especially since there are no lawyers in my family or in my family’s immediate circle….I would have probably made much different choices with my career in the beginning had I known more about the industry.”
FIGURE 6.
TOP-30 LAW SCHOOL GRADUATES AND JUDICIAL CLERKS, 2015

SOURCE: American Bar Association; National Association for Law Placement; U.S. News & World Report

FIGURE 7.
MINORITY LAW CLERKS IN FEDERAL COURTS, 1993–2015

SOURCE: National Association for Law Placement
The likelihood of clerking is positively associated with having more than two mentors in law school.

In our survey, 30% of respondents who had more than two mentors in law school obtained a clerkship, compared to 19% of respondents with one or two mentors, 21% of respondents who sought mentors but had none, and 15% of respondents who did not seek or have mentors. Whereas 12% of respondents with more than two mentors obtained a federal appellate clerkship, the same was true of 4.6% of respondents with one or two mentors, 2.4% of respondents who sought mentors but had none, and 3.0% of respondents who did not seek or have mentors.

It is not clear from these data whether mentoring increases the likelihood of obtaining a clerkship or whether students who seek mentors, successfully or not, are better clerkship candidates. Both may be true. We note that although respondents who had one or two mentors do not differ much in their likelihood of clerking compared to those who had no mentors, the substantially higher likelihood of clerking among those with more than two mentors is suggestive. It is possible that students who find more than two mentors are especially strong clerkship candidates, and it is also possible that a multiplicity of mentors increases the likelihood of obtaining a clerkship. More research is needed to distinguish these hypotheses and their relative influence on outcomes.18

“My most important mentor was one of my law school professors. She taught me important research and writing skills and helped me develop my advocacy skills. She also wrote me letters of recommendation for my prior internships and my current job. She was, and continues to be, my biggest supporter, mentor and friend.”
Compared to other groups, Asians graduate from law school with the lowest level of debt and the highest average salaries.

The *After the JD* study found that the average law school debt for Asians was $66,254, compared to $70,993 for whites, $72,875 for Blacks, and $73,258 for Hispanics.\(^9\) Fourteen percent of Asians graduated with no debt, compared to 19% of whites, 6% of Blacks, and 5% of Hispanics.\(^10\) Two years after bar admission, the mean salary was $96,000 for Asians, compared to $82,000 for whites, $79,000 for Blacks, and $77,000 for Hispanics and Native Americans.\(^21\)

**FIGURE 9.**
**MEAN LAW SCHOOL DEBT AND SALARIES, 2002**

SOURCE: After the JD

<table>
<thead>
<tr>
<th></th>
<th>ASIAN</th>
<th>BLACK</th>
<th>HISPANIC</th>
<th>WHITE</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>MEAN LAW SCHOOL DEBT</strong></td>
<td>$66,254</td>
<td>$72,875</td>
<td>$73,258</td>
<td>$70,993</td>
</tr>
<tr>
<td><strong>MEAN SALARIES 2 YEARS AFTER BAR ADMISSION</strong></td>
<td>$96,000</td>
<td>$79,000</td>
<td>$77,000</td>
<td>$82,000</td>
</tr>
</tbody>
</table>

In the initial years after bar admission, Asians are more likely than other groups, except whites, to work in private law firms or other business settings, and they are the least likely to work in government.

In the *After the JD* sample, 70% of Asians worked in law firms or business settings two years after bar admission, compared to 72% of whites, 52% of Blacks, and 58% of Hispanics.\(^22\) By contrast, 14% of Asians worked in government, compared to 16% of whites, 27% of Blacks, and 21% of Hispanics.\(^23\)

In those initial years, Asians report the lowest level of satisfaction with their decision to become a lawyer.

According to *After the JD*, Asian American respondents averaged about a 3.8 out of 5 on career satisfaction compared to Hispanic respondents, who averaged 3.9 out of 5, and black respondents, who had the highest satisfaction scores and averaged 4.3 out of 5.\(^24\) *After the JD* reports that Asians were more likely than all other groups to report a desire for more or better training, more or better mentoring, greater opportunity to shape decisions, and less pressure to bill.\(^25\)
FIGURE 10.
JOBS 2 YEARS AFTER BAR ADMISSION, 2002

SOURCE: After the JD
For nearly 20 years, Asian Americans have been the largest minority group at major law firms.26

In the National Association for Law Placement’s 2016 report on major U.S. law firms, Asians comprised 7.0% of attorneys, whereas Hispanics comprised 3.3% and African Americans comprised 2.9%.27 Law360’s survey of over 300 firms found that in 2015, Asian Americans comprised 6.5% of U.S.-based attorneys, whereas Hispanics comprised 3.4% and African Americans comprised 2.9%.28 A 2015 survey of 225 law firms by Vault and the Minority Corporate Counsel Association (Vault/MCCA) reported that Asian Americans comprised 11.4% of associates and 13.8% of summer associates, African Americans or Blacks comprised 4.22% of associates and 6.97% of summer associates, and Hispanics or Latinos comprised 4.77% of associates and 5.47% of summer associates.29

Asian Americans have the highest ratio of associates to partners of any racial or ethnic group, and this has been true for more than a decade.30

In 2015, the ratio of associates to partners in the 225 firms surveyed by Vault/MCCA was 3.70 for Asian Americans, compared to 2.22 for African Americans or Blacks, 1.92 for Hispanics or Latinos, and 0.86 for whites.31 Law360’s survey of 289 firms similarly reported that in 2014 the ratio of non-partners to partners was 3.59 for Asian Americans, 2.37 for Blacks, 1.89 for Hispanics, and 0.98 for whites.32

We do not address whether these data reflect differences in the age distribution of attorneys belonging to each group. It is possible that the high ratio of associates to partners for Asian Americans is partly a function of how recently this group has entered the legal profession in substantial numbers. At the same time, as discussed below, Asian Americans have high attrition rates in law firms and reported significant obstacles to career advancement in our survey.
FIGURE 11
RATIO OF ASSOCIATES TO PARTNERS, 2015

SOURCE: Minority Corporate Counsel Association & Vault Law Firm Diversity Database

Compared to their numbers within the overall law firm population, Asian Americans are less well represented than other groups at the management level.

Although Asian Americans comprised 7.05% of all attorneys in the Vault/MCCA survey of 2015 data, they held 2.09% of seats on executive management committees, 2.32% of seats on partner review committees, and 3.78% of seats on associate review committees. African Americans, Hispanics, and whites were better represented in these leadership roles relative to their respective numbers in the overall firm population.

Among Asian Americans, although women outnumber men among law firm associates, men outnumber women by almost twofold at the partner level.

In the Vault/MCCA survey of 2014 data, 56% of Asian American associates were women, while 36% of Asian American partners were women. Among Blacks or African Americans, 58% of associates were women and 37% of partners were women, and among Hispanics or Latinos, 48% of associates were women and 30% of partners were women. The ratio of men to women at the partner rank is less skewed among minority groups; across all groups, male partners outnumber female partners by more than three to one. But there are signs of change: Among the 104 Asian Americans promoted to partner in the 2014 survey, 58 were women and 46 were men.
The attrition rate for Asian Americans, as for other minority groups, is disproportionately high.

Whereas Asian Americans, Blacks or African Americans, and Hispanics or Latinos comprised 6.7%, 3.1%, and 3.5% of all attorneys, respectively, in the Vault/MCCA 2014 survey, they comprised 8.9%, 4.9%, and 4.3% of attorneys, respectively, who left their firms that year.\(^3\) Vault/MCCA’s 2015 survey revealed that 14% of Asian American attorneys left their firms that year, compared to 16% of Blacks or African Americans, 11% of Hispanics or Latinos, and 10% of whites/Caucasians.\(^3\) According to After the ID, the number of Asian Americans working in firms with over 100 attorneys declined by 68% over the decade from 2 to 12 years after bar admission, compared to a 61% decline among Blacks, a 44% decline among Hispanics, and a 53% decline among whites.\(^4\)
MAJOR FINDINGS

Prosecutors and Public Defenders

In some jurisdictions, significant numbers of Asian Americans serve as line prosecutors.

— In 2014, among 5,508 Assistant U.S. Attorneys nationwide, 5.2% were Asian, 8.0% were Black or African American, and 5.2% were Latino.42

— In 2015, among 2,996 full-time line prosecutors in county district attorney’s offices throughout California, 12.6% were Asian or Pacific Islander, 5.6% were Black, and 9.1% were Latino.43 Asians comprise nearly 15% of the California population.44

— In 2016, among 429 staff attorneys in the Manhattan District Attorney’s office, 8.6% were Asian, 10% were Black or African American, and 6.1% were Hispanic or Latino.45 Asians comprise nearly 13% of the Manhattan population.46

— In California, women significantly outnumber men among line prosecutors who are Asian or Pacific Islander.47 The same is true for Black or African Americans, and the opposite is true for whites.48 In the Manhattan District Attorney’s office, women significantly outnumber men among line prosecutors for all three of these groups.49

The number of Asian Americans dwindles at the supervisory level and is vanishingly small among United States Attorneys and elected district attorneys.

— Among the 94 United States Attorneys in office in 2016, there were 3 Asian Americans: one in Hawai‘i, one in Guam and the Northern Mariana Islands, and one in the Southern District of New York.50

— In 2015, among the 769 full-time supervisory prosecutors in California, 9.0% were Asian American or Pacific Islander, 6.6% were Black, and 11% were Latino.51 Among 52 counties composing nearly 98% of California’s population, there was only 1 elected district attorney who is Asian or Pacific Islander.52
In 2016, among the 161 supervising attorneys in the Manhattan District Attorney’s office, 4.3% were Asian American, 7.5% were Black or African American, and 6.2% were Hispanic or Latino.\textsuperscript{53}

A 2014 survey identified only 10 Asian Americans among the 2,437 elected prosecutors in the nation.\textsuperscript{54} We independently sought to identify these 10 and, in so doing, found that only 4 of the 10 are actually Asian American. By comparison, the survey identified 64 African American and 41 Hispanic elected prosecutors. The vast majority of elected prosecutors in America—95% in the survey—are white.

There are no systematic data currently available on the demographics of public defenders.

Although the U.S. Department of Justice conducts an ongoing Census of Public Defender Offices, this data collection does not include attorney demographics.\textsuperscript{55} As of 2016, the Justice Department was developing a survey instrument to collect information on public defenders nationwide, including demographic data.\textsuperscript{56}
Over the past decade, Asian Americans have occupied an increasing share of attorney positions in the federal government.

According to 2015 data compiled by the U.S. Equal Employment Opportunity Commission, Asians comprised 6.7% of attorneys in 68 federal agencies, whereas Blacks comprised 8.3% and Hispanics or Latinos 4.8%. Men outnumbered women by a ratio of 1.3 to 1 among white attorneys, while women outnumbered men by a ratio of 1.4 to 1 among Asians, by 1.9 to 1 among Blacks, and by 1.1 to 1 among Hispanics or Latinos. In 6 of the agencies with the largest numbers of attorneys, the share of attorneys who are Asian increased from 4.2% in 2005 to 6.4% in 2015.

The U.S. Department of Justice, the leading federal agency responsible for setting law enforcement and legal policy priorities, has the largest number of attorneys but a low percentage of Asian Americans compared to other agencies.

In 2015, Asian Americans comprised 5.7% of attorneys in the U.S. Department of Justice and 5.5% of attorneys in the Executive Office of the U.S. Attorneys, compared to 7.5% across all other agencies. Among senior level positions in the Justice Department as of 2011, the percentage of Asians was even smaller at 3.1%. 
The percentage of attorneys who are Asian American dwindles at higher ranks of government.

In 2016, Asians made up 9.0% of GS-11 federal government attorneys, but only 5.6% of GS-15 attorneys (the highest civil service pay grade) and 5.2% of non-GS attorneys with annual salaries over $150,000.61
The number of Asian Americans on the federal bench has increased over the past decade but remains small.

Only 37 Asian Americans have ever served as Article III judges. Among them, 25 are currently serving as active judges—19 as federal district judges, 5 as federal circuit judges, and 1 as a judge on the U.S. Court of International Trade—comprising 3.4% of the 744 authorized active federal judges, compared to 536 (72%) for whites, 106 (14.2%) for African Americans, and 79 (10.6%) for Hispanics. In 2016, there were 47 Asians serving as federal administrative law judges, less than 3% of the total.
Asian Americans are less well represented among state judges than among federal judges.

In 2014, Asian Americans made up approximately 2% of 10,295 surveyed judges serving on a state appellate court or general jurisdiction trial court, compared to 82.7% for white non-Hispanics, 7.9% for African-Americans, and 5.2% for Hispanics. Forty states did not have a single Asian American judge serving on a state appellate court, and 21 states did not have a single Asian American judge serving on a state appellate court or general jurisdiction trial court. Asian Americans made up less than 1% of state appellate or general jurisdiction trial judges in another 12 states, including several with significant Asian American populations (e.g., Illinois, Maryland, New York, and Virginia). Among the 334 state high court judges in the nation, we are aware of 8 Asian Americans.

**FIGURE 15.**
STATE JUDGES, 2014

source: The Gavel Gap: Who Sits in Judgment on State Courts?

Hawai‘i and California have the most Asian American judges.

Over three-quarters of Hawai‘i’s state judges are Asian American. In 2015, 108 (or 6.5%) of California’s 1,674 judges were Asian, 110 (or 6.6%) were African American, and 165 (or 9.9%) were Hispanic or Latino. In 2014, only 22 (or 1.8%) of New York’s 1,250 judges were Asian American.
Although Asian Americans have made inroads into legal academia, their numbers remain low.

In 2013, among the 8,848 full-time law teachers in the United States, 383 (or 4.3%) were Asian American. Among the 6,907 professors in tenured or tenure-track positions, 310 (or 4.5%) were Asian American. By comparison, there were only 61 tenure-track or tenured Asian American law professors in 1992.

There are few Asian Americans in the ranks of academic administration and leadership.

In 2013, there were 3 Asian Americans among the 202 law deans in the country and 18 Asian Americans among the 709 associate or vice deans.
Among PPS respondents, those who work as judges, prosecutors, or government lawyers expressed the greatest satisfaction with their work, while those who work in law firms expressed the least satisfaction.

This is consistent with other research finding that lawyers in public service jobs report greater happiness and less alcohol consumption than lawyers in more lucrative private practices.\(^7\)

**FIGURE 17. SATISFACTION WITH CHOOSING LAW**

We asked respondents how satisfied they were with their current employment. This figure shows the percentage of respondents per type of employment who answered “very satisfied.”

**SOURCE:** Portrait Project Survey
A majority of PPS respondents (58%) indicated they wished to change practice settings, citing as their top reasons a desire for a better match with their interests, higher salary, work-life balance, and geographic location.

The lowest-ranked reasons were to participate or gain influence in the political process, prestige, to address the needs of underserved communities, and to advance issues or values important to the respondent. Over two-thirds of PPS respondents who work in law firms, compared to half of those who work in government and 39% of those who work as corporate counsel, said they would like to change practice settings.

Among PPS respondents who wished to change practice settings, the settings most often identified as desirable were corporate counsel, the federal government, and nonprofit/public interest organizations.

A substantial number of respondents indicated interest in state government, academia, or the judiciary. Few respondents indicated interest in becoming a prosecutor or public defender/legal aid worker.
MAJOR FINDINGS

Obstacles to Professional Advancement

When asked to identify barriers to career advancement, PPS respondents most often cited inadequate access to mentors and contacts, lack of formal leadership training programs, and lack of recognition for their work.

Respondents who work in law firms were more likely than other respondents to indicate inadequate access to mentors and contacts, colleagues’ lack of willingness to work together, and insufficiency of good assignments as significant barriers to career advancement.

Women were more likely than men to report experiencing barriers to career advancement.

Among PPS respondents, 88% of women reported at least one barrier to career advancement, compared to 79% of men. The gender disparity was more pronounced for certain obstacles: 37% of women, compared to 24% of men, cited family demands, including caring for children or aging parents, and 41% of women, compared to 31% of men, cited lack of recognition for their work. These disparities are statistically significant and persist after controlling for age, ethnicity, immigrant generation, sexual orientation, and law firm employment.

“As an APA litigator, I believe that I am not selected for certain assignments (e.g., oral argument) because I am not seen as having enough ‘presence’ to effectively advocate in court.”

“Being an Asian woman added another layer as men were often more interested in expressing themselves as romantic prospects as opposed to colleagues.”
When asked what behaviors they exhibited in the workplace in considering their racial identity and possible discrimination, PPS respondents most commonly reported they “sometimes” sought out association with other Asian Americans for support.

On average, PPS respondents reported they did not often try to downplay traits that may bring attention to their Asian identity or avoid association with other Asian Americans. This is unsurprising since we conducted the survey through NAPABA and affiliated networks. Asian Americans who join these organizations are presumably inclined to embrace their racial identity, and they have voluntarily sought to associate with other Asian Americans for support and networking. Women were more likely than men to seek association with other Asian Americans and to seek association with other (non-Asian) identity groups for support.
Most PPS respondents who reported serious mental health challenges did not seek help or treatment.

Among respondents who reported mild, moderate, or severe panic attacks, alcoholism, drug abuse, or eating disorders, or who reported moderate or severe anxiety, depression, or insomnia, 68% did not seek help or treatment. Women were more likely than men to seek help during their careers.

“Treatment is not a cure. Success is the cure.”

FIGURE 25.
SEEKING PROFESSIONAL HELP OR TREATMENT

source: Portrait Project Survey
Discussion

Our study documents the dramatic rise of Asian Americans in the legal profession over the past generation.

From the mid-1990s to the mid-2000s, Asian American enrollment in law school grew faster than the enrollment of any other group. Since 2009, however, Asian American enrollment has dropped more precipitously than any other group. This recent decline deserves attention and careful study.

As a variety of indicators show, Asian Americans have a foot in the door in virtually every sector of the legal profession. Now the question is how wide the door will swing open. In earlier times, the influence of Asian Americans in the legal profession was largely constrained by their small numbers. Today, the constraints increasingly have to do with career pathways, incentives, and barriers to promotion. It is possible that age and lack of seniority account for some of the underrepresentation of Asian Americans at the top ranks of the profession. But our study suggests other challenges as well.

The barriers to career advancement facing Asian Americans lawyers are often subtle and not explicit, but they are nonetheless real.

One challenge has to do with perceptions. It is striking that across all sectors of the legal profession, Asian Americans report being perceived as hardworking, responsible, logical, and careful, but to a far lesser extent as empathetic, creative, extroverted, and assertive. Whereas Asian Americans are regarded as having the “hard skills” required for lawyerly competence, they are regarded as lacking many important “soft skills.”

A related challenge has to do with our finding that inadequate access to mentors and contacts was the most frequently cited barrier to career advancement among survey respondents. To the extent that mentoring and networking are conditioned by perceptions of sociability and conformity with cultural norms, Asian Americans may face particular obstacles rooted in stereotyped perceptions of being foreign, socially awkward, or unassimilable.

Several of our findings appear consistent with these challenges. Asian American law students are disproportionately enrolled in top-ranked schools, which reflects their strong performance on a key admission criterion, the Law School Admission Test (LSAT).
But Asian Americans do not obtain judicial clerkships in numbers comparable to their enrollment at highly ranked schools, and they are significantly underrepresented in the partner and leadership ranks of law firms. These selection processes—clerkships and law firm promotion—involves not only objective measures of ability, but also access to mentorship and subjective criteria such as likability, gravitas, leadership potential, and other opaque or amorphous factors that may inform whom judges, faculty members, or law firm partners regard as their protégés. Asian Americans appear to face significant obstacles in these settings.

Another challenge has to do with the gravitation of Asian Americans toward business settings and law firm jobs, and the relative dearth of Asian Americans in various government, nonprofit, and academic settings. The skew toward law firm jobs may account for the higher salaries but also lower career satisfaction and higher frequency of mental health problems observed among Asian American attorneys. It is notable that few Asian Americans appear motivated to pursue law in order to gain a pathway into government or politics. This finding is consistent with the paucity of Asian American lawyers in the highest ranks of government, especially among top prosecutors and judges. Greater penetration into these public leadership roles is critical if the increasing number of Asian American attorneys is to translate into increasing influence of Asian Americans in the legal profession and throughout society. A major challenge is to encourage Asian American lawyers to pursue public service roles and to eliminate barriers for those who do.

Finally, although this study offers a comprehensive portrait of Asian Americans in the legal profession, further data collection and research are needed to deepen our understanding of observed disparities and potential interventions.

For example, to what extent is the high associate-to-partner ratio among Asian Americans at major law firms attributable to barriers to advancement versus attractive off-ramps to other opportunities? Is the number of Asian Americans obtaining judicial clerkships more heavily influenced by the hiring decisions of judges or by faculty mentorship and advising? What can be done to position more Asian Americans to serve as judges and top prosecutors? These are among the questions that merit additional research. Going forward, a key challenge is to enhance the portrait we have painted here in broad strokes with more focused and ongoing study of diversity in the legal profession by sector and by state or region. Such study is essential to raising awareness and motivating behavioral and institutional change.
30. See generally Minorities & Women, supra note 26.
31. MINORITY CORP. COUNSEL ASS’N & VAULT, supra note 29, at II–12.
33. MINORITY CORP. COUNSEL ASS’N & VAULT, supra note 29, at II, 23 tbl.1.
34. Id.
36. Id.
37. Id. at 41, tbl.5.
38. Id. at 11, 29 tbl.2.
39. Id. at 30 tbl.2; see also N.Y.C. BAR, DIVERSITY BENCHMARKING REPORT 2015, at 13 (2015) (surveying 75 law firms and reporting that among attorneys who left firms in 2015, 12% were Asian/Pacific Islander, 4% were Black/African American, and 5% were Hispanic).
40. MINORITY CORP. COUNSEL ASS’N & VAULT, supra note 29, at 10.
41. AID3 REPORT, supra note 7, at 74 tbl.9.
43. Id. at 26–28, 36–38. Data on line prosecutors were tabulated by subtracting counts of “Full-Time Supervisory Prosecutors” from counts of “Total Full-Time Prosecutors.” See id. at 25 (survey form).
47. See supra note 43.
48. Id.
49. The New York County District Attorney’s Office—New York, New York, Lawyer Demographics, supra note 45.
50. This information was provided by the National Asian Pacific American Bar Association and only reflects Senate-confirmed United States Attorneys.
51. BIES ET AL., supra note 42, at 38.
52. Id. at 44–47. The report contacted the District Attorney’s Office for each of California’s 58 counties and ultimately obtained data for all but 6 of them. Id. at 8.
53. The New York County District Attorney’s Office—New York, New York, Lawyer Demographics, supra note 45.
57. We obtained these data from the U.S. Equal Employment Opportunity Commission through a Freedom of Information Act request for the number of employees in federal legal occupations as categorized by the U.S. Office of Personnel and Management. These occupations included general attorneys, law clerks, administrative law judges, and adjudicators of hearings and appeals.
58. The 6 agencies reviewed were the U.S. Department of Justice, U.S. Securities and Exchange Commission, National Labor Relations Board, Federal Trade Commission, Federal Communications Commission, and U.S. Equal Employment Opportunity Commission. We decided to calculate numbers for these 6 agencies because they had the most attorneys among federal agencies in which the Equal Employment Opportunity Commission listed “general attorney” as a major occupation. Given the variations in total workforce size of many agencies, note that there remain some agencies not included in this review with more general attorneys than these 6 agencies. OFFICE OF FED. OPERATIONS, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, ANNUAL REPORT ON THE FEDERAL WORK FORCE (2005), https://www.eeoc.gov/federal/reports/fsp2005/fsp2005.pdf; see also supra note 57.
59. See supra note 57. “Attorneys” here refer to any of the aforementioned legal occupations as categorized by the Office of Personnel and Management.
62. History of the Federal Judiciary: Diversity on the Bench, FED. JUD. CTR., https://www.fjc.gov/history/judges/search/advanced-search; see also Active Asian-American & Pacific Islanders Article III Judges, MINORITY CORP. COUNSEL ASS’N (July 31, 2015), http://www.mcca.com/index.cfm?fineaction=pageviewPage&pageID=2586&modeID=1. A number of judges identify with multiple racial or ethnic groups. As a result, the sum of each particular racial or ethnic group’s percentage of the total number of judges exceeds 100 percent when added together.
63. Diversity Cubes, supra note 61.
64. These data were provided by two researchers who created a database of and recently published a study on the demographics of judges in state courts. See TRACEY E. GEORGE & ALBERT H. YOON, AM. CONST. SOC’T, THE GAVEL GAP, WHO SITS IN JUDGMENT ON STATE COURTS? (2016), http://gavelgap.org/pdf/gavel-gap-report.pdf. They are Tani Cantil-Sakauye (California), Ming Chin (California), Goodwin Liu (California), Sabrina McKenna (Hawaii), Lynn Nakamoto (Oregon), Judith Nakamura (New Mexico), Paula Nakayama (Hawaii), and Mary Yu (Washington). We obtained the total number of state high court judges from a tabulation by the California Supreme Court library.
65. See supra note 64.
69. Id.
71. Law School Staff: Fall 2013, supra note 69.
73. The percentages on perceptions of overt and implicit discrimination do not add up to 100 because of rounding.
75. Id. at 51.

Discussion
79. Id. at 51.

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Eric Chung
is a 2017 graduate of Yale Law School, where he was a Paul & Daisy Soros Fellow for New Americans and a student director of the Education Adequacy Project and the Supreme Court Advocacy Clinic.

Samuel Dong
is a 2016–17 Postgraduate Associate at Yale Law School, conducting empirical research under the supervision of Professor Ian Ayres.

Xiaonan April Hu
is a 2017 graduate of Yale Law School, where she worked as a Diversity Representative for the Office of Admissions and served on the executive board of the Asian Pacific American Law Students Association.

Christine Kwon
is a 2017 graduate of Yale Law School, where she served on the executive boards of the Asian Pacific American Law Students Association and the Yale Law Journal.

Goodwin Liu
is an Associate Justice of the California Supreme Court. Before joining the court in 2011, he was Professor of Law and served as Associate Dean at the UC Berkeley School of Law (Boalt Hall).
Corporate social responsibility and employee volunteerism: What do the best companies do?

Cynthia S. Cycyota *,1, Claudia J. Ferrante 1, Jessica M. Schroeder 1

United States Air Force Academy, HQ USAFA/DFM, 2354 Fairchild Drive, Suite 6H-130, USAF Academy, CO 80840, U.S.A.

KEYWORDS
Corporate Social Responsibility; Employee volunteerism; Stakeholder engagement; Corporate reputation; Community involvement; Organizational Citizenship Behavior

Abstract Employee volunteerism as a practice of corporate social responsibility aids corporations by strengthening employee satisfaction and retention internally and by strengthening corporate reputations and connections with stakeholders externally. Of particular interest are the specific practices and procedures used by companies to encourage and support volunteer activities of their employees. We reviewed publicly available documents of Fortune’s 100 Best Companies to Work For ranking to gain insight into how these best companies practice employee volunteerism and whether they link employee volunteerism to their corporate social responsibility strategy. We propose a connection of the position and importance of employee volunteerism in the corporate practices of social responsibility. Our findings suggest that many highly regarded companies specifically link employee volunteerism to their corporate social responsibility strategy. These companies also utilize similar practices to encourage and support employee volunteerism. We highlight the practices that managers could consider to support their corporate social responsibility efforts and offer several suggestions for future consideration.

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1. Volunteerism: inside and outside the organization

Volunteerism by the employees of corporations is an important factor in the process of attracting and retaining employees as well as a strategic component of corporate reputation and performance. Many companies, including 90% of Fortune 500 companies, have employee volunteer programs that support and/or subsidize employee volunteer activities and community outreach on company time.

* Corresponding author
E-mail addresses: cynthia.cycyota@usafa.edu (C.S. Cycyota), claudia.ferrante@usafa.edu (C.J. Ferrante), jessica.schroeder@usafa.edu (J.M. Schroeder)

The views expressed in this article are those of the authors and do not necessarily reflect the official policy or position of the United States Air Force Academy, the Air Force, the Department of Defense, or the U.S. Government.
Volunteerism is an opportunity for firms to address the demands of stakeholders, contribute to the concerns and interests of the community, provide opportunities for employee engagement, and encourage senior organizational leaders to imbed socially responsible behavior within core businesses (Clarke & Butcher, 2006). Employers’ support for employee volunteerism is both noteworthy and compelling, and it gives rise to additional questions. Wilson (2000) identified the lack of attention paid to the contextual effects of volunteering, to include the impact of community, organizational, and regional characteristics on the decision that an individual employee makes to volunteer. It is also necessary to consider the relevant dynamics between the actions and attitudes of the employee who advocates for policies that facilitate employer-sponsored volunteerism and the attitudes and reactions of the internal and external audience. Research has clearly called for more attention to be paid to the business context and the broader environment in which employer sponsored activities are occurring (Van der Voort, Glac, & Meijs, 2009) along with the many facets of corporate social responsibility (CSR) (Janssen, Sen, & Bhattacharya, 2015). We contend that the range of potential benefit from employee volunteerism has not been fully explored and that the specific links between employee volunteerism and a firm’s corporate social responsibility strategy have not been studied.

Employee volunteerism is often linked to CSR; however, we believe volunteerism should be considered a distinct and unique component of CSR that can provide the opportunity to link the macro (external) efforts of a corporation to strengthen corporate reputation and create community-based support with the micro (internal) benefits of employee engagement and satisfaction in a multi-level approach (Aguinis & Glavas, 2012). Taken together, these elements represent a well-balanced public sphere wherein employees are able to actively support public concerns while simultaneously improving their reputation and outreach of the company (Andrews, 1987).

The compelling questions that we ask are how corporations deploy the concept of employee volunteerism and if they intentionally include it as part of their CSR strategy. We explore the employee volunteerism practices of highly regarded firms and examine the relationship between the explicit company association of employee volunteerism with CSR and how the companies convey those practices to stakeholders. We review the volunteerism literature related to our questions, explore the internal and external benefits companies reap by encouraging employee volunteerism, and explain our methodology and results. We conclude with outlining several opportunities for organizations interested in starting or improving their employee volunteer programs (EVPs).

2. What do we know about employee volunteerism?

2.1. Definition of employee volunteerism

We define employee volunteerism in a manner consistent with McGlone, Spain, and McGlone (2011): the deliberate and active giving of one’s time, energy, skills, or talents to a charitable organization without receiving payment in return. Employer-supported volunteerism, in particular, is defined as the active support, through a variety of means, for employees volunteering with charitable organizations. We have not deemed monetary or material charitable contributions as acts of volunteerism. This is consistent with the three key components of individual or private volunteerism laid out by Rodell (2013):

- It is an active giving of time and/or skills rather than more passive support through monetary donations (Musick & Wilson, 2008);
- It is a planned activity as opposed to a reactive act of helping (Clary & Snyder, 1999);
- It occurs in the context of a volunteer or charitable organization (Musick & Wilson, 2008).

2.2. Internal benefits of employee volunteerism: Motivation, skill development, and satisfaction

Understanding the motivations and attitudes behind volunteerism is integral to sustaining an organizational culture conducive to CSR engagement. At the employee level, motivations found for volunteering include altruism, meaningfulness, organizational citizenship, role variety, relational and social task characteristics, networking, and personal reasons. One motive, altruism, was noted as significant by more than 50% of the participants in a study conducted by Pajo and Lee (2011). Similarly, Pelzoa and Hassay (2006) found that volunteerism is motivated by one or more of three main desires: to help one’s employer, to help others, and to help oneself.

The attitudes and motivations toward CSR are especially evident in the Millennial Generation,
defined as the population born between 1980 and 2000 (McGlone et al., 2011). The Cone 2006 Millennial Case Study revealed that 61% of Millennials feel personally responsible for making a difference in the world, and the majority (79%) want to work for a company that cares about how it contributes to society. In fact, 69% of Millennials would refuse to work for a company that is not socially responsible (Cone, 2008). The very act of corporations communicating how CSR is linked to an organization’s strategic plan impacts its ability to attract and keep members of the Millennial Generation as employees. McGlone et al. (2011) found students are more likely to want to work for a company after hearing its top executives discuss how the firm integrated CSR into its strategic plan compared to their desire to do so before the presentation of this information. Peloza, Hudson, and Hassay (2009) found that employees’ egoistic and organizational citizenship behavior motives, as well as their attitudes toward volunteerism, were all positively related to employees’ attitudes toward participation in volunteer activities.

The impact of acquiring skills through volunteerism activities has been shown to spill over into the employee’s perception of his or her organizational job. Booth, Park, and Glomb (2009) determined that volunteer hours predict employee perceptions of skill acquisition, and such perceptions are positively related to perceptions of job success and employer recognition. In fact, an employee who reports the acquisition of a skill increases the likelihood of that report being recognized by the employer by 12%, and it also increases the likelihood of the employee feeling successful on the job by 43% (Booth et al., 2009). In addition, for every additional 100 volunteer hours, they found that the number of reported skills acquired increased by 17%.

Depleted task, social, and knowledge characteristics of jobs are a reality in many organizations, but volunteer project characteristics can compensate for these depleted job characteristics. Employee volunteer activities can be approached as a substitute for enriched jobs (Grant, 2012). Firms also reap the benefit of the new skills acquired by volunteers during volunteering opportunities. Research shows that employees’ hours of volunteering are positively related to an increase in skills acquired from those experiences (Booth et al., 2009), which employees can then reinvest in their regular work role. Other benefits of organizational volunteerism for the firm include increased efficiencies and morale/team building (Peloza & Hassay, 2006). In short, employees’ positive feelings (such as those related to recognition, success in the job, job enrichment, efficiency, and morale building) directly impact their satisfaction with the job and their organization.

2.3. External benefits of employee volunteerism: Reputation, profitability, and stakeholder engagement

Employer-supported volunteerism programs benefit not only the employee, but the corporation as well. Exploring the benefits of corporate-sponsored volunteerism to the firm by looking at the link between volunteerism and the firm’s reputation, profitability, and stakeholder engagement, proves essential to understanding the complete impact of volunteerism. Godfrey and Hatch (2007) argue that corporate investments in community involvement provide the impetus for firms building long-term loyalty, legitimacy, trust, or brand equity that, in turn, reinforce other strategic objectives of the firm.

Ameer and Othman (2012) found that companies, in certain activity sectors, that place emphasis on sustainability practices have higher financial performance measured by return on assets, profit before taxation, and cash flows compared to those without such commitments. Analyzing data from 2006–2010, Ameer and Othman (2012) found that the sales and revenue growth of the Global 100 Most Sustainable Corporations in the World (www.global100.org) was higher than control companies in the industrial sector. In the consumer discretionary and telecommunications sectors, the return on assets were higher for the Global 100 compared to control companies. The profit before taxes of the Global 100 sustainable was higher than the profit of control companies in the energy, health care, and materials sectors. Finally, the cash flow from operations was higher for the Global 100 in the materials sector compared to control companies (Ameer & Othman, 2012).

Employer-supported volunteering programs, when implemented successfully, have been shown to enhance a company’s legitimacy with both the wider public and its own employees (Liu & Ko, 2011). When companies were asked what they believed to be the top two goals of corporate-sponsored volunteerism, to “improve relations with the surrounding community” and to “help maintain a healthy community” were cited (Basil, Runte, Easwaramoorthy, & Barr, 2009). In short, a comparative advantage exists for firms that engage in ameliorating social problems over governments and nonprofits due to the intense marketplace competition existing in the private sector and the unique competencies developed as a result of operating within that environment (Hess, Rogovsky, & Dunfee, 2002).
2.4. CSR strategy

Early research on CSR suggested that CSR activities were typically considered organizational extras, akin to such things as the pet projects or philanthropies of founders or influential senior managers, that were not in any real way related to core organizational activities (Freeman, 1984). More recently, researchers have found inherent links between CSR activities and corporate goals such as enhancing corporate reputation (Ditlev-Simonsen, 2014), national competitiveness (Boulouta & Pitelis, 2014), and consumer perception of companies and/or products (Sohn, Han, & Lee, 2012). In fact, Chin, Hambrick, and Trevino (2103) report that the dynamic has now shifted radically to the point where organizational leaders are expected to be involved in and responsible for determining the CSR strategy for their firms.

Our review of the literature suggests that organizations do provide employee opportunities for volunteerism and consider the practices of sufficient importance to publicize them in various ways. This article explores two questions about employee volunteerism:

1. What are the strategies and tactical activities corporations use to support volunteer activities?

2. Are these employee volunteerism activities specifically linked to and considered an explicit part of the companies’ CSR strategy?

Our approach to answering these questions was to examine publicly available information about Fortune’s 100 Best Companies to Work For to gain insight into how highly regarded companies support employee volunteerism and link it to their CSR efforts.

3. Types of corporate support for employee volunteerism

Our first research question asks “What do the ‘Best Companies to Work For’ do to support employee volunteerism?” The literature on employee volunteerism reviewed above suggests that companies support or encourage employee volunteerism to respond to the needs of current employees, to attract highly qualified potential employees, and to respond to their communities. After considering a number of existing data sources, including the Fortune 100, Glassdoor, the Civic 50, and other published rankings, we selected the Fortune (2013) published ranking of the 100 Best Companies to Work For (hereafter, the 100 Best or Best Companies). This ranking was done by Great Places to Work based upon corporate applications and surveys of company employees using a trust index that measures the quality of relationships in the workplace and a cultural audit questionnaire that addresses the employee-management relationship. We believe that companies seeking to have engaged, happy, and trusting employees would be more likely to include employee volunteerism as a practice and, thus, would be the appropriate places to learn more about the best practices of such organizations.

Our review of the 100 Best found that, while all of the companies included some elements of employee volunteerism in their public disclosures, the types and levels of emphasis varied across the companies. One consistent theme was that all of the companies included employee volunteerism as part of reporting or discussions of corporate social responsibility.

We found six primary themes or areas through which companies discussed and encouraged employee volunteerism as part of their corporate social responsibility efforts: time allowances, community involvement, day of service events, skills-based volunteering or pro bono service provisions, nonprofit board services, and focused philanthropic areas. In Table 1, we list examples of companies that provided publicly available evidence of their participation in each area.

In Table 2, we provide examples of company-specific information about the company community involvement statements. Additional examples for all the categories are available from the authors.

4. Do companies connect CSR and employee volunteerism?

We were also interested in whether or not the companies specifically acknowledged the connection between employee volunteerism and corporate social responsibility in publicly available information. For each company, we reviewed the company website, annual report (if available electronically), and corporate social responsibility (or sustainability) report (if available) for indications of employee volunteerism practices. We found that nearly all of the Best Companies (97%) explicitly encourage and value employee volunteerism as evidenced by having a clear community emphasis statement stressing that the employees’ service in and support of their local communities were important corporate goals and part of their corporate social responsibility. In addition, 91% of
the companies viewed volunteerism as an obligation to the local community. Eighty-nine companies specified focus areas for employee volunteerism, though only 53 of these companies’ focus areas were related to their industry. The initial six themes we identified were consistently applied across the full set of the Best Companies.

5. CSR and the importance of employee volunteerism

Our studies provide evidence that employee volunteerism plays an inherent role in the CSR strategy of a majority of the Best Companies, though the specific practices used to support employee volunteerism vary. Figure 1 provides a framework of the contributions of volunteerism to a firm’s CSR strategy developed from our studies. The theoretic components related to the internal and external benefits of volunteerism and their impact on firms’ CSR strategies and the support practices used to achieve these benefits are consistent with the practices of the companies we studied.

Of particular interest in the themes that we explored was the fact that only a company’s efforts to link CSR with employee volunteerism was significantly correlated with a company’s rank in the 100 Best list (r = .24, p < .05). This correlation indicates that a company’s efforts to make this association increased with its numerical rank in the list; that is, companies lower on the list had made greater efforts. Specifically, we found that the companies in the latter part of the listing (51—100) placed greater emphasis on company time for volunteering, focused philanthropy, focus on local organization(s), and employee volunteerism as an obligation to the local community than those in the top 50 companies.

After thinking about why more practices were associated with the link between CSR and employee volunteerism in the companies in the bottom half of...
Table 2. Examples of companies’ volunteer efforts related to community involvement statements

<table>
<thead>
<tr>
<th>Company</th>
<th>Community Involvement Statements</th>
</tr>
</thead>
<tbody>
<tr>
<td>NetApp</td>
<td>“We are committed to being outstanding global corporate citizens by contributing time, talent, products, services and money to non-profit organizations and schools in the vicinity of major global NetApp employee population centers.”</td>
</tr>
<tr>
<td>Edward Jones</td>
<td>“We believe strongly in giving back to the communities in which we do business.”</td>
</tr>
<tr>
<td>Accenture</td>
<td>“With our core values at its heart, corporate citizenship is an ongoing journey for Accenture and we take thoughtful actions to bring positive change, for today and for the future. From Skills to Succeed to the environment, Accenture and our people do things the Accenture Way, creating long-term value for the communities where we live and work and, ultimately, increasing competitiveness for both business and the world as a whole.”</td>
</tr>
<tr>
<td>Ultimate Software</td>
<td>“As individuals and as corporate citizens, the people of Ultimate Software also work to make a difference in our community. We firmly believe in doing the right thing and making a difference, starting locally. That’s evidenced by our contributions of time and money to charitable organizations...”</td>
</tr>
<tr>
<td>Hasbro</td>
<td>“The mission behind our employee volunteer program is to ‘Make our Community Smile...’”</td>
</tr>
<tr>
<td>Goldman Sachs Group</td>
<td>“Our people and our capital are helping women, small business owners and the betterment of communities and the environment where we work and live.”</td>
</tr>
<tr>
<td>Starbucks</td>
<td>“Every Starbucks store is a part of a community, and we’re committed to strengthening neighborhoods wherever we do business. We believe in the power of the coffeehouse to bring people together. Our stores allow Starbucks partners (employees) and customers to connect and tap into shared passions to be catalysts for change. Throughout the year, our partners (employees) and customers dedicate their time and energy to create positive change in their local neighborhoods.”</td>
</tr>
<tr>
<td>Grainger</td>
<td>“Grainger is committed to building safe and productive communities and environments—especially where our team members and customers live and work.”</td>
</tr>
</tbody>
</table>

* Day of Service information obtained from company websites.

the list as compared to those in the top half, we speculate that these companies may still be working to develop their public image and reputation as CSR champions, while fewer practices are required for companies in the top half due to their established reputations and brand images already connected to CSR.

Paradoxically, we found that only 30% of the Best Companies practice intra-organizational volunteerism (i.e., philanthropic initiatives that are planned

Figure 1. Framework of the contributions of volunteerism to a firm’s CSR strategy.
or endorsed by the employer) through their day of service events, as these events often receive lots of media attention and are good ways to build a company’s reputation for CSR as well as for being a good neighbor in the local community. However, it is possible that many companies get more return on investment by encouraging employees to volunteer throughout the year in many different environments rather than to focus volunteer efforts on one particular day each year.

Another counterintuitive finding was that only one of the 13 nonprofit companies in the top 100 listing specifically linked employee volunteerism to their corporate social responsibility strategy. This may be because some or much of their work is done by unpaid volunteers, and an emphasis on employee volunteerism would create confusion in discussions. Alternatively, these organizations may consider volunteerism as an assumption that does not require discussion or disclosure.

6. Starting or improving employee volunteer programs

There are several excellent organizations that provide resources to help another organization begin or improve an EVP. Two of these are the Points of Light Corporate Institute and the Boston College Center for Corporate Citizenship (BC-CCC) (Boccandro, 2009). We summarize their recommendations and provide evidence from our study, as our review of the 100 Best indicates that these practices are being applied consistently across successful organizations.

6.1. Starting an EVP

The first step in starting an effective EVP is to assess employees’ volunteer interests, specific needs within the local community, and the organization’s goals and strategic priorities. As part of this study, we looked at whether or not the company was aligned with its industry, as well as with charitable organizations at the local and national level. We found evidence that the vast majority of companies on Fortune’s list exhibited alignment in one of these areas. Another mechanism which an organization can employ to determine alignment could include conducting surveys of employees and community members and reviewing company strategic documents. This would ultimately ensure a concerted effort that would integrate the organization’s core competencies, culture, and values; the interests and skills of the employees; and the needs within the surrounding community. Selecting activities that foster maximum employee engagement and broad-based enthusiasm in volunteer activities is an important benefit of any EVP and contributes toward increased morale, productivity, retention, and skills (Points of Light Corporate Institute, 2014). We found this to be particularly true in service organizations, such as accounting and consulting firms, where the volunteer programs encouraged skills-based volunteering such as pro bono hours and board service.

The second step in starting an EVP is to secure the internal support of top management for the program so that employee involvement is encouraged at all levels by company leadership. Highly visible and enthusiastic participation by members of the top management team in volunteer activities is especially valuable for new programs. We saw indications of the importance of top management support as many of the companies we researched provided evidence of employee volunteerism in their annual reports. Clear indicators of this support were the level of detail in the annual report describing the various measurements of volunteerism and the chief executives thanking employees for their volunteer efforts. Similarly, promoting strategic and collaborative partnerships with government, private actors, and non-profit organizations helps ensure external support for the program. Finally, a dedicated managerial position to not only champion the program and activities at all levels of the organization but to also ensure the appropriate level of organization, information distribution, and timely follow-up may benefit a company’s EVP.

The third step is for a company to develop program policies that involve employees at all levels of the organization, as well as metrics that assess the degree to which volunteer initiatives are meeting stated goals. We found evidence of formal company policies supporting employee volunteerism in place at many companies on Fortune’s list. In addition, the measurement of EVP programs was very evident from the available information on the company websites such as the number of hours employees volunteered and the number of organizations benefiting from employee volunteer efforts.

The fourth step is to ensure that the company takes time to collectively celebrate successes achieved through the EVP. Furthermore, a strong EVP program also includes publicizing the efforts and results of the program, both internally and externally (Points of Light Corporate Institute, 2014).

6.2. Improving your existing EVP

The success factors associated with effective EVPs offer important insights into improving an existing
program. One trend we discovered among the companies included on Fortune’s list was the limited disclosure of how the EVP was assessed. Many companies reported total volunteer hours, number of organizations assisted, or other measures. However, we did not find any specific or consistent means of reporting the impact of an EVP across companies, nor were the measurements tied to the stated goals of the programs. We recommend that companies clearly state the goals of the EVP and frequently report how they achieve these goals.

Another area for improvement centers around the organization and execution of the EVP to ensure it benefits employees with the development of additional skills or levels of responsibility, increases comradery within the organization, and instills a sense of meaningful contribution on behalf of the individuals participating. The program should also benefit the organization in significant ways such as increased community and stakeholder involvement, expansion of the organizational brand, and demonstration of corporate social responsibility. Our recommendation is that the EVP be designed and executed in a way that benefits the organization from the inside with employee motivation and engagement, as well as from the outside with improved reputation and stakeholder engagement.

Although we did not look in depth at companies not on Fortune’s list, there are non-corporate organizations that also facilitate and continually improve their employee volunteerism efforts. For example, military organizations, although nationally controlled, typically manage community volunteerism at a local or base level. Military members and government civilian employees often support local community causes such as running in races that support wounded soldiers, participating in community disaster relief operations, and facilitating science career days at local schools. Volunteerism is appreciated, respected, and valued in government and military organizations.

6.3. Caveats regarding EVPs

While there are numerous benefits of EVPs found in the companies on Fortune’s list, there are some cautionary factors that need to be taken into account. The initial investment in an EVP requires sufficient political and financial capital to ensure success. Additional considerations include the degree or lack of appropriate skill sets among employees, difficulties in communicating the exact nature of the program, and the limits to and scheduling details of time off for volunteering, as well as the importance of communicating that it is a voluntary activity versus mandatory participation which can create legal problems regarding the Fair Labor Standards Act (Grensing-Pophal, 2013). Another concern is the corporate liability for injury to employees or others during the volunteer time.

Care should also be taken to ensure that the specific type of employer support offered aligns with the support that employees actually need. For example, women are more likely to volunteer when forms of support ease their time constraints, such as flexible work hours and time off (MacPhail & Bowles, 2009). Employers need to be cognizant that all forms of support are not equal and that resources may be wasted when forms of support are not aligned with employee needs.

Furthermore, some volunteer issues may be politically, socially, or religiously controversial. This may create tension within the organization if volunteers are asked to participate in causes they do not support or with organizations to which they object. Such issues can be mitigated by establishing clear policies about the type of organizations the corporation will support through volunteering. It is also possible that some company volunteers may become overly involved with the entity that is the target of the volunteerism and devote more time than originally allotted. This is a particular problem with pro bono work if the scope of the volunteer work is not carefully defined. Although it is important to be aware of these caveats, the potential benefits that EVPs offer to employees, companies, and communities are not to be understated.

Employee volunteerism is an important part of an organization’s CSR efforts. But, in addition to providing a mechanism for socially responsible endeavors, employee volunteerism appears to positively contribute to a company’s internal relationship with its employees and its external relationship with a variety of important stakeholders. We found that some of the Best Companies strategically consider their volunteerism programs in interesting ways and may even undersell the value of volunteerism in public documents. It is our hope that future research on employee volunteerism will send a positive message about the value of volunteerism so that the number, size, and types of companies that use employee volunteer programs in their operations expand. Employee volunteerism is what the best companies do and is good for business—inside and out.

References


§ 290. Purposes of article.

1. This article shall be known as the "Human Rights Law".

2. It shall be deemed an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of this state, and in fulfillment of the provisions of the constitution of this state concerning civil rights.

3. The legislature hereby finds and declares that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants. A division in the executive department is hereby created to encourage programs designed to insure that every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the state; to encourage and promote the development and execution by all persons within the state of such state programs; to eliminate and prevent discrimination in employment, in places of public accommodation, resort or amusement, in educational institutions, in public services, in housing accommodations, in commercial space and in credit transactions and to take other actions against discrimination as herein provided; and the division established hereunder is hereby given general jurisdiction and power for such purposes.

§ 291. Equality of opportunity a civil right.

1. The opportunity to obtain employment without discrimination because of age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, marital status, or disability, is hereby recognized as and declared to be a civil right.

2. The opportunity to obtain education, the use of places of public accommodation and the ownership, use and occupancy of housing accommodations and commercial space without discrimination because of age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, marital status, or disability, as specified in section two hundred ninety six of this article, is hereby recognized as and declared to be a civil right.

3. The opportunity to obtain medical treatment of an infant prematurely born alive in the course of an abortion shall be the same as the rights of an infant born spontaneously.
§ 292. Definitions.

When used in this article:

1. The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

2. The term "employment agency" includes any person undertaking to procure employees or opportunities to work.

3. The term "labor organization" includes any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection in connection with employment.

4. The term "unlawful discriminatory practice" includes only those practices specified in sections two hundred ninety-six, two hundred ninety-six-a, two hundred ninety-six-c and two hundred ninety-six-d of this article.

[Effective until February 8, 2020:]

5. The term "employer" does not include any employer with fewer than four persons in his or her employ except as set forth in section two hundred ninety-six-b of this article, provided, however, that in the case of an action for discrimination based on sex pursuant to subdivision one of section two hundred ninety-six of this article, with respect to sexual harassment only, the term "employer" shall include all employers within the state.]

[Effective February 8, 2020:]

5. The term "employer" shall include all employers within the state.]

6. The term "employee" in this article does not include any individual employed by his or her parents, spouse or child, or in the domestic service of any person except as set forth in section two hundred ninety-six-b of this title.

7. The term "commissioner", unless a different meaning clearly appears from the context, means the state commissioner of human rights; and the term "division" means the state division of human rights created by this article.

8. The term "national origin" shall, for the purposes of this article, include "ancestry."

9. The term "place of public accommodation, resort or amusement" shall include, regardless of whether the owner or operator of such place is a state or local government entity or a private individual or entity, except as hereinafter specified, all places included in the meaning of such terms as: inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest, or restaurants, or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are
sold; ice cream parlors, confectionaries, soda fountains, and all stores where ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for consumption on the premises; wholesale and retail stores and establishments dealing with goods or services of any kind, dispensaries, clinics, hospitals, bath-houses, swimming pools, laundries and all other cleaning establishments, barber shops, beauty parlors, theatres, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiuums, shooting galleries, billiard and pool parlors; garages, all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour advisory services, agencies or bureaus; public halls, public rooms, public elevators, and any public areas of any building or structure. Such term shall not include kindergartens, primary and secondary schools, high schools, academies, colleges and universities, extension courses, and all educational institutions under the supervision of the regents of the state of New York; any such kindergarten, primary and secondary school, academy, college, university, professional school, extension course or other education facility, supported in whole or in part by public funds or by contributions solicited from the general public; or any institution, club or place of accommodation which proves that it is in its nature distinctly private. In no event shall an institution, club or place of accommodation be considered in its nature distinctly private if it has more than one hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of a nonmember for the furtherance of trade or business. An institution, club, or place of accommodation which is not deemed distinctly private pursuant to this subdivision may nevertheless apply such selective criteria as it chooses in the use of its facilities, in evaluating applicants for membership and in the conduct of its activities, so long as such selective criteria do not constitute discriminatory practices under this article or any other provision of law. For the purposes of this section, a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state or a religious corporation incorporated under the education law or the religious corporations law shall be deemed to be in its nature distinctly private.

No institution, club, organization or place of accommodation which sponsors or conducts any amateur athletic contest or sparring exhibition and advertises or bills such contest or exhibition as a New York state championship contest or uses the words "New York state" in its announcements shall be deemed a private exhibition within the meaning of this section.

10. The term "housing accommodation" includes any building, structure, or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied, as the home, residence or sleeping place of one or more human beings.

11. The term "publicly-assisted housing accommodations" shall include all housing accommodations within the state of New York in

(a) public housing,

(b) housing operated by housing companies under the supervision of the commissioner of housing,
(c) housing constructed after July first, nineteen hundred fifty, within the state of New York
(1) which is exempt in whole or in part from taxes levied by the state or any of its political subdivisions,
(2) which is constructed on land sold below cost by the state or any of its political subdivisions or any agency thereof, pursuant to the federal housing act of nineteen hundred forty-nine,
(3) which is constructed in whole or in part on property acquired or assembled by the state or any of its political subdivisions or any agency thereof through the power of condemnation or otherwise for the purpose of such construction, or
(4) for the acquisition, construction, repair or maintenance of which the state or any of its political subdivisions or any agency thereof supplies funds or other financial assistance,

(d) housing which is located in a multiple dwelling, the acquisition, construction, rehabilitation, repair or maintenance of which is, after July first, nineteen hundred fifty-five, financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions or any agency thereof, provided that such a housing accommodation shall be deemed to be publicly assisted only during the life of such loan and such guaranty or insurance; and

(e) housing which is offered for sale by a person who owns or otherwise controls the sale of ten or more housing accommodations located on land that is contiguous (exclusive of public streets), if (1) the acquisition, construction, rehabilitation, repair or maintenance of such housing accommodations is, after July first, nineteen hundred fifty-five, financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions or any agency thereof, provided that such a housing accommodation shall be deemed to be publicly assisted only during the life of such loan and guaranty or insurance, or (2) a commitment, issued by a government agency after July first, nineteen hundred fifty-five, is outstanding that acquisition of such housing accommodations may be financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions or any agency thereof.

12. The term "multiple dwelling", as herein used, means a dwelling which is occupied, as a rule, for permanent residence purposes and which is either sold, rented, leased, let or hired out, to be occupied as the residence or home of three or more families living independently of each other. A "multiple dwelling" shall not be deemed to include a hospital, convent, monastery, asylum or public institution, or a fireproof building used wholly for commercial purposes except for not more than one janitor's apartment and not more than one penthouse occupied by not more than two families. The term "family," as used herein, means either a person occupying a dwelling and maintaining a household, with not more than four boarders, roomers or lodgers, or two or more persons occupying a dwelling, living together and maintaining a common household, with not more than four boarders, roomers or lodgers. A "boarder," "roomer" or "lodger" residing with a family means a person living within the household who pays a consideration for such residence and does not occupy such space within the household as an incident of employment therein.
Within the context of this definition, the terms "multiple dwelling" and "multi-family dwelling" are interchangeable.

13. The term "commercial space" means any space in a building, structure, or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied for the manufacture, sale, resale, processing, reprocessing, displaying, storing, handling, garaging or distribution of personal property; and any space which is used or occupied, or is intended, arranged or designed to be used or occupied as a separate business or professional unit or office in any building, structure or portion thereof.

14. The term "real estate broker" means any person, firm or corporation who, for another and for a fee, commission or other valuable consideration, lists for sale, sells, at auction or otherwise, exchanges, buys or rents, or offers or attempts to negotiate a sale, at auction or otherwise, exchange, purchase or rental of an estate or interest in real estate, or collects or offers or attempts to collect rent for the use of real estate, or negotiates, or offers or attempts to negotiate, a loan secured or to be secured by a mortgage or other incumbrance upon or transfer of real estate. In the sale of lots pursuant to the provisions of article nine-a of the real property law, the term "real estate broker" shall also include any person, partnership, association or corporation employed by or on behalf of the owner or owners of lots or other parcels of real estate, at a stated salary, or upon a commission, or upon a salary and commission, or otherwise, to sell such real estate, or any parts thereof, in lots or other parcels, and who shall sell or exchange, or offer or attempt or agree to negotiate the sale or exchange, of any such lot or parcel of real estate.

15. The term "real estate salesperson" means a person employed by a licensed real estate broker to list for sale, sell or offer for sale, at auction or otherwise, to buy or offer to buy or to negotiate the purchase or sale or exchange of real estate, or to negotiate a loan on real estate, or to lease or rent or offer to lease, rent or place for rent any real estate, or who collects or offers or attempts to collect rent for the use of real estate for or in behalf of such real estate broker.

16. The term "necessary party" means any person who has such an interest in the subject matter of a proceeding under this article, or whose rights are so involved, that no complete and effective disposition can be made without his or her participation in the proceeding.

17. The term "parties to the proceeding" means the complainant, respondent, necessary parties and persons permitted to intervene as parties in a proceeding with respect to a complaint filed under this article.

18. The term "hearing examiner" means an employee of the division who shall be assigned for stated periods to no other work than the conduct of hearings under this article;

19. The term "discrimination" shall include segregation and separation.

20. The term "credit", when used in this article means the right conferred upon a person by a creditor to incur debt and defer its payment, whether or not any interest or finance charge is made for the exercise of this right.
21. The term "disability" means (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.

21-a. "Predisposing genetic characteristic" shall mean any inherited gene or chromosome, or alteration thereof, and determined by a genetic test or inferred from information derived from an individual or family member that is scientifically or medically believed to predispose an individual or the offspring of that individual to a disease or disability, or to be associated with a statistically significant increased risk of development of a physical or mental disease or disability.

21-b. "Genetic test" shall mean a test for determining the presence or absence of an inherited genetic characteristic in an individual, including tests of nucleic acids such as DNA, RNA and mitochondrial DNA, chromosomes or proteins in order to identify a predisposing genetic characteristic.

21-c. Blank

21-d. Blank

21-e. The term "reasonable accommodation" means actions taken which permit an employee, prospective employee or member with a disability, or pregnancy-related condition, to perform in a reasonable manner the activities involved in the job or occupation sought or held and include, but are not limited to, provision of an accessible worksite, acquisition or modification of equipment, support services for persons with impaired hearing or vision, job restructuring and modified work schedules; provided, however, that such actions do not impose an undue hardship on the business, program or enterprise of the entity from which action is requested.

21-f. The term "pregnancy-related condition" means a medical condition related to pregnancy or childbirth that inhibits the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques, including but not limited to lactation; provided, however, that in all provisions of this article dealing with employment, the term shall be limited to conditions which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held; and provided further, however, that pregnancy-related conditions shall be treated as temporary disabilities for the purposes of this article.

22. The term "creditor", when used in this article, means any person or financial institution which does business in this state and which extends credit or arranges for the extension of credit by others. The term creditor includes, but is not limited to, banks and trust companies, private bankers, foreign banking corporations and national banks, savings banks, licensed lenders,
savings and loan associations, credit unions, sales finance companies, insurance premium finance agencies, insurers, credit card issuers, mortgage brokers, mortgage companies, mortgage insurance corporations, wholesale and retail merchants and factors.

23. The term "credit reporting bureau", when used in this article, means any person doing business in this state who regularly makes credit reports, as such term is defined by subdivision e of section three hundred seventy-one of the general business law.

24. The term "regulated creditor", when used in this article, means any creditor, as herein defined, which has received its charter, license, or organization certificate, as the case may be, from the banking department or which is otherwise subject to the supervision of the banking department.

25. The term "superintendent", when used in this article, means the head of the banking department appointed pursuant to section twelve of the banking law.

26. The term "familial status", when used in this article, means:

(a) any person who is pregnant or has a child or is in the process of securing legal custody of any individual who has not attained the age of eighteen years, or

(b) one or more individuals (who have not attained the age of eighteen years) being domiciled with:
   (1) a parent or another person having legal custody of such individual or individuals, or
   (2) the designee of such parent.

27. The term "sexual orientation" means heterosexuality, homosexuality, bisexuality or asexuality, whether actual or perceived. However, nothing contained herein shall be construed to protect conduct otherwise proscribed by law.

28. The term "military status" when used in this article means a person's participation in the military service of the United States or the military service of the state, including but not limited to, the armed forces of the United States, the army national guard, the air national guard, the New York naval militia, the New York guard, and such additional forces as may be created by the federal or state government as authorized by law.

29. The term "reserve armed forces", when used in this article, means service other than permanent, full-time service in the military forces of the United States including but not limited to service in the United States Army Reserve, the United States Naval Reserve, the United States Marine Corps Reserve, the United States Air Force Reserve, or the United States Coast Guard Reserve.

30. The term "organized militia of the state", when used in this article, means service other than permanent, full-time service in the military forces of the state of New York including but not limited to the New York army national guard, the New York air national guard, the New York naval militia and the New York guard.
31. [repealed]
32. [repealed]
33. [repealed]

34. The term "victim of domestic violence" shall have the same meaning as is ascribed to such term by section four hundred fifty-nine-a of the social services law.

35. The term "gender identity or expression" means a person's actual or perceived gender-related identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender.

36. The term "lawful source of income" shall include, but not be limited to, child support, alimony, foster care subsidies, income derived from social security, or any form of federal, state, or local public assistance or housing assistance including, but not limited to, section 8 vouchers, or any other form of housing assistance payment or credit whether or not such income or credit is paid or attributed directly to a landlord, and any other forms of lawful income. The provisions of this subdivision shall not be construed to prohibit the use of criteria or qualifications of eligibility for the sale, rental, leasing or occupancy of publicly-assisted housing accommodations where such criteria or qualifications are required to comply with federal or state law, or are necessary to obtain the benefits of a federal or state program. A publicly assisted housing accommodation may include eligibility criteria in statements, advertisements, publications or applications, and may make inquiry or request information to the extent necessary to determine eligibility.

[There are two paragraphs 37 from the 2019 amendments.]

37. The term "race" shall, for the purposes of this article include traits historically associated with race, including but not limited to, hair texture and protective hairstyles.

38. The term "protective hairstyles" shall include, but not be limited to, such hairstyles as braids, locks, and twists.

[There are two paragraphs 37 from the 2019 amendments.]

37. The term "private employer" as used in section two hundred ninety-seven of this article shall include any person, company, corporation, labor organization or association. It shall not include the state or any local subdivision thereof, or any state or local department, agency, board or commission.

39. The term "educational institution" shall mean:
   (a) any education corporation or association which holds itself out to the public to be non-sectarian and exempt from taxation pursuant to the provisions of article four of the real property tax law; or
   [Effective December 6, 2021: (b) any for-profit entity that operates a college, university, licensed private career school or certified English as a second language school which holds itself out to the public to be non-sectarian and which is not exempt from taxation pursuant to the provisions of article four of the real property tax law; or]
(c) any public school, including any school district, board of cooperative educational services, public college or public university.

§ 293. Division of human rights.

1. There is hereby created in the executive department a division of human rights hereinafter in this article called the division. The head of such division shall be a commissioner hereinafter in this article called the commissioner, who shall be appointed by the governor, by and with the advice and consent of the senate and shall hold office at the pleasure of the governor. The commissioner shall be entitled to his or her expenses actually and necessarily incurred by him or her in the performance of his or her duties.

2. The commissioner may establish, consolidate, reorganize or abolish such bureaus and other organizational units within the division as he or she determines to be necessary for efficient operation.

§ 294. General policies of division.

The division shall formulate policies to effectuate the purposes of this article and may make recommendations to agencies and officers of the state or local subdivisions of government in aid of such policies and purposes.

§ 295. General powers and duties of division.

The division, by and through the commissioner or his or her duly authorized officer or employee, shall have the following functions, powers and duties:

1. To establish and maintain its principal office, and such other offices within the state as it may deem necessary.

2. To function at any place within the state.

3. To appoint such officers, attorneys, clerks and other employees and agents, consultants and special committees as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.

4. To obtain upon request and utilize the services of all governmental departments and agencies.
5. To adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions of this article, and the policies and practices of the division in connection therewith.

6. (a) To receive, investigate and pass upon complaints alleging violations of this article.

(b) Upon its own motion, to test and investigate and to make, sign and file complaints alleging violations of this article and to initiate investigations and studies to carry out the purposes of this article.

7. To hold hearings, to provide where appropriate for cross interrogatories, subpoena witnesses, impel their attendance, administer oaths, take the testimony of any person under oath, and in connection therewith, to require the production for examination of any books or papers relating to any matter under investigation or in question before the division. The division may make rules as to the issuance of subpoenas which may be issued by the division at any stage of any investigation or proceeding before it. In any such investigation or hearing, the commissioner, or an officer duly designated by the commissioner to conduct such investigation or hearing, may confer immunity in accordance with the provisions of section 50.20 of the criminal procedure law.

8. To create such advisory councils, local, regional or state wide, as in its judgment will aid in effectuating the purposes of this article and of section eleven of article one of the constitution of this state, and the division may empower them to study the problems of discrimination in all or specific fields of human relationships or in specific instances of discrimination because of age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability or marital status and make recommendations to the division for the development of policies and procedures in general and in specific instances. The advisory councils also shall disseminate information about the division's activities to organizations and individuals in their localities. Such advisory councils shall be composed of representative citizens, serving without pay, but with reimbursement for actual and necessary traveling expenses; and the division may make provision for technical and clerical assistance to such councils and for the expenses of such assistance.

9. To develop human rights plans and policies for the state and assist in their execution and to make investigations and studies appropriate to effectuate this article and to issue such publications and such results of investigations and research as in its judgment will tend to inform persons of the rights assured and remedies provided under this article, to promote good will and minimize or eliminate discrimination because of age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability or marital status.

10. To render each year to the governor and to the legislature a full written report of all its activities and of its recommendations.

11. To inquire into incidents of and conditions which may lead to tension and conflict among racial, religious and nationality groups and to take such action within the authority granted by law to the division, as may be designed to alleviate such conditions, tension and conflict.
12. To furnish any person with such technical assistance as the division deems appropriate to further compliance with the purposes or provisions of this article.

13. To promote the creation of human rights agencies by counties, cities, villages or towns in circumstances the division deems appropriate.

14. To accept, with the approval of the governor, as agent of the state, any grant, including federal grants, or any gift for any of the purposes of this article. Any moneys so received may be expended by the division to effectuate any purpose of this article, subject to the same limitations as to approval of expenditures and audit as are prescribed for state moneys appropriated for the purposes of this article.

15. To adopt an official seal.

16. To have concurrent jurisdiction with the New York city commission on human rights over the administration and enforcement of title C of chapter one of the administrative code of the city of New York.

§ 296. Unlawful discriminatory practices.

1. It shall be an unlawful discriminatory practice:

   (a) For an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or status as a victim of domestic violence, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

   (b) For an employment agency to discriminate against any individual because of age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, or marital status, in receiving, classifying, disposing or otherwise acting upon applications for its services or in referring an applicant or applicants to an employer or employers.

   (c) For a labor organization, because of the age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, or marital status of any individual, to exclude or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer.

   (d) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which
expresses directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, or marital status, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification; provided, however, that neither this paragraph nor any provision of this chapter or other law shall be construed to prohibit the department of civil service or the department of personnel of any city containing more than one county from requesting information from applicants for civil service examinations concerning any of the aforementioned characteristics, other than sexual orientation, for the purpose of conducting studies to identify and resolve possible problems in recruitment and testing of members of minority groups to insure the fairest possible and equal opportunities for employment in the civil service for all persons, regardless of age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, or marital status.

(e) For any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

(f) Nothing in this subdivision shall affect any restrictions upon the activities of persons licensed by the state liquor authority with respect to persons under twenty-one years of age.

(g) For an employer to compel an employee who is pregnant to take a leave of absence, unless the employee is prevented by such pregnancy from performing the activities involved in the job or occupation in a reasonable manner.

(h) For an employer, licensing agency, employment agency or labor organization to subject any individual to harassment because of an individual's age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, domestic violence victim status, or because the individual has opposed any practices forbidden under this article or because the individual has filed a complaint, testified or assisted in any proceeding under this article, regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims. Such harassment is an unlawful discriminatory practice when it subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership in one or more of these protected categories. The fact that such individual did not make a complaint about the harassment to such employer, licensing agency, employment agency or labor organization shall not be determinative of whether such employer, licensing agency, employment agency or labor organization shall be liable. Nothing in this section shall imply that an employee must demonstrate the existence of an individual to whom the employee's treatment must be compared. It shall be an affirmative defense to liability under this subdivision that the harassing conduct does not rise above the level of what a reasonable victim of discrimination with the same protected characteristic or characteristics would consider petty slights or trivial inconveniences.
1-a. It shall be an unlawful discriminatory practice for an employer, labor organization, employment agency or any joint labor-management committee controlling apprentice training programs:

(a) To select persons for an apprentice training program registered with the state of New York on any basis other than their qualifications, as determined by objective criteria which permit review;

(b) To deny to or withhold from any person because of race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, familial status, or marital status, the right to be admitted to or participate in a guidance program, an apprenticeship training program, on-the-job training program, executive training program, or other occupational training or retraining program;

(c) To discriminate against any person in his or her pursuit of such programs or to discriminate against such a person in the terms, conditions or privileges of such programs because of race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, familial status or marital status;

(d) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for such programs or to make any inquiry in connection with such program which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, familial status or marital status, or any intention to make any such limitation, specification or discrimination, unless based on a bona fide occupational qualification.

2. (a) It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability or marital status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof, including the extension of credit, or, directly or indirectly, to publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability or marital status, or that the patronage or custom thereat of any person of or purporting to be of any particular race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex or marital status, or having a disability is unwelcome, objectionable or not acceptable, desired or solicited.

(b) Nothing in this subdivision shall be construed to prevent the barring of any person, because of the sex of such person, from places of public accommodation, resort or amusement if the division grants an exemption based on bona fide considerations of public policy; nor shall this
subdivision apply to the rental of rooms in a housing accommodation which restricts such rental to individuals of one sex.

(c) For the purposes of paragraph (a) of this subdivision, "discriminatory practice" includes:

(i) a refusal to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford facilities, privileges, advantages or accommodations to individuals with disabilities, unless such person can demonstrate that making such modifications would fundamentally alter the nature of such facilities, privileges, advantages or accommodations;
(ii) a refusal to take such steps as may be necessary to ensure that no individual with a disability is excluded or denied services because of the absence of auxiliary aids and services, unless such person can demonstrate that taking such steps would fundamentally alter the nature of the facility, privilege, advantage or accommodation being offered or would result in an undue burden;
(iii) a refusal to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable;
(iv) where such person is a local or state government entity, a refusal to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal does not constitute an undue burden; except as set forth in paragraph (e) of this subdivision; nothing in this section would require a public entity to: necessarily make each of its existing facilities accessible to and usable by individuals with disabilities; take any action that would threaten or destroy the historical significance of an historic property; or to make structural changes in existing facilities where other methods are effective in achieving compliance with this section; and
(v) where such person can demonstrate that the removal of a barrier under subparagraph (iii) of this paragraph is not readily achievable, a failure to make such facilities, privileges, advantages or accommodations available through alternative methods if such methods are readily achievable.

(d) For the purposes of this subdivision:

(i) "Readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include:
   (A) the nature and cost of the action needed under this subdivision;
   (B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources or the impact otherwise of such action upon the operation of the facility;
(C) the overall financial resources of the place of public accommodation, resort or amusement; the overall size of the business of such a place with respect to the number of its employees; the number, type and location of its facilities; and
(D) the type of operation or operations of the place of public accommodation, resort or amusement, including the composition, structure and functions of the workforce of such place; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to such place.

(ii) "Auxiliary aids and services" include:
   (A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
   (B) qualified readers, taped texts or other effective methods of making visually delivered materials available to individuals with visual impairments;
   (C) acquisition or modification of equipment or devices; and
   (D) other similar services and actions.

(iii) "Undue burden" means significant difficulty or expense. In determining whether an action would result in an undue burden, factors to be considered shall include:
   (A) The nature and cost of the action needed under this article;
   (B) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;
   (C) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
   (D) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and
   (E) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

(iv) "Reasonable modifications in policies, practices, procedures" includes modification to permit the use of a service animal by a person with a disability, consistent with federal regulations implementing the Americans with Disabilities Act, Title III, at 28 CFR 36.302(c).

(e) Paragraphs (c) and (d) of this subdivision do not apply to any air carrier, the National Railroad Passenger Corporation, or public transportation facilities, vehicles or services owned, leased or operated by the state, a county, city, town or village, or any agency thereof, or by any public benefit corporation or authority.

2-a. It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of publicly-assisted housing accommodations or other person having the right of ownership or possession of or the right to rent or lease such accommodations:

   (a) To refuse to sell, rent or lease or otherwise to deny to or withhold from any person or group of persons such housing accommodations because of the race, creed, color, disability, national origin, sexual orientation, gender identity or expression, military status, age, sex, marital status,
order to recover such reasonable attorney's fees must make a motion requesting such fees and show that the action or proceeding brought was frivolous. In no case shall attorney's fees be awarded to the department, nor shall the department be liable to a prevailing party for attorney's fees. In order to find the action or proceeding to be frivolous, the superintendent must find in writing one or more of the following:

(a) the action or proceeding was commenced, used or continued in bad faith, solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another; or
(b) the action or proceeding was commenced or continued in bad faith without any reasonable basis and could not be supported by a good faith argument for an extension, modification or reversal of existing law. If the action or proceeding was promptly discontinued when the party or attorney learned or should have learned that the action or proceeding lacked such a reasonable basis, the court may find that the party or the attorney did not act in bad faith.

(4) require the regulated creditor to cease and desist from such unlawful discriminatory practices;

(5) require the regulated creditor to take such further affirmative action as will effectuate the purposes of this section, including, but not limited to, granting the credit which was the subject of the complaint.

c. If the superintendent finds that a violation of this section has occurred, the superintendent shall issue an order which shall do one or more of the following:

(1) impose a fine in an amount not to exceed ten thousand dollars for each violation, to be paid to the people of the state of New York;

(2) award compensatory damages to the person aggrieved by such violation;

(3) require the regulated creditor to cease and desist from such unlawful discriminatory practices;

(4) require the regulated creditor to take such further affirmative action as will effectuate the purposes of this section, including, but not limited to, granting the credit which was the subject of the complaint.

d. Any complainant, respondent or other person aggrieved by any order or final determination of the superintendent may obtain judicial review thereof.

8. Where the superintendent makes a determination that a regulated creditor has engaged in or is engaging in discriminatory practices, the superintendent is empowered to issue appropriate orders to such creditor pursuant to the banking law. Such orders may be issued without the necessity of a complaint being filed by an aggrieved person.

9. Whenever any creditor makes application to the superintendent or the banking board to take any action requiring consideration by the superintendent or such board of the public interest and
the needs and convenience thereof, or requiring a finding that the financial responsibility, experience, charter, and general fitness of the applicant, and of the members thereof if the applicant be a co-partnership or association, and of the officers and directors thereof if the applicant be a corporation, are such as to command the confidence of the community and to warrant belief that the business will be operated honestly, fairly, and efficiently, such creditor shall certify to the superintendent compliance with the provisions of this section. In the event that the records of the banking department show that such creditor has been found to be in violation of this section, such creditor shall describe what action has been taken with respect to its credit policies and procedures to remedy such violation or violations. The superintendent shall, in approving the foregoing applications and making the foregoing findings, give appropriate weight to compliance with this section.

10. Any complaint filed with the superintendent pursuant to this section shall be so filed within one year after the occurrence of the alleged unlawful discriminatory practice.

11. The superintendent is hereby empowered to promulgate rules and regulations hereunder to effectuate the purposes of this section.

12. The provisions of this section, as they relate to age, shall not apply to persons under the age of eighteen years.

§ 296-b. Unlawful discriminatory practices relating to domestic workers.

1. For the purposes of this section: "Domestic workers" shall have the meaning set forth in section two of the labor law.

2. It shall be an unlawful discriminatory practice for an employer to:

(a) Engage in unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature to a domestic worker when: (i) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (ii) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (iii) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or offensive working environment.

(b) Subject a domestic worker to unwelcome harassment as set out in paragraph (h) of subdivision 1 of section two hundred ninety-six of this article.

§ 296-c. Unlawful discriminatory practices relating to interns.

1. As used in this section, "Intern" means a person who performs work for an employer for the purpose of training under the following circumstances:

a. the employer is not committed to hire the person performing the work at the conclusion of the training period;
b. the employer and the person performing the work agree that the person performing the work is not entitled to wages for the work performed; and

c. the work performed:

(1) provides or supplements training that may enhance the employability of the intern;
(2) provides experience for the benefit of the person performing the work;
(3) does not displace regular employees; and
(4) is performed under the close supervision of existing staff.

2. It shall be an unlawful discriminatory practice for an employer to:

a. refuse to hire or employ or to bar or to discharge from internship an intern or to discriminate against such intern in terms, conditions or privileges of employment as an intern because of the intern's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status;

b. discriminate against an intern in receiving, classifying, disposing or otherwise acting upon applications for internships because of the intern's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status;

c. print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment as an intern or to make any inquiry in connection with prospective employment, which expresses directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status or domestic violence victim status, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification; provided, however, that neither this paragraph nor any provision of this chapter or other law shall be construed to prohibit the department of civil service or the department of personnel of any city containing more than one county from requesting information from applicants for civil service internships or examinations concerning any of the aforementioned characteristics, other than sexual orientation, for the purpose of conducting studies to identify and resolve possible problems in recruitment and testing of members of minority groups to insure the fairest possible and equal opportunities for employment in the civil service for all persons, regardless of age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status or domestic violence victim status;

d. to discharge, expel or otherwise discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article; or
e. to compel an intern who is pregnant to take a leave of absence, unless the intern is prevented by such pregnancy from performing the activities involved in the job or occupation in a reasonable manner.

3. It shall be an unlawful discriminatory practice for an employer to:

a. engage in unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature to an intern when:

   (1) submission to such conduct is made either explicitly or implicitly a term or condition of the intern's employment;
   (2) submission to or rejection of such conduct by the intern is used as the basis for employment decisions affecting such intern; or
   (3) such conduct has the purpose or effect of unreasonably interfering with the intern's work performance by creating an intimidating, hostile, or offensive working environment; or

b. subject an intern to unwelcome harassment based on age, sex, race, creed, color, sexual orientation, military status, disability, predisposing genetic characteristics, marital status, domestic violence victim status, or national origin, where such harassment has the purpose or effect of unreasonably interfering with the intern's work performance by creating an intimidating, hostile, or offensive working environment.

4. Nothing in this section shall affect any restrictions upon the activities of persons licensed by the state liquor authority with respect to persons under twenty-one years of age.

5. Nothing in this section shall create an employment relationship between an employer and an intern for the purposes of articles six, seven, eighteen or nineteen of the labor law.

§ 296-d. Unlawful discriminatory practices relating to non-employees. It shall be an unlawful discriminatory practice for an employer to permit unlawful discrimination against non-employees in its workplace. An employer may be held liable to a non-employee who is a contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace or who is an employee of such contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace, with respect to an unlawful discriminatory practice, when the employer, its agents or supervisors knew or should have known that such non-employee was subjected to an unlawful discriminatory practice in the employer's workplace, and the employer failed to take immediate and appropriate corrective action. In reviewing such cases involving non-employees, the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of the person who engaged in the unlawful discriminatory practice shall be considered.
§ 297. Procedure.

1. Any person claiming to be aggrieved by an unlawful discriminatory practice may, by himself or herself or his or her attorney-at-law, make, sign and file with the division a complaint in writing under oath or by declaration which shall state the name and address of the person alleged to have committed the unlawful discriminatory practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the division. The commissioner of labor or the attorney general, or the executive director of the justice center for the protection of people with special needs, or the division on its own motion may, in like manner, make, sign and file such complaint. In connection with the filing of such complaint, the attorney general is authorized to take proof, issue subpoenas and administer oaths in the manner provided in the civil practice law and rules. Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this article, may file with the division a verified complaint asking for assistance by conciliation or other remedial action.

2. a. After the filing of any complaint, the division shall promptly serve a copy thereof upon the respondent and all persons it deems to be necessary parties, and make prompt investigation in connection therewith. Within one hundred eighty days after a complaint is filed, the division shall determine whether it has jurisdiction and, if so, whether there is probable cause to believe that the person named in the complaint, hereinafter referred to as the respondent, has engaged or is engaging in an unlawful discriminatory practice. If it finds with respect to any respondent that it lacks jurisdiction or that probable cause does not exist, the commissioner shall issue and cause to be served on the complainant an order dismissing such allegations of the said complaint as to such respondent.

b. Notwithstanding the provisions of paragraph a of this subdivision, with respect to housing discrimination only, after the filing of any complaint, the division shall, within thirty days after receipt, serve a copy thereof upon the respondent and all persons it deems to be necessary parties, and make prompt investigation in connection therewith. Within one hundred days after a complaint is filed, the division shall determine whether it has jurisdiction and, if so, whether there is probable cause to believe that the person named in the complaint, hereinafter referred to as the respondent, has engaged or is engaging in an unlawful discriminatory practice. If it finds with respect to any respondent that it lacks jurisdiction or that probable cause does not exist, the commissioner shall issue and cause to be served on the complainant an order dismissing such allegations of the said complaint as to such respondent.

3. a. If in the judgment of the division the circumstances so warrant, it may, at any time after the filing of the complaint, endeavor to eliminate such unlawful discriminatory practice by conference, conciliation and persuasion. Each conciliation agreement shall include provisions requiring the respondent to refrain from the commission of unlawful discriminatory practices in the future and may contain such further provisions as may be agreed upon by the division, the complainant, and the respondent, including a provision for the entry in the supreme court in any county in the judicial district where the alleged unlawful discriminatory practice was committed, or where any respondent resides or maintains an office for the transaction of business, or where the housing accommodation, land or commercial space specified in the complaint is located, of a
consent decree embodying the terms of the conciliation agreement. The division shall not disclose what has transpired in the course of such endeavors.

b. If a conciliation agreement is entered into, the division shall issue an order embodying such agreement and serve a copy of such order upon all parties to the proceeding, and if a party to any such proceeding is a regulated creditor, the division shall forward a copy of the order embodying such agreement to the superintendent.

c. If the division finds that noticing the complaint for hearing would be undesirable, the division may, in its unreviewable discretion, at any time prior to a hearing before a hearing examiner, dismiss the complaint on the grounds of administrative convenience. However, in cases of housing discrimination only, an administrative convenience dismissal will not be rendered without the consent of the complainant. The division may, subject to judicial review, dismiss the complaint on the grounds of untimeliness if the complaint is untimely or on the grounds that the election of remedies is annulled.

4. a. Within two hundred seventy days after a complaint is filed, or within one hundred twenty days after the court has reversed and remanded an order of the division dismissing a complaint for lack of jurisdiction or for want of probable cause, unless the division has dismissed the complaint or issued an order stating the terms of a conciliation agreement not objected to by the complainant, the division shall cause to be issued and served a written notice, together with a copy of such complaint, as the same may have been amended, requiring the respondent or respondents to answer the charges of such complaint and appear at a public hearing before a hearing examiner at a time not less than five nor more than fifteen days after such service and at a place to be fixed by the division and specified in such notice. The place of any such hearing shall be the office of the division or such other place as may be designated by the division. The case in support of the complaint shall be presented by one of the attorneys or agents of the division and, at the option of the complainant, by his or her attorney. With the consent of the division, the case in support of the complainant may be presented solely by his or her attorney. No person who shall have previously made the investigation, engaged in a conciliation proceeding or caused the notice to be issued shall act as a hearing examiner in such case. Attempts at conciliation shall not be received in evidence. At least two business days prior to the hearing the respondent shall, and any necessary party may, file a written answer to the complaint, sworn to subject to the penalties of perjury, with the division and serve a copy upon all other parties to the proceeding. A respondent who has filed an answer, or whose default in answering has been set aside for good cause shown may appear at such hearing in person or otherwise, with or without counsel, cross examine witnesses and the complainant and submit testimony. The complainant and all parties shall be allowed to present testimony in person or by counsel and cross examine witnesses. The hearing examiner may in his or her discretion permit any person who has a substantial personal interest to intervene as a party, and may require that necessary parties not already parties be joined. The division or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent and any other party shall have like power to amend his or her answer. The hearing examiner shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and a record made.
§ 301. Separability.

If any clause, sentence, paragraph or part of this article or the application thereof to any person or circumstances, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this article.
The Rehabilitation Act of 1973

Sections 501 and 505

EDITOR’S NOTE: The following is the text of Sections 501 and 505 of the Rehabilitation Act of 1973 (Pub. L. 93-112) (Rehab. Act), as amended, as these sections will appear in volume 29 of the United States Code, beginning at section 791. Section 501 prohibits employment discrimination against individuals with disabilities in the federal sector. Section 505 contains provisions governing remedies and attorney’s fees under Section 501. Relevant definitions that apply to sections 501 and 505 follow these sections.


Most recently, the Lilly Ledbetter Fair Pay Act of 2009 (Pub. L. 111-2) amended Title VII, the Age Discrimination in Employment Act of 1967, the ADA and the Rehab Act to clarify the time frame in which victims of discrimination may challenge and recover for discriminatory compensation decisions or other discriminatory practices affecting compensation.

ADAAA amendments and Lilly Ledbetter Fair Pay Act amendments appear in boldface type. Cross references to the Rehabilitation Act as enacted appear in italics following each section heading. Editor’s notes also appear in italics.
DEFINITIONS

SEC. 705 [Section 7]

For the purposes of this chapter:

* * *

(10) Drug and illegal use of drugs

(A) Drug

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

(B) The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or other provisions of Federal law.

* * *

(20) Individual with a disability

(B) Certain programs; limitations on major life activities

Subject to subparagraphs (C), (D), (E), and (F), the term "individual with a disability" means, for purposes of sections 701, 711, and 712 of this title and subchapters II, IV, V, and VII of this chapter [29 U.S.C. §§ 760 et seq., 780 et seq., 790 et seq., and 796 et seq.], any person who has a disability as defined in section 12102 of Title 42.

(C) Rights and advocacy provisions

(i) In general; exclusion of individuals engaging in drug use

For purposes of subchapter V of this chapter [29 U.S.C. § 790 et seq.], the term "individual with a disability" does not include an individual who is currently
engaging in the illegal use of drugs, when a covered entity acts on the basis of such use.

(ii) Exception for individuals no longer engaging in drug use

Nothing in clause (i) shall be construed to exclude as an individual with a disability an individual who--

(I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(II) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(III) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter [29 U.S.C. § 701 et seq.] for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in subclause (I) or (II) is no longer engaging in the illegal use of drugs.

* * *

(E) Rights provisions; exclusion of individuals on basis of homosexuality or bisexuality For the purposes of sections 791, 793, and 794 of this title--

(i) for purposes of the application of subparagraph (B) to such sections, the term "impairment" does not include homosexuality or bisexuality; and

(ii) therefore the term "individual with a disability" does not include an individual on the basis of homosexuality or bisexuality.

(F) Rights provisions; exclusion of individuals on basis of certain disorders

For the purposes of sections 791, 793, and 794 of this title, the term "individual with a disability" does not include an individual on the basis of--

(i) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
(ii) compulsive gambling, kleptomania, or pyromania; or

(iii) psychoactive substance use disorders resulting from current illegal use of drugs.

* * *

EMPLOYMENT OF INDIVIDUALS WITH DISABILITIES

SEC. 791. [Section 501]

(a) Interagency Committee on Employees who are Individuals with Disabilities; establishment; membership; co-chairmen; availability of other Committee resources; purpose and functions

There is established within the Federal Government an Interagency Committee on Employees who are Individuals with Disabilities (hereinafter in this section referred to as the "Committee"), comprised of such members as the President may select, including the following (or their designees whose positions are Executive Level IV or higher): the Chairman of the Equal Employment Opportunity Commission (hereinafter in this section referred to as the "Commission"), the Director of the Office of Personnel Management, the Secretary of Veterans Affairs, the Secretary of Labor, the Secretary of Education, and the Secretary of Health and Human Services. Either the Director of the Office of Personnel Management and the Chairman of the Commission shall serve as co-chairpersons of the Committee or the Director or Chairman shall serve as the sole chairperson of the Committee, as the Director and Chairman jointly determine, from time to time, to be appropriate. The resources of the President's Committees on Employment of People With Disabilities and on Mental Retardation shall be made fully available to the Committee. It shall be the purpose and function of the Committee (1) to provide a focus for Federal and other employment of individuals with disabilities, and to review, on a periodic basis, in cooperation with the Commission, the adequacy of hiring, placement, and advancement practices with respect to individuals with disabilities, by each department, agency, and instrumentality in the executive branch of Government and the Smithsonian Institution, and to insure that the special needs of such individuals are being met; and (2) to consult with the Commission to assist the
Commission to carry out its responsibilities under subsections (b), (c), and (d) of this section. On the basis of such review and consultation, the Committee shall periodically make to the Commission such recommendations for legislative and administrative changes as it deems necessary or desirable. The Commission shall timely transmit to the appropriate committees of Congress any such recommendations.

(b) Federal agencies; affirmative action program plans

Each department, agency, and instrumentality (including the United States Postal Service and the Postal Regulatory Commission) in the executive branch and the Smithsonian Institution shall, within one hundred and eighty days after September 26, 1973, submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, instrumentality, or Institution. Such plan shall include a description of the extent to which and methods whereby the special needs of employees who are individuals with disabilities are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities.

(c) State agencies; rehabilitated individuals, employment

The Commission, after consultation with the Committee, shall develop and recommend to the Secretary for referral to the appropriate State agencies, policies and procedures which will facilitate the hiring, placement, and advancement in employment of individuals who have received rehabilitation services under State vocational rehabilitation programs, veterans' programs, or any other program for individuals with disabilities, including the promotion of job opportunities for such individuals. The Secretary shall encourage such State agencies to adopt and implement such policies and procedures.

(d) Report to Congressional committees

The Commission, after consultation with the Committee, shall, on June 30, 1974, and at the end of each subsequent fiscal year, make a complete report to the appropriate committees of the Congress with respect to the practices of and
achievements in hiring, placement, and advancement of individuals with disabilities by each department, agency, and instrumentality and the Smithsonian Institution and the effectiveness of the affirmative action programs required by subsection (b) of this section, together with recommendations as to legislation which have been submitted to the Commission under subsection (a) of this section, or other appropriate action to insure the adequacy of such practices. Such report shall also include an evaluation by the Committee of the effectiveness of the activities of the Commission under subsections (b) and (c) of this section.

(e) Federal work experience without pay; non-Federal status

An individual who, as a part of an individualized plan for employment under a State plan approved under this chapter, participates in a program of unpaid work experience in a Federal agency, shall not, by reason thereof, be considered to be a Federal employee or to be subject to the provisions of law relating to Federal employment, including those relating to hours of work, rates of compensation, leave, unemployment compensation, and Federal employee benefits.

(f) Federal agency cooperation; special consideration for positions on President's Committee on Employment of People With Disabilities

(1) The Secretary of Labor and the Secretary of Education are authorized and directed to cooperate with the President's Committee on Employment of People With Disabilities in carrying out its functions.

(2) In selecting personnel to fill all positions on the President's Committee on Employment of People With Disabilities, special consideration shall be given to qualified individuals with disabilities.

(g) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.


(1) sections 501(g) and 504(d) of such Act (29 U.S.C. 791(g), 794(d)), respectively, which adopt the standards applied under title I of the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.] for determining whether a violation has occurred in a complaint alleging employment discrimination; and

(2) paragraphs (1) and (2) of section 505(a) of such Act (29 U.S.C. 794a(a)) (as amended by subsection (c)).

REMEDIES AND ATTORNEYS' FEES

SEC. 794a. [Section 505]

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)) (and the application of section 706(e)(3) (42 U.S.C. 2000e-5(e)(3)) to claims of discrimination in compensation), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefore or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.
(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.
SOURCE: The following is the text of Title VII of the Civil Rights Act of 1964, as amended, as it appears at volume 42 of the United States Code, beginning at section 2000e. Editor’s notes in italics.

DEFINITIONS

SEC. 2000e. [Section 701]

For the purposes of this subchapter-

(a) The term “person” includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11 [originally, bankruptcy], or receivers.

(b) The term “employer” means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5 [United States Code]), or

(2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26 [the Internal Revenue Code of 1986], except that during the first year after March 24, 1972 [the date of enactment of the Equal Employment Opportunity Act of 1972], persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term “employment agency” means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term “labor organization” means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general
committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972 [the date of enactment of the Equal Employment Opportunity Act of 1972], or (B) fifteen or more thereafter, and such labor organization-

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C. 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C. 151 et seq.];

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term “employee” means an individual employed by an employer, except that the term “employee” shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.
(g) The term “commerce” means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term “industry affecting commerce” means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry “affecting commerce” within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.], and further includes any governmental industry, business, or activity.

(i) The term “State” includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.].

(j) The term “religion” includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.

(k) The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title [section 703(h)] shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term “complaining party” means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term “demonstrates” means meets the burdens of production and persuasion.

(n) The term “respondent” means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.
APPLICABILITY TO FOREIGN AND RELIGIOUS EMPLOYMENT

SEC. 2000e-1. [Section 702]

(a) Inapplicability of subchapter to certain aliens and employees of religious entities

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(b) Compliance with statute as violative of foreign law

It shall not be unlawful under section 2000e-2 or 2000e-3 of this title [section 703 or 704] for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.

(c) Control of corporation incorporated in foreign country

(1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 2000e-2 or 2000e-3 of this title [section 703 or 704] engaged in by such corporation shall be presumed to be engaged in by such employer.

(2) Sections 2000e-2 and 2000e-3 of this title [sections 703 and 704] shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on-

(A) the interrelation of operations;

(B) the common management;

(C) the centralized control of labor relations; and

(D) the common ownership or financial control, of the employer and the corporation.
UNLAWFUL EMPLOYMENT PRACTICES

SEC. 2000e-2. [Section 703]

(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization-

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual’s race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs
It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase “unlawful employment practice” shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C. 781 et seq.].

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if-
(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29 [section 6(d) of the Labor Standards Act of 1938, as amended].

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with
the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1) (A) An unlawful employment practice based on disparate impact is established under this subchapter only if-

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B) (i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent’s decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of “alternative employment practice”.

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is
adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(I) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1) (A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws-

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had-

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same
legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to-

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of Title 28 [United States Code].

OTHER UNLAWFUL EMPLOYMENT PRACTICES

SEC. 2000e-3. [Section 704]

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on—the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.
(b) Printing or publication of notices or advertisements indicating prohibited preference, limitation, specification, or discrimination; occupational qualification exception

It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SEC. 2000e-4. [Section 705]

(a) Creation; composition; political representation; appointment; term; vacancies; Chairman and Vice Chairman; duties of Chairman; appointment of personnel; compensation of personnel

There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted. The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and, except as provided in subsection (b) of this section, shall appoint, in accordance with the provisions of Title 5 [United States Code] governing appointments in the competitive service, such officers, agents, attorneys, administrative law judges [originally, hearing examiners], and employees as he deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of Title 5 [United States Code], relating to classification and General Schedule pay rates: Provided, That assignment,
removal, and compensation of administrative law judges [originally, hearing examiners] shall be in accordance with sections 3105, 3344, 5372, and 7521 of Title 5 [United States Code].

(b) General Counsel; appointment; term; duties; representation by attorneys and Attorney General

(1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 2000e-5 and 2000e-6 of this title [sections 706 and 707]. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is appointed and qualified.

(2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this subchapter.

c) Exercise of powers during vacancy; quorum

A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum.

d) Seal; judicial notice

The Commission shall have an official seal which shall be judicially noticed.

e) Reports to Congress and the President

The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken [originally, the names, salaries, and duties of all individuals in its employ] and the moneys it has disbursed. It shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

(f) Principal and other offices

The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this subchapter.

g) Powers of Commission
The Commission shall have power-

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this subchapter such technical assistance as they may request to further their compliance with this subchapter or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this subchapter, to assist in such effectuation by conciliation or such other remedial action as is provided by this subchapter;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public;

(6) to intervene in a civil action brought under section 2000e-5 of this title [section 706] by an aggrieved party against a respondent other than a government, governmental agency or political subdivision.

(h) Cooperation with other departments and agencies in performance of educational or promotional activities; outreach activities

(1) The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.

(2) In exercising its powers under this subchapter, the Commission shall carry out educational and outreach activities (including dissemination of information in languages other than English) targeted to-

(A) individuals who historically have been victims of employment discrimination and have not been equitably served by the Commission; and

(B) individuals on whose behalf the Commission has authority to enforce any other law prohibiting employment discrimination, concerning rights and obligations under this subchapter or such law, as the case may be.
(i) Personnel subject to political activity restrictions

All officers, agents, attorneys, and employees of the Commission shall be subject to the provisions of section 7324 of Title 5 [originally, section 9 of the Act of August 2, 1939, as amended (the Hatch Act)], notwithstanding any exemption contained in such section.

(j) Technical Assistance Training Institute

(1) The Commission shall establish a Technical Assistance Training Institute, through which the Commission shall provide technical assistance and training regarding the laws and regulations enforced by the Commission.

(2) An employer or other entity covered under this subchapter shall not be excused from compliance with the requirements of this subchapter because of any failure to receive technical assistance under this subsection.

(3) There are authorized to be appropriated to carry out this subsection such sums as may be necessary for fiscal year 1992.

(k) EEOC Education, Technical Assistance, and Training Revolving Fund

(1) There is hereby established in the Treasury of the United States a revolving fund to be known as the “EEOC Education, Technical Assistance, and Training Revolving Fund” (hereinafter in this subsection referred to as the “Fund”) and to pay the cost (including administrative and personnel expenses) of providing education, technical assistance, and training relating to laws administered by the Commission. Monies in the Fund shall be available without fiscal year limitation to the Commission for such purposes.

(2)(A) The Commission shall charge fees in accordance with the provisions of this paragraph to offset the costs of education, technical assistance, and training provided with monies in the Fund. Such fees for any education, technical assistance, or training--

(i) shall be imposed on a uniform basis on persons and entities receiving such education, assistance, or training,

(ii) shall not exceed the cost of providing such education, assistance, and training, and

(iii) with respect to each person or entity receiving such education, assistance, or training, shall bear a reasonable relationship to the cost of providing such education, assistance, or training to such person or entity.

(B) Fees received under subparagraph (A) shall be deposited in the Fund by the Commission.
(C) The Commission shall include in each report made under subsection (e) of this section information with respect to the operation of the Fund, including information, presented in the aggregate, relating to--

(i) the number of persons and entities to which the Commission provided education, technical assistance, or training with monies in the Fund, in the fiscal year for which such report is prepared,

(ii) the cost to the Commission to provide such education, technical assistance, or training to such persons and entities, and

(iii) the amount of any fees received by the Commission from such persons and entities for such education, technical assistance, or training.

(3) The Secretary of the Treasury shall invest the portion of the Fund not required to satisfy current expenditures from the Fund, as determined by the Commission, in obligations of the United States or obligations guaranteed as to principal by the United States. Investment proceeds shall be deposited in the Fund.

(4) There is hereby transferred to the Fund $1,000,000 from the Salaries and Expenses appropriation of the Commission.

ENFORCEMENT PROVISIONS

SEC. 2000e-5. [Section 706]

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title [section 703 or 704].

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment
agency, labor organization, or joint labor-management committee (hereinafter referred to as the “respondent”) within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission
In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits,
or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1977A of the Revised Statutes (42 U.S.C. 1981a), liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person
aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28 [United States Code], the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear
and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2) (A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this Title [section 704(a)].

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title [section 703(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court-
(i) may grant declaratory relief, injunctive relief (except as provided in clause (iii)), and attorney’s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title [section 703(m)]; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of Title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of title 29 [the Act entitled “An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes,” approved March 23, 1932 (29 U.S.C. 105-115)] shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28 [United States Code].

(k) Attorney’s fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney’s fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.
CIVIL ACTIONS BY THE ATTORNEY GENERAL

SEC. 2000e-6. [Section 707]

(a) Complaint

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged
in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and
that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein
described, the Attorney General may bring a civil action in the appropriate district court of the United States by
filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts
pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or
temporary injunction, restraining order or other order against the person or persons responsible for such
pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) Jurisdiction; three-judge district court for cases of general public importance: hearing, determination,
expedition of action, review by Supreme Court; single judge district court: hearing, determination, expedition of
action

The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted
pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a
request that a court of three judges be convened to hear and determine the case. Such request by the Attorney
General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A
copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the
chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending.
Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as
the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit
judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear
and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at
the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to
be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the
chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to
designate a judge in such district to hear and determine the case. In the event that no judge in the district is
available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case
may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall
then designate a district or circuit judge of the circuit to hear and determine the case.
It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Transfer of functions, etc., to Commission; effective date; prerequisite to transfer; execution of functions by Commission

Effective two years after March 24, 1972 [the date of enactment of the Equal Employment Opportunity Act of 1972], the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of Title 5 [United States Code], inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Transfer of functions, etc., not to affect suits commenced pursuant to this section prior to date of transfer

Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Investigation and action by Commission pursuant to filing of charge of discrimination; procedure

Subsequent to March 24, 1972 [the date of enactment of the Equal Employment Opportunity Act of 1972], the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 of this title [section 706].
EFFECT ON STATE LAWS

SEC. 2000e-7. [Section 708]

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

INVESTIGATIONS

SEC. 2000e-8. [Section 709]

(a) Examination and copying of evidence related to unlawful employment practices

In connection with any investigation of a charge filed under section 2000e-5 of this title [section 706], the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

(b) Cooperation with State and local agencies administering State fair employment practices laws; participation in and contribution to research and other projects; utilization of services; payment in advance or reimbursement; agreements and rescission of agreements

The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this subchapter and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this subchapter. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this subchapter.
(c) Execution, retention, and preservation of records; reports to Commission; training program records; appropriate relief from regulation or order for undue hardship; procedure for exemption; judicial action to compel compliance

Every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this subchapter which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this subchapter, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

(d) Consultation and coordination between Commission and interested State and Federal agencies in prescribing recordkeeping and reporting requirements; availability of information furnished pursuant to recordkeeping and reporting requirements; conditions on availability

In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such
information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) Prohibited disclosures; penalties

It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

CONDUCT OF HEARINGS AND INVESTIGATIONS PURSUANT TO SECTION 161 OF TITLE 29

SEC. 2000e-9. [Section 710]

For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of Title 29 [section 11 of the National Labor Relations Act] shall apply.

POSTING OF NOTICES; PENALTIES

SEC. 2000e-10. [Section 711]

(a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from or, summaries of, the pertinent provisions of this subchapter and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

VETERANS’ SPECIAL RIGHTS OR PREFERENCE

SEC. 2000e-11. [Section 712]

Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.
(a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of subchapter II of chapter 5 of Title 5 [originally, the Administrative Procedure Act].

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this subchapter if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this subchapter regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this subchapter.
APPLICATION TO PERSONNEL OF COMMISSION OF SECTIONS 111 AND 1114 OF TITLE 18; PUNISHMENT FOR VIOLATION OF SECTION 1114 OF TITLE 18

SEC. 2000e-13. [Section 714]

The provisions of sections 111 and 1114, Title 18 [United States Code], shall apply to officers, agents, and employees of the Commission in the performance of their official duties. Notwithstanding the provisions of sections 111 and 1114 of Title 18 [United States Code], whoever in violation of the provisions of section 1114 of such title kills a person while engaged in or on account of the performance of his official functions under this Act shall be punished by imprisonment for any term of years or for life.

TRANSFER OF AUTHORITY

[Administration of the duties of the Equal Employment Opportunity Coordinating Council was transferred to the Equal Employment Opportunity Commission effective July 1, 1978, under the President’s Reorganization Plan of 1978.]

EQUAL EMPLOYMENT OPPORTUNITY COORDINATING COUNCIL; ESTABLISHMENT; COMPOSITION; DUTIES; REPORT TO PRESIDENT AND CONGRESS

SEC. 2000e-14. [Section 715]

[Original introductory text: There shall be established an Equal Employment Opportunity Coordinating Council (hereinafter referred to in this section as the Council) composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Civil Rights Commission, or their respective delegates.]

The Equal Employment Opportunity Commission [originally, Council] shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before October 1 [originally, July 1] of each year, the Equal Employment Opportunity Commission [originally, Council] shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section.
PRESIDENTIAL CONFERENCES; ACQUAINTANCE OF LEADERSHIP WITH PROVISIONS FOR EMPLOYMENT RIGHTS AND OBLIGATIONS; PLANS FOR FAIR ADMINISTRATION; MEMBERSHIP

SEC. 2000e-15. [Section 716]

[Original text: (a) This title shall become effective one year after the date of its enactment.

(b) Notwithstanding subsection (a), sections of this title other than sections 703, 704, 706, and 707 shall become effective immediately.

(c) The President shall, as soon as feasible after July 2, 1964 [the date of enactment of this title], convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this subchapter to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this subchapter when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this subchapter.

TRANSFER OF AUTHORITY

[Enforcement of Section 717 was transferred to the Equal Employment Opportunity Commission from the Civil Service Commission (Office of Personnel Management) effective January 1, 1979 under the President's Reorganization Plan No. 1 of 1978.]

EMPLOYMENT BY FEDERAL GOVERNMENT

SEC. 2000e-16. [Section 717]

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5 [United States Code], in executive agencies [originally, other than the General Accounting Office] as defined in section 105 of Title 5 [United States Code] (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the
Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission [originally, Civil Service Commission] shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission [originally, Civil Service Commission] shall-

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to-

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and
(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission [originally, Civil Service Commission] shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission [originally, Civil Service Commission] upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission [originally, Civil Service Commission] on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title [section 706], in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions

The provisions of section 2000e-5(f) through (k) of this title [section 706(f) through (k)], as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.
(f) Section 2000e-5(e)(3) [Section 706(e)(3)] shall apply to complaints of discrimination in compensation under this section.

PROCEDURE FOR DENIAL, WITHHOLDING, TERMINATION, OR SUSPENSION OF GOVERNMENT CONTRACT SUBSEQUENT TO ACCEPTANCE BY GOVERNMENT OF AFFIRMATIVE ACTION PLAN OF EMPLOYER; TIME OF ACCEPTANCE OF PLAN

SEC. 2000e-17. [Section 718]

No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of section 554 of Title 5 [United States Code], and the following pertinent sections: Provided, That if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: Provided further, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan.
Everyone knows that mentoring relationships are one important avenue for professional learning. Young people are taught to seek out senior executives in their organization, function, industry, or geographical location who can help them learn the ropes, share knowledge, teach new skills, broaden their network and, in some cases, fast track their careers. Less talked about, but just as important, are the benefits and learning that mentors can derive from mentees.
The best of these relationships are, in fact, a mutual exchange. In my work studying cross-cultural mentor-mentee dyads in Canada —local executives who’d been paired with immigrant job-seekers—I found much give-and-take between partners. Though they were supposed to be the “gurus” in these pairings, the mentors said they, too, derived personal growth and development in multiple domains.

The first was in their awareness of and appreciation for diversity. After hearing mentees describe their experiences trying to navigate a new labor market, the mentors in my study reported feeling greater respect for newcomers and the value of inclusion. As one participant told me, “My role was to explain what life in Canadian business is like, and how to adjust. But that’s kind of unfair. We’re not asking Canadian business to adjust to immigrants. So I had a newfound respect for Paul and people in his situation.” Another commented, “I just wanted to go up to my VP and say, “I found a gem here. This person is so creative and knowledgeable, I think we could really benefit from their expertise.” A third emphasized the value of the back-and-forth exchange: “Her sharing of articles, thoughts, and feelings [led us to] great dialogues and conversation.”

Mentors said that their time with protégés also provided them with an opportunity for much-needed self-reflection. One executive explained, “Sometimes you’re so caught up in business and work, that you forget to balance. Ella was my balance. I had the capacity to be myself, here and now, find my calm, relax and still keep her engaged in her pursuit of something.” These busy executives said that they
appreciated a chance to get away from the grind of daily work routines; after focusing on someone else’s challenges, they had new perspective on their own. Mentoring “gave me a space to actually find out where my calm was,” one participant reported. “I could relax with Lina, but still keep her engaged in her pursuit of something. I grew from it.”

Skill-building and increased self-esteem were two more common benefits cited by mentors. Some said they’d learned to become better coaches, while others described feeling newly confident and inspired to step up their own networking efforts. “I spent a lot of time being a sounding board,” one mentor told me, which “taught me how to recognize and build on my listening skills.” Another commented, “I was able to give Stacey advice and connect her with other individuals inside my organization, [and] she [helped me to] understand that I do have something to offer.”

It’s clear that mentoring can be just as inspiring, rewarding, and educational as being mentored.

**Jelena Zikic** is an Associate Professor at York University. In her research and practice, she explores a combination of career and life transitions of diverse populations.
Summary. “Imposter syndrome,” or doubting your abilities and feeling like a fraud at work, is a diagnosis often given to women. But the fact that it’s considered a diagnosis at all is problematic. The concept, whose development in the ‘70s excluded the effects of systemic racism, classism, xenophobia, and other biases, took a fairly universal feeling of discomfort, second-guessing, and mild anxiety in the workplace and pathologized it, especially for women. The answer to overcoming imposter syndrome is not to fix individuals, but to create an
Inclusion on Purpose: An Intersectional Approach to Creating a Culture of Belonging at Work. She is the founder of Candour, an inclusion strategy firm.

**Jodi-Ann Burey** is a sought-after speaker and writer who works at the intersections of race, culture, and health equity. She is the creator and host of Black Cancer, a podcast about the lives of people of color through their cancer journeys. Her TEDx talk, “Why You Should Not Bring Your Authentic Self to Work,” embodies her disruption of traditional narratives about racism at work.
PRO BONO + INCLUSIVE LEADERSHIP

Harnessing the power of pro bono to cultivate inclusive leaders

Developed by

Deloitte Tapproot Foundation
Inclusive Leadership Imperative

In an ever-changing and increasingly globalized economy, what constitutes effective leadership in business is changing, too.

In addition to traditional leadership skills, inclusion-focused values and traits are critical for leaders navigating a diverse corporate landscape. Deloitte has done significant research in this area and created a framework called the Six Signature Traits of Inclusive Leadership to help leaders engage with and contribute to the diversity of markets, customers, ideas, and talent that characterize global commerce in the 21st century. The framework defines inclusive leadership through six traits: commitment, courage, cognizance of bias, curiosity, cultural intelligence, and collaboration. While companies experiment with many different methods to develop these characteristics, pro bono service is emerging as an impactful growth opportunity for cultivating inclusive leaders—and we know why. From a corporate perspective, pro bono service is a win on many levels: nonprofits benefit from access to employees’ unique experiences and commitment to social impact, while companies benefit by strengthening community ties and developing an adaptable workforce. Everyone can thrive when we develop a culture of inclusion.

Dr. Terri Cooper, Vice Chair, External Diversity, Equity & Inclusion at Deloitte, has pinpointed inclusive leadership as one of the most significant elements of a comprehensive diversity, equity, and inclusion (DEI) strategy. As part of the 2019 Taproot webinar Pro Bono + The Inclusive Leader, Cooper shared that companies whose leaders create an inclusive culture “are twice as likely to meet or exceed financial targets, three times as likely to be high-performing, and six times more likely to be innovative and agile.” These statistics underscore the fact that a company’s promotion of inclusive leadership can have a significant bearing on its ability to compete in the global marketplace, prepare employees for the future of work, and acquire and retain diverse talent.

Companies have a chance to engage in this business imperative by embedding inclusive leadership principles across their workforce. Pro bono service is a powerful tool for helping develop leaders through accelerated, experiential learning that has a real-world impact. This piece examines how Deloitte leverages pro bono as one way to help develop these inclusive leadership traits. A series of profiles showcases the ways in which their professionals connect these experiences to their own leadership development. By bringing this concept to life, this piece aims to illustrate the exciting opportunity DEI, learning and development (L&D), and corporate social responsibility (CSR) professionals have to work together in driving meaningful employee development and engagement.
Deloitte: A Case Study in Inclusive Leadership and Pro Bono

Deloitte focuses on fostering an environment where everyone can connect, belong, and grow. The organization’s broad portfolio of pro bono service programs has emerged as a key driver in those efforts. Pro bono service is the centerpiece of Deloitte’s community impact strategy; the organization offers professionals the opportunity to participate in an array of offerings, ranging from an annual day of service to multi-week, team-based engagements to immersive international projects. Many of Deloitte’s pro bono initiatives align with broader employee development, engagement, and inclusion priorities at the organization, like bridging the veteran-civilian divide and diversifying workforce pipelines.

Deloitte has strategically aligned leadership roles at the organization to connect talent development, inclusion, and pro bono service. Patrick O’Donnell, Chief Diversity, Equity, and Inclusion Officer and principal for Deloitte & Touche LLP, and Dr. Kwasi Mitchell, Chief Diversity, Equity, and Inclusion Officer and principal for Deloitte Consulting LLP, each lead both DEI and pro bono efforts. “It’s been exciting to explore how this alignment between DEI and Corporate Citizenship can help us support more organizations that are building leaders from diverse backgrounds and build more empathetic, inclusive leaders within Deloitte,” Mitchell says.

Through this internal alignment, Deloitte targets the development of specific inclusive competencies among emerging leaders within their pro bono service programming—all while giving these professionals the chance to have a meaningful impact in the community. From the perspective of Deloitte’s Corporate Citizenship team, this linkage is crucial to maximizing shared value. “Pro bono uniquely complements corporate inclusion strategies, and if we explicitly cultivate that partnership, we’re not guessing about what value we drive—we’re working together to determine what it looks like,” says Doug Marshall, Managing Director of Corporate Citizenship for Deloitte Services LP. Empowering diverse voices to contribute their unique perspectives strengthens the organization by unearthing opportunities for decision-making and innovation. O’Donnell and Mitchell have both seen that partnership pay off, observing how pro bono service can build inclusive leadership traits. “Pro bono and skills-based volunteering projects provide Deloitte professionals with hands-on learning experiences that also amplify the inclusive leadership competencies they can—and do—bring to their work at the organization,” notes O’Donnell.

Using Service to Build Inclusive Leadership Skills

The link between pro bono service and the development of inclusive leadership traits is clear. Professionals of varying levels and skillsets have cited foundational leadership growth and development as among the benefits of participation in Deloitte’s programs.

Following are the stories of six Deloitte professionals who have connected their pro bono experience to key inclusive leadership traits—and then applied those learnings to their day-to-day work at the organization.
How Pro Bono Supports Curiosity

A nonprofit professional’s day—pivoting from addressing the needs of vulnerable populations to problem-solving on a shoestring budget—can be quite different than the day-to-day of a corporate employee. Employees must be curious about and open to learning the realities of their beneficiaries to develop solutions with lasting impact.

The Story: Robert Bui
Senior Consultant, Deloitte Consulting LLP

In his seven years at Deloitte, Robert Bui had never done a pro bono project – until 2020. Excited about the chance to do something meaningful and different, he had the opportunity to help Roca, a Massachusetts-based nonprofit dedicated to serving high-risk young people.

Roca asked Deloitte to help them quantify the impact of its Young Mothers Program through extensive research and stakeholder interviews. While Robert and his team had experience with strategic communications and data analysis, they weren’t familiar with Roca’s intervention model or the challenges facing the young parents that Roca serves. Robert noted, “Our team had to feel comfortable going into executive-level meetings not knowing all the answers or where the conversation would go. There were times we would completely pivot mid-meeting or leave with more additional questions than answers. But our conversations always spurred new information or insights that helped us tell an even stronger story in the end.”

Robert saw first-hand how powerful curiosity can be. He learned to ask open-ended questions and facilitate conversations that brought together the Deloitte team’s expertise and the client’s knowledge. This co-creative process helped them articulate Roca’s impact in an entirely new way, estimate the size of the population they could serve, and quantify the impact to society of Roca’s Young Mothers Program. This collaborative approach became a core part of Robert’s leadership style and client interactions.

Why it Matters

An inclusive environment must also be a curious one. Inclusive leaders constantly ask questions, recognizing that knowledge from others can fill in the gaps in the bigger picture. They create an environment of inquiry to discover where new passions may lie. This openness can create a space for teams to safely push and inspire each other to the highest quality results.

DESIGN TIP: APPLYING THIS TO YOUR PROGRAM
Continue cultivating curious employees by providing supplemental learning materials and follow-on opportunities. Encouraging teams to stay in touch with their nonprofit client, join a board, or start an issue-area focused learning group can help them maintain the spark of curiosity once the pro bono engagement ends.

“By challenging thinking, our conversations always spurred new information or insights that helped us tell an even stronger story in the end.”
—Robert Bui
How Pro Bono Supports Collaboration

Pro bono projects bring a broad, diverse set of participants to the table—whether across business units, nonprofit leadership, or sectors—and push employees to create a safe, collaborative, and inclusive workplace environment in which everyone can thrive.

The Story: Jessica Bortolussi

Consultant, Deloitte Consulting LLP, Government & Public Services

At the end of 2018, Jessica Bortolussi joined a pro bono project team to support the U.S. Chamber of Commerce Foundation’s Hiring Our Heroes initiative and its Veteran Employment Task Force. The Task Force was launched to improve veteran employment outcomes by leveraging relationships in the public, private, and nonprofit sectors. Deloitte helped by providing recommendations to Hiring Our Heroes on how they can best amplify their impact. The project has exposed her to a new set of experiences and challenges, including working on a large team comprised of a diverse set of stakeholders. During one part of this project, Jessica worked internally across departments and seniority levels, and externally across sectors, to write a white paper comparing private sector veteran transition programs to the government-driven Transition Assistance Program. Through this work, she practiced “harmonizing different perspectives and goals to build stronger recommendations” and added that “working directly with many stakeholders helped me appreciate the value of [bringing together] different points of view to help solve tough challenges.”

Jessica says that this experience has made her a better collaborator and consultant at Deloitte. For example, in her current project, she proactively opens lines of communication across different workstreams. She says, “I’m so much better at reaching out to groups with different perspectives.”

Why it Matters

When inclusive leaders actively and intentionally stretch outside their comfort zone to pursue close connections and outside perspectives, their team members feel valued and heard.

DESIGN TIP: APPLYING THIS TO YOUR PROGRAM

Push collaboration further by establishing cross-business pro bono project teams. Pro bono consultants on teams representing different business units and seniority levels can be empowered to practice delegation, communication, and team management in a new environment.
How Pro Bono Supports Commitment

Working for impact through pro bono service can strengthen an employee's own values while deepening their connection to their company for sharing those values. Pro bono teams often bring together diverse perspectives to be successful, and that experience reinforces the value of diversity to talent, innovation, and business/social impact.

The Story: Janysia Jenkins Smith
Senior Manager, Deloitte & Touche LLP

For Janysia Smith, pro bono service is as deeply rooted in her personal values as it is in her professional ambitions. She articulates this by sharing a concept she’s adopted from the National Association of Black Accountants, which is to “lift as you climb.” Janysia is keen to note that you can’t lift unless you are giving back and paying it forward.

Over her 13-year Deloitte career, Janysia says, “Giving back to my local community through pro bono and volunteer efforts is really what I love most about what I do. It has allowed me to build what I commonly refer to as my professional family here at Deloitte.” From giving high school level students a week-long experience in the field of accounting with the Accounting Awareness Program (ACAP) of Houston, to helping Goodwill Houston formalize user-centric innovation ideas for their local stores, she is committed to using her skills and experiences to help more people succeed in school and work and life.

Through her pro bono service, Janysia tapped into Deloitte’s values to take care of each other and foster inclusion - motivating her to think more deeply about diversity and the role of inclusion at Deloitte. Over the past year, Janysia has leaned in on her values and taken a full-time role as the Chief of Staff to the Chief Diversity, Equity, and Inclusion Officer and Pro Bono Lead for Deloitte Risk & Financial Advisory within Deloitte & Touche LLP. In this role, she’s focused on DEI efforts for over 16,000 professionals. And the list goes on. Janysia holds leadership roles within Deloitte’s Black Employee Network and the Houston office Inclusion Council. She also serves as a champion for INROADS Houston, which seeks to increase ethnically diverse employees in corporate management in the U.S., and to help change the way these candidates gain entry into the business world.

Living out her personal values within her professional sphere empowers Janysia to not only give back to her community, but to lead by example and promote the well-being of those around her. This is how she makes an impact every day.

Why it Matters

Not everyone who participates in pro bono will take on an inclusion-focused role, but pro bono service can strengthen employees’ connection to organizational values. And when inclusive leaders lean on those values while managing their team, they can bring out the best in each of their employees by encouraging them to share diverse viewpoints.

DESIGN TIP: APPLYING THIS TO YOUR PROGRAM

Connect pro bono service back to your company’s cultural values. Making an explicit connection can encourage employees to apply their pro bono experiences to their day-to-day roles and create an inclusive, service-based company culture.
Cognizance of Bias

Highly inclusive leaders are mindful of personal and organizational blind spots and self-regulate to help encourage “fair play.” —The Six Traits of Inclusive Leadership

How Pro Bono Supports Cognizance of Bias

Exposing employees to diverse perspectives and challenges—by way of nonprofits and their beneficiaries—can help them be more aware of the assumptions they hold about the world around them.

The Story: Alex Hilliker
Manager, Deloitte Consulting LLP, Government & Public Services

When Alex Hilliker joined the Deloitte team seven years ago, he received an email inviting him to join a project with a military-related organization. That email—and the two years he spent on the project supporting veterans with disabilities—shaped the entire trajectory of his career. He was so inspired by that work that he took on pro bono projects for the Warrior Games and the Veteran Employment Task Force. His commitment to military and veteran issues has now extended beyond pro bono, through his paid, day-to-day client work with federal government agencies.

Alex’s exposure to the veteran community has transformed his understanding of bias in his personal and professional life. One limiting cultural perception he recognized was the portrayal of veterans as either heroes or victims. By working alongside veterans and gaining more exposure to that community, Alex made personal connections that broke down those biases. “We tend to group all veterans together,” Alex says, “but, of course, there are millions of veterans with different backgrounds and experiences.” Bridging the veteran-civilian gap is also an organization-wide priority at Deloitte, and his work has made great strides in this direction.

Being aware of these biases has helped Alex build programming at work that intentionally brings together differing groups and perspectives. “I’ve applied the idea of breaking down unconscious biases to make sure we bring together people from a variety of age groups, educational backgrounds, and cultural perspectives,” Alex noted, and he staffs projects accordingly. Alex relies on Business Chemistry®, a framework created by Deloitte that draws upon the latest analytics technologies to reveal four scientifically based patterns of behavior. The system is designed to provide insights about individuals and teams based on observable traits and preferences and helps leverage team members’ unique strengths.

Why it Matters

Unrecognized biases can often narrow leaders’ perspectives and potentially prevent them from making fair and objective decisions. And those decisions can affect an employee’s sense of belonging at an organization. Leaders who understand their biases and develop strategies to address them are often uniquely positioned to break down barriers and drive an inclusive workplace environment.

DESIGN TIP: APPLYING THIS TO YOUR PROGRAM

Include training modules that prepare employees to work with new perspectives in unfamiliar situations. Surfacing preconceived biases about the nonprofit sector and inviting employees to question those notions will prepare them to successfully navigate projects that challenge their pre-existing bias.
Harnessing the Power of Pro Bono to Cultivate Inclusive Leaders at Your Company

The evidence is clear: inclusive leadership is imperative for modern businesses, and pro bono service can be an effective tool for developing inclusive leaders.

Corporate L&D and DEI professionals have a unique opportunity to strengthen their own inclusion strategies by collaborating with CSR to implement pro bono initiatives.

While many companies are dedicated to building an inclusive culture, business leaders should consider taking meaningful action to embody that commitment in tangible ways. Professionals who have participated in pro bono service programs report that they built one or more of these six traits identified by Deloitte and are applying those skills to help drive a more inclusive organization culture in their day-to-day roles.

Establishing a pro bono service program can help a company cultivate the leadership that may usher in a more inclusive culture, and it could be an indispensable piece of a comprehensive L&D and DEI strategy. In developing a strategy for the greatest impact, company leaders should thoughtfully engage internal stakeholders in conversations and collaborate with them as champions. As evidenced by Deloitte’s experience, close collaboration between CSR and DEI leaders can empower companies to design pro bono service programs aligned with both social impact and inclusion goals and can enhance the experiential learning opportunity for the professionals. Furthermore, companies may also find that joining efforts across other departments, such as talent development, can drive even greater success and impact.

Ready to get started? Connect with us today!
advisory@taprootfoundation.org

Taproot Foundation, a U.S. based nonprofit, connects nonprofits and social change organizations with passionate, skilled volunteers who share their expertise pro bono. Taproot is creating a world where organizations dedicated to social change have full access—through pro bono service—to the marketing, strategy, HR, and IT resources they need to be most effective. Since 2001, Taproot’s skilled volunteers have served over 8,400 social change organizations providing more than 1.8 million hours of service worth over $210 million in value. Taproot has offices in New York City, Chicago, San Francisco, and Los Angeles, and co-founded a network of global pro bono providers in over 30 countries around the world.

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The connection between diversity, inclusion and corporate responsibility

By Rohini Anand
February 26, 2019

Last year has been a watershed for our culture. With the #MeToo movement and the many, often painful episodes of racial friction, we are reaching a new public consciousness and consensus around the need to understand each other’s perspectives. At the same time, with high levels of engagement around the Sustainable Development Goals, we are seeing remarkable levels of consensus on the opportunity for a new level of inclusion on a global scale.

For those of us in the diversity and inclusion (D&I) trenches, pushing for changes in the workplace that have brought us this far, there is hope that this cultural moment will help propel us further toward a fully empowered and respected generation.

I wrote “hope” for a reason. This is not a given.

A quick look at most leadership structures tells us that we have a way to go to help our businesses realize their potential with full participation from and consideration of a diversity of viewpoints.

If our hope is to be realized, I believe we as D&I leaders have to capitalize on this moment by working with a natural — but not yet fully leveraged — partner. That would be our friends in social responsibility.

Here is another movement that started, like diversity, on the defense. External pressures, risk mitigation and official compliance triggered most businesses to adopt more responsible practices and support innovative efforts to promote human rights, address environmental challenges and improve communities. Eventually, these efforts became more integral and were pulled together under a corporate social responsibility (CSR) or sustainability team.
Then came along the Millennials and Gen Zs. These younger employees and customers have come to see practices such as sustainability and community economic empowerment as mandatory for their loyalty. Their voices, combined with business insiders who were increasingly seeing tangible business benefits of social responsibility, moved the discipline to the forefront.

Forbes recently cited Boston College Center for Corporate Citizenship research that shows C-suite leadership overseeing CSR initiatives has spiked nearly 75 percent since five years ago. Like, D&I, however, few people in the Social Responsibility discipline would say they have reached their destination.

How can they get there? The same way we can. Embracing our shared goals and pushing toward them.

Both D&I and CSR, fundamentally, are about reaching out to disenfranchised communities, bringing new market insights to the table and driving collaborative solutions to business challenges. They are also both skilled at helping the business to understand new, broader definitions of success that will be relevant for the evolving marketplace.

Taken together, they both envision a business community that embraces broader economic benefits and more social inclusion.

This may seem obvious to outsiders, but within the D&I and CSR silos, we can feel quite different.

"Both D&I and social responsibility are about reaching out to disenfranchised communities, bringing new insights to the table and driving collaborative solutions."

For instance, there is often an obvious lack of diversity in CSR. This is partially rooted in the fact that many CSR divisions began with a focus on environmental practices and drew talent from that sector. Environmentalism, as a recent GreenBiz piece described, is sometimes marked by a woeful lack of diversity.

At the same time, we sometimes approach the same goal from different starting points. Take gender equality. We both want it, but D&I might focus more on recruitment and leadership where CSR might focus more on community empowerment. These can seem like different goals, but they are, in fact, merely different approaches to the same end: improving quality of life.

Take, for example, the shared goal for gender equity, which can broaden a company’s leadership perspective, improve employee engagement, boost brand recognition and other KPIs while lifting up local economies. (You read more in the new Pew Research study on Women and Leadership). A 2015 McKinsey report found that if women globally were to reach their full economic potential, it could add $12 trillion to the economy.

Similar cases can be made for human rights, hunger and environmental protections and others. It is why the highest levels of social responsibility strategy are increasingly integrating the two imperatives in their messaging. While the approach to change may differ between D&I and CSR and the core subject matters are distinct, many skills we use intersect. These may include stakeholder engagement, change management, supply chain assessment, community relations, measurement and reporting, and telling our story.
How can we turn our hopes into realities? In the future, we will benefit from increasing levels of collaboration between the two fields to work better together even while allowing teams to maintain their subject matter expertise.

We can build bridges and listen to each other. We can broaden our own perspectives. We can work together to reach our shared vision.
Chapter 14

BANKRUPTCY AND THE RESOLUTION OF FINANCIAL DISTRESS*

EDITH S. HOTCHKISS
Boston College

KOSE JOHN
New York University

ROBERT M. MOORADIAN
Northeastern University

KARIN S. THORBURN
Dartmouth College

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Abstract

This chapter reviews empirical research on the use of private and court-supervised mechanisms for resolving default and reorganizing companies in financial distress. Starting with a simple framework for financial distress and a quick overview of the theoretical research in this area, we proceed to summarize and synthesize the empirical research in the areas of financial distress, asset and debt restructuring, and features of the formal bankruptcy procedures in the United States and around the world. Studies of out-of-court restructurings (workouts and exchange offers), corporate governance issues relating to distressed restructurings, and the magnitude of the costs and the efficiency of bankruptcy reorganizations are among the topics covered.

Keywords

bankruptcy, financial distress, bankruptcy costs, fire sales, bankruptcy auctions, reorganizations, Chapter 11
1. Introduction

Bankruptcy law and related out-of-court mechanisms governing default on debt contracts form one of the essential building blocks of a private economy. The law provides a general structure that helps claimholders resolve unforeseen conflicts arising when the firm defaults on its debt payments. It also determines the allocation of control over the distressed firm to various claimholders and the extent to which market mechanisms are used in resolving financial distress. This in turn affects investors' willingness to provide capital ex ante and thus firms' choice of capital structure and cost of capital.¹

The design of bankruptcy procedures varies widely across the world. Some countries, like the United States and France, have laws that are favorable to the incumbent management and the continuation of the firm as an ongoing entity. Other countries, like the UK and Sweden, rely on the market in allocating the failing firm's assets. With emerging economies striving to adopt adequate bankruptcy procedures, the relative efficiency of existing procedures has become an important topic for debate.

Furthermore, the use of high leverage in corporate restructuring and the popularity of junk bonds (original issue high-yield bonds) have been important aspects of the U.S. corporate finance scene since the 1980s. Leverage increases are accompanied by increased potential for default and bankruptcy. These structures raise the importance to financial economists, managers, and legal scholars of understanding how firms deal with financial distress.

An active academic literature that examines various aspects of the use of private and court-supervised mechanisms for resolving default has developed over the last two decades. The purpose of this chapter is to summarize and synthesize the empirical research in the areas of financial distress, asset and debt restructuring, and formal bankruptcy procedures in the United States and around the world.²

The survey is organized as follows. Section 2 presents a simple conceptual framework for analyzing financial distress that guides the organization of the empirical literature in the subsequent sections. The bulk of the evidence is from the United States, and we turn to the international evidence at the end (Section 8). We review the U.S. evidence in the following order: Evidence on asset restructurings is reviewed in Section 3. Studies of out-of-court debt restructuring (workout and exchange offers) are described in Section 4. Section 5 reviews corporate governance issues related to the restructuring of financially distressed firms. Sections 6 and 7 discuss different aspects of formal bankruptcy proceedings in the United States, in particular the magnitude of costs and the efficiency of the outcome. In Section 8, research on insolvency procedures in other countries is surveyed. Section 9 concludes by offering some comments and suggestions for the direction of future research.

¹ These ex-ante effects are analyzed in the literature on optimal security design and capital structure. See, for example, Allen (1989), Allen and Gale (1994), and Allen and Winton (1995) for security design, and Harris and Raviv (1991) and Part 3 of this book for capital structure. We focus here on the ex-post efficiency of the distress resolution mechanisms.

² See Wruck (1990), John and John (1992), John (1993), and Senbet and Seward (1995) for earlier surveys of this literature.
2. Theoretical framework

This section presents a simple framework describing financial distress and the mechanisms available to resolve distress. The framework provides an overview of the issues analyzed in the theoretical literature and hence a motivation for the questions examined in the empirical literature.

2.1. Restructuring of assets and financial contracts

The financial contracts of a firm can be broadly categorized into hard and soft contracts. An example of a hard contract is a coupon-paying debt contract that promises periodic payments by the firm to its bondholders. If these payments are not made on time, the firm is in violation of the contract, and bondholders can seek legal recourse to enforce the agreement. Lack of liquidity does not constitute a mitigating circumstance for non-payment. Obligations to suppliers and employees are other examples of hard contracts. In contrast, common stock and preferred stock are examples of soft contracts. Here, even though equityholders have expectations of receiving regular cash payouts from the firm, the level and frequency of these payouts are discretionary policy decisions made by the firm. Specifically, the payouts can be suspended or postponed based on the availability of liquid resources remaining in the firm after satisfying the claims of the hard contracts.

The assets of a firm also have a natural categorization based on liquidity. Cash and marketable securities that can quickly be converted into cash are liquid assets. Long-term investments, such as plant and machinery, which may only produce liquid assets in the future, are considered illiquid or hard assets.

These categorizations of the financing contracts of a firm and its assets form the basis for a straightforward definition of financial distress. A firm is in financial distress at a given point in time when the liquid assets of the firm are not sufficient to meet the current requirements of its hard contracts. Mechanisms for resolving financial distress do so by rectifying the mismatch through restructuring the assets or restructuring the financing contracts, or both. In this survey, we examine the costs of resolving financial distress using either method.

On the asset side, the hard assets can be wholly or partially sold to generate additional cash in order to meet the current obligations. Premature sale of illiquid assets, however, may result in the destruction of going-concern value and involves a cost of liquidation. This cost can be thought of as the difference between the going-concern value of the assets (i.e., the present value of all future cash flows produced by the assets) and the highest value that can be realized if the assets are sold immediately. The cost of liquidation, and hence the cost of the asset restructuring, depends on a variety of factors such as what fraction of the assets needs to be sold and what operational relationship the liquidated assets has to those that are retained. If the assets can be sold as a going-concern package instead of a piecemeal sale of assets, the liquidation costs may be lower. Similarly, if the assets are sold in a competitive auction to a buyer who can use these assets efficiently, liquidation costs may be very low or—if the buyer is a higher-value user than
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the seller—even positive. In other words, the efficiency of the asset-restructuring channel will depend on the liquidation costs associated with the sale of the required assets.

Shleifer and Vishny (1992) analyze the determinants of liquidation costs related to asset sales in financial distress. They focus on different aspects of market liquidity, including credit constraints in the industry, asset fungibility (the number of distinct uses and users for a particular asset), and participation restrictions (e.g., regulations on foreign acquisitions and antitrust restrictions). In their model, industry outsiders are lower-valuation users of the assets. Shleifer and Vishny argue that the price received in a distressed asset sale may suffer from large discounts if the entire industry is financially distressed and industry insiders are unable to compete for the assets due to liquidity constraints.

An alternative way of dealing with financial distress involves restructuring the financial contracts. One mechanism for this restructuring is to negotiate with creditors and reformulate the terms of hard contracts such that the current obligations are reduced or are deferred to a later date. Another technique is to replace the hard contract with soft securities that have residual rather than fixed payoffs. In general, debt restructuring provides relief from financial distress by replacing the existing debt with a new debt contract that reduces the interest or principal payments, or extends the maturity, or exchanges equity securities for the debt.

An additional financial restructuring mechanism that helps correct the imbalance between current assets and requirements of the hard contracts is to raise current liquidity by issuing additional new claims against future cash flows. Although the original hard contracts are left unaltered, the claim structure of the firm is changed by the new financing undertaken. When the newly issued claims are a softer contract or have longer maturity, the total package of financing becomes less onerous on the firm, resolving financial distress. An infusion of private equity is an example of this type of restructuring.

Both asset restructurings and debt restructurings can be accomplished either through a formal court-adjudicated process or in a voluntary out-of-court workout. The choice of method used to resolve financial distress depends on the relative costs and benefits of each mechanism. For example, in an illiquid secondary market, the costs of asset restructurings are likely to be high, and financial restructuring may constitute a dominant restructuring mechanism. By the same token, if asset restructuring involves asset sales through efficient mechanisms such as auctions, the overall costs of resolving financial distress may be lower.

2.2. Efficiency issues in recontracting

The efficiency of the mechanisms for resolving distress can be measured by the loss in asset value incurred in the process of the asset and debt restructuring. A number of factors related to the structure of the firm’s claims and to the institutional framework governing the process for restructuring contribute to these costs. To understand these factors, it is useful to first consider a simple theoretical setting in which distress can be resolved costlessly.
In this simple setting, a single lender has access to the same information as corporate insiders, and the debt contract is complete; that is, a complete state-contingent set of contracts can be written and are enforced by the legal system. Here, either an initial contract can be designed that imposes the financial restructuring necessary to avoid a premature liquidation of assets, or the contract will be renegotiated costlessly in default in order to avoid suboptimal liquidations. For example, if at any time the firm’s current liquidity falls short of the current coupon obligations of the debt contract, the debt contract is renegotiated. In the negotiation, the lender is promised a combination of cash in the current period that the firm can pay without liquidating assets and additional cash flow in the future. The expected value of this combination is equal to the cash flow guaranteed by the old debt contract. Under symmetric information, the lender knows that the restructuring of the debt is such that he or she is indifferent between the new contract and the old one, and will accept the proposed contract. Moreover, the firm is no longer financially distressed under the new contract. In this example, the distress resolution is completely efficient and simply accomplished through a costless restructuring of the debt contract.

In practice, however, contracts are by nature generally incomplete. Neither outside investors nor the court system can verify the detailed information required to enforce many contracts. The current cash available, for instance, may not be observable to outside parties, preventing the enforcement of contracts that are contingent on these cash flows. Moreover, managers may have some latitude to divert a portion of the firm’s cash flows according to their personal preferences. Hart and Moore (1998) show that when one cannot contract on cash flows, creditors must be given some rights to liquidate physical assets in order to make borrowing viable. Otherwise, managers would always choose to default strategically and divert available cash to them. Anticipating this situation, creditors would not be willing to lend money to the firm. In contrast, if creditors are given the right to sell assets following nonpayment (default), the threat of liquidation helps deter strategic defaults. To keep the threat credible, suboptimal asset sales may sometimes occur following liquidity-induced defaults.

Financial restructuring can provide a solution to this problem. Mechanisms facilitating debt restructuring will reduce the costs of premature asset sales following liquidity defaults. The same mechanisms, however, will reduce creditors’ rights to liquidate assets following a strategic default, encouraging such defaults. The efficiency of the debt-restructuring mechanism ultimately depends on the relative importance of these two effects. Harris and Raviv (1991) and Bolton and Scharfstein (1996) develop related arguments.

In addition to the incomplete contracting problem, asymmetric information between debtors and creditors about the value of the assets—ongoing firm value and liquidation value—can impede a mutually beneficial debt renegotiation. As pointed out by Brown (1989), a private workout is always successful when there is symmetric information between management and a single creditor. Many of the theoretical models in the area examine the effect of incomplete contracting and asymmetric information on the efficiency of contracting, as well as the mechanisms necessary to resolve financial distress arising from a failure to meet the terms of the debt contract.
A third problem in practice is that there are usually multiple creditors with interests that are not congruent. Depending on the nature of the debt contract (private debt vs. public debt, syndicated vs. nonsyndicated debt), it may be difficult to achieve an agreement among creditors. Moreover, each creditor may have incentives to be the first to force a liquidation of the firm’s assets in order to guarantee payment in full. It has been argued that one of the central reasons for needing a bankruptcy law is to curb the inefficiencies resulting from this “common pool” problem.

The presence of all these factors will influence the firm’s choice of restructuring venue—that is, whether it will recontract privately or will instead choose to enter formal bankruptcy proceedings. We discuss this choice further in Section 2.4, following a brief review of the main ingredients of the formal bankruptcy process in the United States.

2.3. Rules and procedures of the U.S. bankruptcy code

For most firms in the United States, formal bankruptcy practices are governed by the Bankruptcy Reform Act of 1978 and, more recently, the Bankruptcy Reform Act of 2005. Bankruptcy petitions are filed in one of 94 regional bankruptcy courts, often based on the physical location of the company’s assets. Corporations generally file for liquidation under Chapter 7 or for reorganization under Chapter 11. Although creditors may initiate an involuntary filing under Chapter 7, management is often successful in converting the case to Chapter 11, allowing an attempt to reorganize. Because management can challenge an involuntary petition, bankruptcy filings are more frequently initiated by management.

For firms filing under Chapter 7, the court appoints a trustee that organizes a sale of the firm’s assets. Proceeds from the asset sales are distributed to claimholders according to the absolute priority rule, implying that junior claims do not receive any payment until senior claims are paid in full. Each claimholder’s distribution depends on the seniority of his claim and the total amount of proceeds received from the sale of assets.

Filings under Chapter 11 are treated as corporate reorganizations, and the bankrupt firm is expected to continue as a going concern after leaving bankruptcy. Consistent with the objective of reorganization, the major provisions of Chapter 11 are designed to allow the firm to continue operating. In general, incumbent management continues to run the business in Chapter 11. To protect the firm during the reorganization, Chapter 11 imposes an automatic stay that stops all payment of interest and principal to creditors and prevents secured creditors from foreclosing on their collateral. The debtor firm may also obtain debtor-in-possession (DIP) financing, taking the form of a line of credit or new financing for routine business expenses. Firms typically file a motion for authorization of a DIP loan at the same time as the Chapter 11 petition or shortly thereafter. Under Section 364 of the Bankruptcy Code, these post-petition loans are granted a super-seniority status.

LoPucki and Whitford (1991) examine the choice of venue for 43 large, publicly traded companies in financial distress. They find that firms often engage in “forum shopping,” that is, file in a court where the firm has little physical presence, avoiding courts that appear hostile to extensions of exclusivity or aggressively regulate attorney’s fees. See also Eisenberg and LoPucki (1999) for evidence on forum shopping.
that effectively strips seniority covenants from existing debt. This reduces the default risk of the new loan, hence encouraging new lending.

To manage the large number of creditors and equityholders that may be involved in the reorganization, the Bankruptcy Code provides for the appointment of committees to represent the interests of different claimholder classes before the court. Committees normally consist of the seven largest members of a particular class who are willing to serve, and they are empowered to hire legal counsel and other professional help at the expense of the firm. A committee representing unsecured creditors is almost always appointed. Other committees can be appointed at the discretion of the Executive Office for U.S. Trustees or the court to represent other claimholder classes, including stockholders.4

In order to emerge from Chapter 11, the bankrupt firm must develop a reorganization plan that restructures and reallocates the financial claims on the firm. Similar claims are grouped into classes depending on the priority and other characteristics of the claims. The plan specifies what each class of claimants will receive in exchange for their pre-bankruptcy claims. The distributions typically consist of a mix of cash, new debt securities, equity, and other distributions.

The reorganization plan may embrace a substantial restructuring of the operations. For example, firms operating in Chapter 11, and particularly those with poor operating performance, undertake significant asset sales. In a successful reorganization plan, the firm must demonstrate to the bankruptcy court that, after emerging from bankruptcy, the firm is unlikely to refile for bankruptcy in the near future, either because of an inappropriate capital structure or because of continued poor operating performance.

The rules under which negotiation of a plan takes place give substantial bargaining power to the filing firm, or debtor. One source of bargaining power is that the debtor has the exclusive right to propose a reorganization plan for the first 120 days following the Chapter 11 filing. Prior to the 2005 Bankruptcy Reform Act, bankruptcy judges had considerable discretion to extend this exclusivity period. If the debtor retains exclusivity, then creditors can only accept or reject a reorganization plan that management proposes. Acceptance of the plan requires an affirmative vote by a majority (two-thirds in value and one-half in number) of the claimholders in each impaired class.5

The Bankruptcy Code encourages bargaining among claimholders and promotes achieving agreement over the reorganization plan with limited court intervention. However, if the plan is not approved by each impaired class, the court can unilaterally impose or “cram down” the plan on dissenting classes as long as the plan is “fair and equitable.” That is, the market value of the new securities distributed to each class under the plan must be at least equal to what the class would receive in a liquidation of the firm. In practice, cram-downs are extremely rare (Klee, 1979). It is in the joint interest of all classes to avoid a cram-down, because application of the fair and equitable standard requires the

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4 Although firms file in specific bankruptcy courts, various aspects of the administration of the case are overseen by the Executive Office for U.S. Trustees.

5 An impaired class is one in which the distributions under the reorganization plan are insufficient to meet the terms of the original claims. Equityholders are always presumed to be impaired in bankruptcy.
court to determine the firm’s going-concern value in a special hearing. These hearings are considered extremely time-consuming and costly.

Avoidance of cram-down also explains observed deviations from absolute priority, where stockholders or other junior claimants receive some payment under a reorganization plan that provides for less than full payment of senior claims. Since classes that receive nothing under the plan (including stockholders) are considered as objecting to the plan, more senior creditors have an incentive to voluntarily relinquish part of their claim in order to reach an agreement. Empirical studies show that deviations from absolute priority are a common feature of Chapter 11 reorganizations (see Sections 4.1 and 5.1).

The Bankruptcy Reform Act of 2005 enhances the rights of creditors in Chapter 11 reorganizations. Some of the more important changes are restrictions on the use and size of management bonuses and severance payments; limitations of the exclusivity period (for management to propose a reorganization plan) to a maximum of 18 months; extension of the fraudulent conveyance look-back period to two years; and reduction of the time that the debtor has to assume or reject leases.

2.4. The choice between private and court-supervised restructuring

With a single lender, complete contracting, and symmetric information, the efficient method of resolving financial distress would be a private restructuring of the debt contract. In a more realistic setting, however, a costless private workout is not feasible, and the firm must weigh the costs and benefits of a private workout against those of a court-supervised proceeding.

Impediments to reaching a settlement in a private restructuring include information asymmetries that arise between poorly informed outside creditors and better informed managers or insiders of the firm; holdout problems when the firm’s debt is held by a large number of diffuse creditors; and various conflicts of interest exacerbated when a firm has multiple layers of creditors. Giammarino (1989) and Mooradian (1994) demonstrate that poorly informed creditors may prefer a more costly bankruptcy alternative when information problems are severe. Carapeto (2005) argues that informational asymmetries could lead to extended bargaining, requiring several plans of reorganization before an agreement is reached.

As proposed by Mooradian (1994), Chapter 11 bankruptcy may serve as a screening device when outsiders cannot observe the economic efficiency of the financially distressed firm. Given the debtor’s bargaining power and the associated preservation of equity value in Chapter 11, inefficient firms prefer to restructure in court rather than mimic efficient firms in a private restructuring. The self-selection on the part of inefficient firms reduces the information asymmetry between management and outsiders, thus mitigating the impediment to private restructuring for efficient firms. Alternatively, Hotchkiss and Mooradian (2003) suggest that by submitting a bid for the bankrupt firm, a coalition of management and creditors convey positive information about the value of
the firm. This may encourage outsider bidders to enter the auction, hence facilitating an efficient redeployment of the bankrupt firm’s assets.\footnote{Povel and Sing (2007) warn that outsiders may worry about overpaying when winning against a better informed insider, and suggest that bankruptcy auctions should be biased against insiders.}

It is possible that Chapter 11 may fail to resolve information asymmetries, leaving creditors uncertain about the viability of the distressed firm. Kahl (2002) claims that with sufficient uncertainty, it may be optimal for creditors to postpone the liquidation decision and gather more information about the firm’s survival characteristics. Under this strategy, some inefficient firms will be allowed to emerge from Chapter 11 and, if unsuccessful post-bankruptcy, instead be liquidated at a later date.

Gertner and Scharfstein (1991) focus on the conflicts that arise when there are multiple creditors. In particular, holdout problems can arise when a class of claims, such as public debt, is diffusely held. Under the Trust Indenture Act of 1939, a change in the interest rate, principal amount, or maturity of public debt outside of a formal bankruptcy requires unanimity. As a result, public debtholders cannot coordinate their out-of-court restructuring decision. If the out-of-court restructuring is successful and a more costly bankruptcy is avoided, holdouts are paid according to the original debt contract. The cost is borne entirely by the bondholders who participated in the exchange and accepted a reduction in the value of their claim. Small claimants, such as individual bondholders and trade creditors, may realize that their decision to hold out will not materially affect the outcome of the restructuring offer (Grossman and Hart, 1981), and therefore have few incentives to participate. Thus, even though it may be collectively in the interest of public debtholders to agree to the out-of-court restructuring and avoid bankruptcy, it is likely to be individually rational for bondholders to hold out. Chapter 11 is designed to resolve holdout problems, however, since a majority vote is binding on all members of a creditor class.

Abstracting from information and contracting problems, Haugen and Senbet (1978) suggest that bankruptcy is a capital structure decision that should not be linked to liquidation, which is a capital budgeting decision. If the capital structure problem can be resolved by restructuring the financial claims, then firms will avoid costly bankruptcy procedures and privately agree on a financial restructuring. Haugen and Senbet (1978, 1988) maintain that the costs of such private mechanisms are small and should form an upper bound on the costs of managing financial distress. Similarly, Jensen (1989, 1991) argues that since private restructuring represents an alternative to formal bankruptcy, it pays to avoid bankruptcy when the informal mechanism is cost-efficient. Roe (1983) has made similar arguments.

A complication to the restructuring choice is, however, that a redistribution of the financial claims on the firm may not be independent of the firm’s asset restructuring decisions. For a highly leveraged firm in financial distress, different claimholders may have conflicting incentives as to the investment decisions. The issue is that the value of junior claims increases with the riskiness of the firm’s assets, while the value of senior claims decreases with risk. At the extreme, a conflict can arise as to whether to liquidate or reorganize the firm. Senior creditors that are first in line may prefer an inefficient
liquidation that converts the firm’s assets into cash and provides senior debtholders with a safe distribution. In contrast, junior creditors or out-of-the-money shareholders may prefer inefficient continuation because it has a potential upside. The models in Bulow and Shoven (1978), White (1980), and Gertner and Scharfstein (1991) show that inefficient liquidation versus reorganization decisions may occur when there are multiple classes of creditors.

Zender (1991) models a distressed restructuring as a means of transferring control from equityholders to debtholders. He argues that the shift in decision making improves the efficiency of investment decisions. If decision making is transferred to the creditor who effectively is the residual claimholder, that is, holds the claim whose value is the most sensitive to a change in firm value, the incentives of the controlling security holder will be aligned with firm value maximization.7

It is often not only financial distress—that is, that the hard contract obligations are too large—but also economic distress that leaves the firm unable to pay its debts. Optimally, assets of economically inefficient distressed firms should be moved to higher value uses and users, while economically efficient distressed firms should be allowed to continue to operate.8 The problem is that economic efficiency or inefficiency may not be readily observable.

Moreover, managers may not voluntarily reveal that a firm is economically inefficient. A manager who has private benefits of control and who is interested in preserving his or her job may seek to continue to operate the firm as an ongoing concern and also when it is efficient to liquidate the firm. Aghion, Hart, and Moore (1992) and White (1996) argue that the incentives to undertake high-risk but negative net present value projects increase when managers expect to get a harsh treatment in bankruptcy, for example by losing his or her job. Eckbo and Thorburn (2003), however, suggest that the manager’s desire to continue to run the firm following a successful restructuring may counteract any such incentives to overinvest at the expense of bondholders.

In a perfect world, claimholders of a financially distressed firm would always renegotiate and voluntarily agree to a restructuring of the firm’s capital structure. In reality, however, with impediments such as information asymmetries, holdout problems, and conflicting interests, firms sometimes resort to bankruptcy for a court-supervised reorganization. In any restructuring of hard contracts or hard assets, the choice of restructuring venue ultimately affects the cost of the restructuring and the impact it has on the firm’s investment decisions.

3. Asset restructuring

As outlined in the preceding, one set of mechanisms to deal with financial distress involves restructuring the asset side of the balance sheet in order to generate sufficient

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7 One way of transferring the liquidation versus continuation decision to the marginal claimholder is to sell the bankrupt firm in an auction, where the highest bidder gets to decide over the future use of the assets.

8 The inefficient bankruptcy outcomes of allowing economically inefficient firms to continue and liquidating economically efficient firms are labeled Type I and Type II errors, respectively, by White (1989).
cash to meet the requirements of the hard contracts. Assets can be sold, either piece-
meal or in their entirety, to other firms and new management teams. Asset sales can be
done privately or through court-supervised procedures, for example, during bankruptcy
reorganization (e.g., Chapter 11 of the Bankruptcy Code) or under a liquidation process
(e.g., Chapter 7 of the Bankruptcy Code). Each of these alternatives has different costs
attached. The incidence and efficiency of asset restructuring to resolve financial distress
will depend on the structure of the bankruptcy system in place. This section describes
the empirical evidence on the sale of individual assets by distressed firms in the United
States. Studies of sales of entire firms in Chapter 11 are discussed in Section 5, and sales
of bankrupt firms in other countries are described in Section 8.

The literature described here broadly addresses the following questions: how fre-
quently do distressed firms sell assets; what determines whether distressed firms will
sell assets in or out of bankruptcy court; do asset sales lead to efficient outcomes, in that
assets are moved to higher value uses; and do “fire sales” exist, where assets are sold at
depressed prices?

3.1. Frequency and determinants of asset sales

Financially distressed firms may face a liquidity shortfall, yet be constrained in their
ability to raise external funds to meet their obligations. In this situation, asset sales
may serve as an alternative source of funds by which liquidity-constrained firms can
generate cash. Consistent with this view, Lang, Poulsen, and Stulz (1995) find that
asset sales typically follow a period of poor stock performance. On average, these sales
announcements are associated with a positive stock price reaction.

In contrast to the evidence for poorly performing firms, Brown, James, and Mooradian
(1994) find insignificant returns to announcements of asset sales for a sample of 62
distressed companies. The announcement returns are, however, significantly lower for
sellers who use the proceeds to retire debt than for sellers who use the proceeds for other
purposes. Firms using sales proceeds to repay debt are more likely to sell assets in poorly
performing industries. Also, the greater the proportion of short-term bank debt, the more
likely are the sale proceeds to be paid out to creditors, indicating that creditors may
influence the decision to liquidate assets. The asset sales appear to benefit the creditors
of the financially distressed firm more than its equityholders, suggesting that creditors
may force a premature liquidation of the assets.

Asset sales may also convey information about the financial condition of the seller.
Sicherman and Pettway (1992) report lower announcement returns for firms divesting
assets following a credit downgrade than for sellers with no such downgrade. Brown,
James, and Mooradian (1994) examine the characteristics of distressed firms that sell
assets and find that sellers typically have experienced a period of extremely poor operat-
ing performance and are in poor financial condition. Moreover, the selling firms tend to
be distinguished by multiple divisions or subsidiaries. Leverage has also been found to
be a determinant of asset sales. Ofek (1993) and Kruse (2002) show that the probability
of asset sales increases in the firm’s debt level.
A number of papers more generally document the frequency of asset sales for financially distressed companies. Asquith, Gertner, and Scharfstein (1994), Brown, James, and Mooradian (1994), and Hotchkiss (1993, 1995) all demonstrate a high frequency of asset sales for distressed firms, whether out of court or as part of a Chapter 11 restructuring. For example, Hotchkiss (1995) shows that many firms that successfully emerge from Chapter 11 sell a substantial portion of their assets while in bankruptcy.

Asquith, Gertner, and Scharfstein (1994) find that significant asset sales are an important means of avoiding bankruptcy. They find that only 3 out of 21 companies (14%) that sell over 20% of their assets subsequently file for bankruptcy compared to 49% of firms with small or no asset sales. Firms that sell a large fraction of their assets are more likely to complete a successful debt exchange (62% versus 28%). The proceeds are often used to pay off senior private debt. Moreover, the probability of asset sales decreases with industry leverage, suggesting that asset sales may be limited by industry conditions.

3.2. Do “fire sales” of assets exist?

If creditors exert pressure on firms to inefficiently liquidate assets, the value of the firm declines. Not only should we see negative effects on the value of equity and junior debt claims, but firms should also be observed to sell assets at depressed prices in their “fire sale” attempts to raise cash. As discussed earlier, Shleifer and Vishny (1992) argue that distressed firms are likely to be selling assets at a time when potential buyers for those assets—firms in the same industry—are financially distressed as well, contributing to depressed prices. Their model predicts that distressed sellers will receive lower prices and be more likely to sell to industry outsiders in periods when the industry is financially distressed. Moreover, the more specialized the assets, the greater this fire-sale discount.

Several studies examine these issues and their implications for the efficiency of restructurings. An empirical caveat, however, is that it is almost impossible to know whether prices are low because industry demand is low or because industry insiders are liquidity constrained and unable to pay their full valuation. If industry demand has dropped, a low price simply represents an updated (and efficient) market valuation of the assets. If demand exists but a lack of liquidity prevents potential buyers from bidding aggressively, the discount is a true cost associated with the forced asset sale. Most studies construct a model price to represent the fundamental value of the asset, and they compute the fire-sale discount as the difference between this model price and the actual price. Obviously, any evidence on fire-sale discounts is limited by the quality of the estimate of such fundamental values.

Pulvino (1998, 1999) addresses the question of whether fire sales exist. He shows that financially constrained airlines receive lower prices relative to a model price when selling used aircraft than their unconstrained rivals. He also finds that the conditional prices that bankrupt airlines receive for their used aircraft typically are lower than those received by distressed but nonbankrupt firms. Therefore, not only do distressed sellers
receive lower conditional prices, but the bankruptcy status of the seller appears to further influence the outcome. Moreover, when the airline industry is depressed—defined as periods when prices are generally low—capital-constrained airlines are more likely to sell to industry outsiders (financial institutions) than are unconstrained airlines. Overall, the evidence in Pulvino (1998, 1999) is consistent with the Shleifer and Vishny (1992) model.

Two related papers study the impact of asset and industry-level characteristics on asset sales. Ramey and Shapiro (2001) examine individual equipment sales that follow three California plant closures in the aerospace industry. They find that actual transaction prices take place at a discount from estimated replacement costs. This discount is greater for equipment that is more specialized to the aerospace industry and when the buyer is an industry outsider. Kim (1998) investigates the significance of asset liquidity in the contract drilling industry, measured by trading volume and the depth of the buyers’ market. She shows that the turnover of illiquid assets drops when the industry is distressed, defined as periods of low crude oil prices and few active rigs. Moreover, sellers of illiquid assets are more financially constrained than sellers of liquid assets and buyers, suggesting that firms avoid selling highly specific assets until it is necessary.9

Maksimovic and Phillips (1998) examine whether assets sold by manufacturing firms are redeployed efficiently. Using plant-level data from the U.S. Census Bureau, they track changes in the productivity of assets and operating cash flows for firms entering Chapter 11 and their nonbankrupt industry rivals. Maksimovic and Phillips (1998) show that industry conditions are important in explaining economic decisions such as asset redeployment. Bankrupt firms in high-growth industries are more likely to sell assets than bankrupt firms in declining industries. Furthermore, in high-growth industries, the productivity of the assets sold increases under new ownership. This evidence is consistent with the efficient redeployment of assets to more productive uses and does not support the notion of fire sales in distressed industries. Interestingly, industry conditions are more important than Chapter 11 status in explaining changes in the productivity of assets, regardless of whether they are sold or retained by the firm.

Andrade and Kaplan (1998) also contribute to the body of evidence on asset sales by distressed firms. In a sample of highly leveraged transactions that subsequently became distressed, they find that the total costs of financial distress, measured as the change in the market value of the firm, are independent of the industry’s stock performance. Since the market value includes the costs associated with asset sales, their evidence fails to establish that distressed industries force asset sales at greater discounts.

Overall, asset sales appear to be an important component of how firms deal with financial distress. The asset sales are often undertaken in conjunction with a restructuring of the firm’s debt contracts. While such asset sales may be costly, because they are so commonly

9 Asset liquidity can also influence the firm’s choice of capital structure. Firms with more liquid assets tend to have higher debt levels and longer maturities; see, for example, Alderson and Betker (1995) and Benmelech, Garmaise, and Moskowitz (2005).
observed, it is conceivable that they still constitute a relatively low-cost mechanism to help resolve financial distress.

4. Debt workouts

Debt restructurings can be used to soften the hard contracts that cause financial distress. As outlined in Section 2, the distressed firm may reduce or defer payments on its debt contracts, or replace the debt with soft securities that have residual rather than fixed payoffs. We define a debt restructuring as a transaction in which an existing debt contract is replaced by a new debt contract with a reduction in the required interest or principal payments or an extension of maturity, or exchanged for common stock or securities convertible into common stock. In an out-of-court debt restructuring, claims are renegotiated via a workout or an exchange offer, without resorting to formal bankruptcy proceedings. A workout typically involves renegotiation of bank debt and other privately held claims. Publicly traded debt is restructured through an exchange offer, in which the distressed debt is exchanged for new debt or equity securities. This section surveys the empirical evidence related to different types of debt restructurings.

4.1. The choice between out-of-court restructuring and formal bankruptcy

Many firms first attempt to resolve financial difficulties via a workout or exchange offer. Private mechanisms to restructure a financially distressed firm are expected to be less costly than formal bankruptcy proceedings. The greater are the cost savings, the greater are claimholders’ incentives to settle privately. However, as discussed in Section 2.4, there are substantial impediments that hinder private restructurings, including asymmetric information, conflicts of interest among claimants, and holdout problems. When private mechanisms to resolve financial distress fail, the firm enters Chapter 11.

Early empirical work indicates that a substantial fraction of firms fail to successfully restructure out-of-court and file for Chapter 11 bankruptcy. Gilson, John, and Lang (1990) examine 169 financially distressed public companies that experienced extreme stock price declines and for which a debt restructuring is mentioned in the Wall Street Journal. Of these distressed firms, 80 (47%) restructure their debt out-of-court, while the remaining 89 firms (53%) fail to privately restructure their debt and subsequently file for Chapter 11. Franks and Torous (1994) investigate 161 firms that are downgraded to CCC or below by Standard and Poor’s. They identify equal proportions of firms that complete a distressed exchange offer (76 firms) and firms filing for Chapter 11 (78 firms).

It is possible that the proportion of firms that successfully restructure out-of-court has declined. Altman and Stonberg (2006) track the size of the defaulted public bond and private debt markets. Recently, approximately 60% of defaults are concurrent with a bankruptcy filing, and many more defaulted bonds subsequently enter Chapter 11.
is an increase from the earlier years of Chapter 11 and suggests that private workouts have become relatively less common for distressed firms. One explanation could be legal rulings related to the treatment of claims in the event of a subsequent bankruptcy that discourage out-of-court restructurings relative to bankruptcy (Jensen, 1991).10

Following the legal rulings that discourage out-of-court restructurings, prepackaged bankruptcies (prepacks) became more widely used in the early 1990s and now replace some out-of-court restructurings, particularly for firms with public debt (Tashjian, Lease, and McConnell, 1996). Prepacks are a hybrid through which a reorganization plan is negotiated with creditors prior to bankruptcy and filed concurrently with the bankruptcy petition. They are sometimes done in conjunction with an out-of-court exchange offer; if the exchange offer fails to receive sufficient support, the firm can enter Chapter 11 and use votes solicited simultaneously with the exchange offer to confirm a reorganization plan in bankruptcy. Thus, firms filing prepacks can take advantage of certain attractive features of a Chapter 11 filing, such as beneficial tax treatment and voting rules to overcome a holdout problem, without going through long and costly bankruptcy proceedings (Betker, 1995a). Baird and Rasmussen (2003) estimate that one quarter of 93 large-firm Chapter 11 bankruptcies in 2002 were prepackaged bankruptcies.

Gilson, John, and Lang (1990) examine the determinants of firms’ choice between formal bankruptcy and out-of-court restructuring. They find that the probability of completing an out-of-court restructuring is higher the greater proportion of the firm’s assets that is intangible. The value of intangible assets is more likely to erode in bankruptcy, for example, through asset fire sales or perishing customer demand. Since bankruptcy is relatively more costly for firms with more intangible assets, these firms have greater incentives to preserve value via an out-of-court restructuring.

The study by Gilson et al. (1990) further shows that private workouts are more common when the firm has fewer distinct classes of debt outstanding and a greater proportion of the firm’s long-term debt is bank debt. Conflicts of interest among different classes of creditors are more manageable the smaller the number of distinct creditor classes. Moreover, because banks are better informed than public debtholders, reducing potential information asymmetries, it is easier and therefore less costly for firms with banks as dominant creditors to renegotiate their debt. The bank debt is also more likely to be pivotal to the restructuring the greater is the proportion of bank debt, forcing the bank to internalize some of the restructuring costs. In contrast, with a greater proportion of diffusely held debt, such as public debt or trade credit, holdout problems become more severe.

Franks and Torous (1994) compare characteristics of the financial recontracting for firms completing public debt exchange offers and firms entering Chapter 11. They find

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10 One such decision was made in the LTV Corp. bankruptcy case. The bankruptcy case was filed on July 17, 1986 in the Southern District of New York, U.S. Bankruptcy Court. The court ruled on January 32, 1990 that debtholders who had participated in a prior out-of-court restructuring could only make a bankruptcy claim for the new reduced principal amount, while holdouts could claim the original principal amount. This decision discourages creditors from agreeing to reduce the principal of their debt claim in an out-of-court restructuring.
that the firms restructuring out-of-court are more solvent and liquid, and have less negative stock returns prior to the restructuring. Unlike Gilson et al. (1990), however, Franks and Torous do not find that firms restructuring out-of-court have a greater proportion of bank debt. This could be because the firms in their sample are larger and therefore rely less heavily on bank debt or because the bank loans of these firms often are syndicated and hence involve a larger number of banks. James (1995) and Asquith, Gertner, and Scharfstein (1994) also show that the presence of public bonds junior to the bank debt may impede restructurings.

Chatterjee, Dhillon, and Ramirez (1995) show that the firm’s level of debt, its short-term liquidity, and the potential for coordination problems among creditors jointly determine the choice of restructuring mechanism. Firms filing for Chapter 11 are characterized by poor operating performance, high leverage, and coordination problems among creditors, whereas firms restructuring out-of-court tend to have relatively strong operating cash flows. They also examine firms filing prepacks and find that they typically have relatively strong operating performance but, in contrast to firms doing workouts, face an immediate liquidity crisis.

Asquith, Gertner, and Scharfstein (1994) provide similar evidence on the relationship between the firm’s liability structure and the form of the restructuring. In particular, companies with more secured private debt and those with more complex public debt structures are more likely to enter Chapter 11. The larger fraction of secured debt may indicate a relatively low proportion of intangible assets, and thus less costly bankruptcy proceedings. They also find that 59% of firms whose banks agree to a debt restructuring ultimately enter bankruptcy, which suggests that these firms either did not reduce leverage sufficiently or did not adequately restructure assets to avoid bankruptcy. Altogether, the evidence indicates that conflicts between classes of claimants and holdout problems impede out-of-court restructurings, constrain the structure of out-of-court restructurings, or limit the effectiveness of out-of-court restructurings in the resolution of financial distress.

Although there are substantial impediments or limitations to out-of-court restructurings, the direct restructuring costs are likely to be substantially lower for an out-of-court restructuring than for a court-supervised bankruptcy. Measuring the direct costs of an out-of-court restructuring is often difficult because these costs are typically not reported separately from other nonrestructuring related operating expenses of the distressed firm. For example, although several studies of bank loan restructurings have been made, researchers have been unable to identify the related expenses. The costs can be observed, however, for the restructuring of public debt via a formal exchange offer. Gilson, John, and Lang (1990) document an average cost for 18 exchange offers of 0.6% of the book value of assets. The cost for 29 exchange offers studied by Betker (1997) is somewhat higher, with a mean of 2.5% of the pre-exchange assets (median 2.0%). In addition, out-of-court restructurings take significantly less time than Chapter 11 proceedings, suggesting that various indirect costs may be lower as well.

These estimates are useful in two respects. First, relatively low direct costs may make an out-of-court restructuring desirable relative to formal bankruptcy, particularly for firms
with less severe impediments to a privately negotiated solution. Second, in considering a firm's ex-ante optimal leverage, relatively low costs of reorganizing would encourage firms to take advantage of the tax benefits of debt through higher leverage.

The stock market reaction to the announcement of a workout versus a bankruptcy filing corroborates the lower costs of workouts. Chatterjee, Dhillon, and Ramirez (1995) report less negative abnormal returns for announcement of workouts than Chapter 11 filings. Gilson, John and Lang (1990) show that stock returns on the announcement of debt renegotiations are more negative for firms that subsequently file for Chapter 11, suggesting that the market is able to identify firms that are more likely to succeed in restructuring their debt out-of-court.

Another circumstance indicating that there is greater firm value to share in workouts than in bankruptcy is documented by Franks and Torous (1994). They find that senior creditors in workouts are willing to forego a greater share of the value of the reorganized firm in favor of equityholders through deviations from the absolute priority rule. In exchange offers, all creditor classes relinquish some financial consideration to equity (on average 9% of the value of the reorganized firms), while the magnitude of these deviations is much smaller for firms in Chapter 11 (on average 2% of firm value). The fact that senior creditors are willing to give up a greater fraction of the firm to junior claimants in a workout suggests that on average firms attempting workouts may be less severely financially insolvent than bankrupt firms. Alternatively, if senior creditors prefer a smaller fraction of a potentially more valuable firm in a workout than a larger fraction of a potentially less valuable firm in bankruptcy, then this suggests lower overall costs of a workout compared to a bankruptcy.

4.2. Characteristics of debt restructurings

A number of studies have documented various aspects of out-of-court restructurings such as the medium of exchange and debt recovery rates. Asquith, Gertner, and Scharfstein (1994) study the characteristics of private bank debt restructurings. They report that bank lenders respond to financial distress in various ways, including requiring accelerated payments and reducing further lending. Banks also waive covenants but rarely agree to a reduction in the principal amount of their claim. James (1995) expands on these results for a sample of 102 debt restructurings. He shows that banks make concessions only if public debtholders also agree to restructure their claims. In general, banks are more likely to forgive principal and take equity when a smaller fraction of the debt is held by public creditors.

James (1996) demonstrates that bank participation in the workout is important because it facilitates public debt exchange offers. Compared to restructurings in which banks do not participate, exchange offers accompanied by bank concessions have a higher likelihood of succeeding and involve significantly greater reductions in public debt outstanding and less senior debt offered to bondholders. Thus, the characteristics of a firm's debt structure help explain what form of restructuring will be feasible.
Evidence on the characteristics of distressed public debt exchanges is presented by Franks and Torous (1994). They find that a majority of the payments in exchanges of senior public debt are in the form of cash (29%) and new senior debt (38%), whereas the majority of payments in exchanges of junior debt constitutes common stock (67%). They further show that creditor recovery rates tend to be substantially higher in distressed exchange offers than in Chapter 11 reorganizations. Also, relative to Chapter 11 reorganizations, cash is used less extensively and equityholders typically get to retain a larger fraction of the reorganized firm’s equity.

Brown, James, and Mooradian (1993) examine how the type of securities offered in a debt restructuring relates to information asymmetries about the firm’s prospects. When firms offer equity to private lenders, who tend to be better informed about the firm, and senior debt to public debtholders, this conveys positive information about firm value. In contrast, abnormal announcement returns are negative when private lenders are offered senior debt and public lenders are offered equity.

The participation of investment banks in public debt exchange offers is investigated by Mooradian and Ryan (2005). Firms can chose to conduct a public debt exchange offer without involving an investment bank. Though costly, 61% of the sample firms engage an investment bank as an intermediary in the distressed exchange offers. Mooradian and Ryan show that investment bank participation decreases with the level of commercial bank debt outstanding and increases with bank loan concessions, firm size, number of public debt contracts outstanding, and size of the proposed debt reduction. This suggests that financially distressed firms hire an investment bank to manage their exchange offers when the debt structure is complex and there is a greater need for help in mitigating potential impediments to an out-of-court restructuring. Interestingly, the investment-bank-managed exchange offers involve less senior debt to bondholders, achieve greater debt reduction, and result in better post-restructuring operating performance.

The use of coercive tactics to alleviate holdout problems can be beneficial to the firm. A coercive offer involves a consent agreement to issue a more senior class of debt (which only requires a two-thirds majority vote) combined with an exchange offer replacing the current debt with a more senior debt issue requiring lower interest payments, less principal, or longer maturity. The offer is coercive because if the exchange offer is successful, a creditor holding out ends up with a more junior claim, albeit with more favorable terms. Chatterjee, Dhillon, and Ramirez (1995) report higher completion rates and a higher proportion of bonds tendered or exchanged when exchange offers are coercive, indicating that the coercion helps alleviate the holdout problem. They also show that the equity and debt price reactions to the announcement of the exchange offer indicate that coercion may benefit stockholders without being detrimental to bondholders.

The general conclusion from much of this literature is that absent holdout problems and other coordination problems, private debt restructurings such as exchange offers provide a lower cost restructuring mechanism than formal bankruptcy. Moreover, various characteristics of the financially distressed firm’s capital structure and asset composition determine the severity of the impediments to a successful out-of-court restructuring.
5. Governance of distressed firms

The governance structure in bankruptcy determines the relative influence of different stakeholders over the process and hence the outcome of the reorganization. Because bankruptcy is a likely event if an out-of-court restructuring fails, the governance structure in bankruptcy also affects the relative power of claimants outside of bankruptcy and is thus influential in shaping any out-of-court restructuring.

Many aspects of a firm’s governance are affected when a firm becomes financially distressed. The fiduciary duties of managers and directors, normally owed to the firm’s shareholders, expand to include creditors. With conflicting interests between various debtholders and equityholders, corporate executives may be caught in the middle. Both managers and directors typically experience a higher turnover than normal. Also, most significant restructurings lead to large changes in ownership, with creditors often emerging as new owners of the firm. The mechanisms through which the change in control occurs, however, can be quite different from those for nondistressed firms. This section discusses various aspects of governance and their impact on the incentives of managers and other participants in the restructuring process.

5.1. Conflicts of interest and the fiduciary duties of managers and directors

When a corporation is solvent, the managers and directors have fiduciary duties to the corporation and its shareholders. When a company is in financial distress, however, decisions increasing the value of equity may in fact reduce total firm value. Thus, it is no longer clear that the decision making should be left to agents whose incentives are aligned with equity. The courts recognize this problem by extending the fiduciary duties of directors and officers to also include creditors when the firm becomes insolvent (Branch, 2000). This expansion of the fiduciary duties creates potential difficulties in defining managers’ responsibilities, however, since shareholders and senior creditors often have opposing interests.

The 1989 bankruptcy of Eastern Airlines, described by Weiss and Wruck (1998), illustrates the potential magnitude of such conflicts. Relying on an offer to purchase the company, Weiss and Wruck estimate the equity going-concern value at the time of filing at approximately $1.2 billion. Based on the perceived continuation value, creditors and other groups initially supported management’s attempts to reorganize. However, even as Eastern continued to experience large operating losses, it was granted the right to use cash available from asset sales to continue operating. Weiss and Wruck estimate a decline in the value of the airline of more than $2 billion over a 22-month period in bankruptcy. If management were acting solely in shareholders’ interests, its best strategy was to continue operating the airline, hoping for a recovery of the business. Given the decline in asset value, however, creditors would have fared better if the cash had been used to pay their claims rather than continue funding unprofitable operations. Reorganization attempts ultimately failed, and Eastern was liquidated under Chapter 7 in 1991.
While Eastern Airlines’ bankruptcy provides an extreme example of the tensions between incentives to reorganize versus liquidate, conflicts between different claimholders are manifested in many reorganization cases. Macy’s bankruptcy is another example of conflicting interests between stakeholders (Noe and Rebello, 2003). After filing for bankruptcy in 1992, Macy’s management embarked on a plan to restructure the operations and close underperforming stores with the objective of ultimately emerging from bankruptcy as an independent company. Negotiations between management, shareholders, and creditors over the reorganization plan remained deadlocked, however. To break the deadlock, Macy’s creditors enlisted Federated Department Stores to make a bid for the bankrupt company. Management contested the acquisition and repeatedly sought extension of the exclusivity period to prevent competing reorganization plans. A fraction of the board headed by a bondholder, Laurence Tisch, opposed management’s plan. Eventually, Federated and Macy’s creditors jointly filed a plan under which Federated gained control of the company, providing no distribution to shareholders.

Until a debt restructuring is completed, the interests of different claimholders regarding the firm’s investment decisions can deviate substantially. Chapter 11 provides features that are aimed at balancing such conflicts of interest. The “pro-debtor” provisions of the Bankruptcy Code yield considerable influence to incumbent management over the course of the restructuring and development of the reorganization plan. At the same time, both creditors and the court are granted substantial oversight of the proceedings. Unsecured creditors typically are represented by a committee, giving them influence over the negotiation process. The appointment of other committees, however, is more uncertain. Betker (1995b), for example, documents the formation of an equity committee in one-third of his sample of 75 large Chapter 11 cases.

To speed up the confirmation of a reorganization plan, preventing further deterioration of asset values, senior creditors may agree to a side-payment to junior creditors and equityholders. Such side-payments show up as deviations from the absolute priority rule. The priority of claims is violated for three-quarters of the Chapter 11 cases in Franks and Torous (1989), Eberhart, Moore, and Roenfeldt (1990), and Weiss (1990). For a more recent sample of Chapter 11 filings, Bris, Welch, and Zhu (2006) find violations of the absolute priority rule in only 12% of the cases. The much lower incidence of deviations from the priority of claims could partly be explained by a smaller firm size in Bris et al. (2006) and thus a less complex proceeding, and partly by a change in the view and enforcement of creditor rights. This trend is, however, corroborated by Bharath, Panchapegesan, and Werner (2007), who examine 531 large firms that filed for Chapter 11 between 1991 and 2005. While 26% of the bankruptcy cases in the 1990s involve deviations from absolute priority, such deviations are recorded for only 9% of the cases after year 2000.

Similarly, for a sample of 153 large corporate Chapter 11 filings in 2001, Ayotte and Morrison (2007) report that very few reorganization plans (6% or less) violate absolute priority rules by distributing any value to equityholders.11 They argue

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11 This measure does not account for distributions to equityholders of warrants, which are usually the right to buy out the creditors at the face value of their claims.
that governance in Chapter 11 has shifted to emphasize creditor control and creditor conflict. Senior lenders exercise control through pre- and post-petition lines of credit, which limit the debtor’s access to financing and impose strict requirements on business activity. Three-quarters of their sample firms obtain DIP financing, typically secured by a lien on all corporate assets. The vast majority of loans contain covenants imposing line-item budgets, profitability targets, and deadlines for reorganization plans. If these covenants are violated, the lender is generally free to seize collateral unilaterally, without seeking court approval. Ayotte and Morrison (2007) further document that junior lenders use claims trading, committees, and other tactics to gain control over the reorganization process. Acting through the unsecured creditors committee, junior creditors file objections in over half of the sample cases. In almost as many cases, DIP lenders object to actions proposed or taken by incumbent management. Amendments to the U.S. Bankruptcy Code effective October 2005 have further increased creditor influence in Chapter 11.

In sum, when a firm becomes financially distressed, the residual claim often shifts from equityholders to creditors. This creates conflicts of interest regarding the firm’s investment and continuation decisions that have an important effect on bankruptcy outcome.

5.2. Management and board changes

Critics of Chapter 11 bankruptcy suggest that the process protects bad managers from being removed. Bradley and Rosenzweig (1992) argue, on the one hand, that bankruptcy law allows management to go relatively unpunished, retaining control over corporate assets, even when their own actions helped to render the firm insolvent. On the other hand, operating decisions of healthy firms will be affected by an increased likelihood that managers are replaced in the event of financial distress. For example, managers may be reluctant to undertake highly profitable (positive net present value) but also highly risky investments if they are likely to be fired should the investment fail.

Several academic papers examine whether financial distress is costly to managers in the sense that they are likely to lose their jobs. Gilson (1989) examines the turnover of managers carrying the title of CEO, chairman, and president over a four-year period beginning two years prior to bankruptcy filing or debt restructuring. For 69 firms filing for bankruptcy, 71% of managers are replaced over the four years. This turnover rate is significantly higher than that of financially distressed firms that successfully restructure their debt out of court. None of the executives who lose their position are employed by another publicly traded firm over a three-year period following their departure, suggesting that the personal costs are significant.

Other studies of management replacement rates for failing firms show similarly high turnover. Betker (1995b) reports a 91% turnover of CEOs in office two years prior to filing by the time the firm emerges from bankruptcy. In comparison, Weisbach (1988) and Warner, Watts, and Wruck (1988) document substantially lower CEO turnover rates for nondistressed firms. Moreover, both studies show that management turnover increases
as firm performance deteriorates. In a more recent study, Ayotte and Morrison (2007) find that 70% of CEOs are replaced within two years of a bankruptcy filing.

While the turnover of managers is abnormally high for distressed firms in general, certain bankruptcy courts (e.g., Delaware) have been alleged to maintain relatively strong pro-debtor biases. LoPucki (2004) argues that managers choose to file for bankruptcy in such districts, where they expect to receive favorable rulings that help them retain control of the reorganization process. The documented high turnover of managers, however, runs counter to the notion that they are overly protected by the process. Gilson (1989), Betker (1995b), and Hotchkiss (1995) show that although a significant fraction of managers is able to stay in place until a plan is proposed, it is unlikely that they still remain when the firm emerges from bankruptcy.

Financial distress also leads to significant changes in the membership and composition of boards. Distressed firms require a substantial commitment of time and attention from managers and directors to address the firm’s operating problems and develop a restructuring plan. Some directors may resign in anticipation of the firm’s problems and the implications for the board. Such concerns can potentially make it difficult to recruit new outside directors. Countering the problems with a shrinking board is that certain parties, such as large creditors or outsiders investing in the distressed firm, may seek board seats to protect their interests in the restructuring.

Gilson (1990) finds that although average board size declines for distressed firms, replacement directors often possess some special skill or interest in managing troubled companies (for example, investment bankers or workout specialists). On average, only 46% of the board members prior to financial distress are still present two years after a reorganization or debt restructuring. Hotchkiss and Mooradian (1997) show that “vulture” investors are frequently active in the governance of firms defaulting on their public debt. These investors join the board of directors for 28% of the firms they study, often maintaining these positions for at least one year after emergence from bankruptcy.

In summary, the literature documents the increase in top management turnover rates as firms become financially distressed, suggesting large personal costs for incumbent managers. Director turnover is also high, often resulting in new restructuring specialists joining the board.

5.3. Management compensation in financial distress

Compensation contracts are a common means to align managers’ incentives. In financial distress, the compensation policy is often an integral part of the firm’s overall restructuring strategy, for example, through providing incentives that facilitate negotiations with creditors or encourage a speedy resolution. Once in bankruptcy, contracts with key employees are subject to the approval of the bankruptcy court.

Gilson and Vetsuypens (1993) examine the compensation contracts of managers that are in place as the firm enters financial distress and the contracts of the managers replacing them. They find that managers who retain their position through a debt restructuring often take a substantial cut in salary and bonus. Replacement CEOs who were
previous employees of the firm earn a median of 35% less than their predecessors. In contrast, the median outside replacement CEO earns 35% more than the manager he or she replaces.

The compensation of CEOs of emerging firms exhibits high sensitivity to the post-bankruptcy stock performance (Gilson and Vetsuypens, 2003). For a sample of 63 Chapter 11 cases, Gilson, Hotchkiss, and Ruback (2000) show that half of the managers receive stock and options in the reorganized firm. Stock-based incentive compensation, however, may be associated with a downward bias in cash flows projected for the reorganized firm. A low reorganization value can create a windfall for managers if the option exercise price is set to that low value or the number of shares that managers receive increases with a lower initial stock price. Nevertheless, the form of the compensation contract for managers of the reorganized firm will affect management’s efforts in developing a reorganization plan.

A common approach in financial distress is to tie management compensation to the successful resolution of the firm’s bankruptcy or debt restructuring, or to the recovery of certain creditor groups. Gilson and Vetsuypens (2003) describe cases in which the CEO is granted a substantial salary increase as a reward for successfully bringing the firm through its financial restructuring or in which part of the CEO’s compensation is deferred until the financial restructuring is completed. They further observe cases in which the CEO incentives are tied to the value of creditor claims, for example, by awarding claims with similar characteristics as those held by creditors, or paying a bonus based on the amount of cash creditors receive under the reorganization plan or as a result of asset sales.

Another prevalent practice that has been criticized is the granting of generous retention plans to certain executives and key employees for remaining with the company during the course of the bankruptcy reorganization. Such key employee retention plans (KERPs) led to widespread controversies since they were often accompanied by massive layoffs and wage concessions, and they are now severely limited by the 2005 amendments to the U.S. Bankruptcy Code. Two recent court rulings, however, circumvent these limitations by allowing the debtors to use bonus compensation plans to provide adequate financial incentives to management during the reorganization.12

The repricing of executive stock options for firms that have performed poorly has also received much attention. Repricing refers to the practice of lowering the strike price of previously issued employee stock options, typically following a significant stock price decline. Although repricing may reward management following a period of poor performance, it may also be necessary in order to restore appropriate incentives for management.13 Chidambaran and Prabhala (2003) show that a majority of the repriced options have a new vesting period or exercise restrictions related to continued employment. This suggests that repricing may be useful in the motivation and retention of key employees.

12 In re Global Home Products, LLC 1 and In re Nellson Nutraceutical, 2.
13 See Acharya, John, and Sundaram (2000) for a theoretical analysis of the trade-off between reducing current-period incentives and restoring continuation incentives that determine the optimality of repricing options.
Repricing has more recently been replaced by a practice known as rescission. In a rescission, shares received by the employee from exercise of the options are returned to the company in exchange for a refund of the strike price. Similar to repricing, this practice has been criticized as symptomatic of poor governance, yet it may be necessary to restore incentive structures.

Overall, CEO salaries tend to decline when their firms become financially distressed. The distressed firms, however, often put in place new management compensation contracts that increase the sensitivity of pay either to a successful resolution of the restructuring or to post-bankruptcy equity performance. Stock or option grants in the emerging firms risk leading to a downward bias in the valuation on which a reorganization plan is based.

5.4. Changes in ownership and control

A distressed debt restructuring typically results in a substantial change in the ownership of the firm. The primary reason is that the poor performance has eroded the equity value, so that shareholders often receive little or no equity in the reorganized firm. Much of the reorganized firm’s stock is distributed to a subset of existing creditors, who become the new owners of the firm.

In Gilson’s (1990) study of 61 firms filing for bankruptcy, on average 80% of the common stock in the reorganized firm is distributed to creditors. The distribution of stock in exchange for pre-petition debt claims can frequently lead to a change in control. Federal and state banking laws provide U.S. banks with authority to hold common stock received in loan restructurings. For three-quarters of all 111 financially distressed firms in Gilson’s (1990) sample, bank lenders and other creditors receive significant blocks of voting stock in the restructured firm. Banks receive on average 36% of the firm’s common stock and frequently appoint representatives to the board of directors. James (1995) studies 102 distressed bank debt restructurings and finds that banks take equity positions in 31% of the transactions. Moreover, the banks typically maintain a substantial equity stake for at least two years following the restructuring.

Although asset sales are common, early studies of ownership changes of firms in Chapter 11 detect relatively few acquisitions of the bankrupt firm as a whole by other operating companies (Hotchkiss and Mooradian, 1998). A possible explanation is that Chapter 11, by allowing incumbent management to retain control, discourages potential acquirers. Furthermore, industry rivals may be distressed and lack the financial strength to bid for the bankrupt firm.

Hotchkiss and Mooradian (1998) examine a sample of 55 acquisitions of firms in Chapter 11 by other public companies. The bidding firm is often in the same industry and frequently has some prior relationship (such as a previous asset purchase) with the target. One-third of the transactions they examine involve multiple bidders, indicating substantial competition for the bankrupt targets. Transactions prices, however, are significantly lower than those paid for nonbankrupt firms matched on size and industry. More recently, as sales of businesses through Section 363 of the bankruptcy code have become
more common, M&A activity involving bankrupt targets is observed more frequently (Baird and Rasmussen, 2003).

Along with the increase in takeover activity in Chapter 11, changes in control through claims trading have also become more commonplace. The market for trading claims of distressed firms has grown dramatically since the early 1990s. This market provides banks and other creditors with an opportunity to exit the process earlier, with new investors taking the place of existing creditors in the negotiation of a restructuring plan. A common strategy for an investor who specifically seeks control of a distressed company is to purchase a large block of debt. With a stake sufficiently large to block a reorganization plan, the investor gains influence over the course of the restructuring. Depending on the final negotiated terms of the plan, the stake potentially can be converted into a controlling ownership position. The debt security that will ultimately be exchanged for equity is commonly referred to as the “fulcrum” security. Examining a sample of 288 firms defaulting on their debt between 1980 and 1993, Hotchkiss and Mooradian (1997) find that vulture investors become blockholders (owning more than 5% of the reorganized firm’s stock) for half of the sample firms and gain control of 16% of the firms. Some investors have developed a reputation for using this strategy to gain control of firms in bankruptcy, and as a result, they manage a portfolio of reorganized firms (Apollo Advisors, for example).

Equity infusions in the reorganized firm can also shift control to a new investor. Gilson, Hotchkiss, and Ruback (2000) find such equity investments for 12 of the 63 firms (19%) in their sample, resulting in the investors owning a median of 54% of the reorganized firm’s stock. The activity of these investors, together with high management and board turnover, contributes to significant changes in the governance of distressed firms.

6. Bankruptcy costs

A restructuring can be costly because of asymmetric information, coordination problems among creditors, and conflicting interests of different claimholders. Distressed firms incur direct expenses for lawyers, accountants, financial advisers, and other turnaround professionals. In addition, over the course of a distressed restructuring, the firm may pursue a suboptimal investment policy or inefficiently liquidate assets due to insufficient liquidity and limited ability to obtain new financing. Indirect costs of financial distress include unobservable opportunity costs, such as lost sales driven by the firm’s deteriorating financial condition and lack of management attention on the business itself. This section reviews estimates of the different costs related to financial distress and bankruptcy.

6.1. Direct costs

Studies estimating the direct costs for firms reorganizing in Chapter 11 are listed in Table 1 (Altman and Hotchkiss, 2006). The sample-size weighted average direct cost across the seven studies of Chapter 11 is 6.5% of the book value of assets. Since there is no single
<table>
<thead>
<tr>
<th>Study</th>
<th>Sample</th>
<th>Time period</th>
<th>Estimated costs</th>
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<tr>
<td><strong>Traditional Chapter 11 cases:</strong></td>
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<tr>
<td>Warner (1977)</td>
<td>11 bankrupt railroads; estimated mean market value $50 million at filing.</td>
<td>1933–1955</td>
<td>Mean 4% of market value of firm one year prior to default.</td>
</tr>
<tr>
<td>Altman (1984)</td>
<td>19 Chapter 11 cases; mean assets $110 million before filing.</td>
<td>1974–1978</td>
<td>Mean 4% (median 1.7%) of firm value just prior to bankruptcy for 12 retailers; 9.8% (6.4%) for 7 industrial firms.</td>
</tr>
<tr>
<td>Weiss (1990)</td>
<td>37 cases from 7 bankruptcy courts; average total assets before filing $230 million.</td>
<td>1980–1986</td>
<td>Mean 3.1% (median 2.6%) of firm value prior to filing.</td>
</tr>
<tr>
<td>Betker (1997)</td>
<td>75 cases; mean assets FYE before restructuring $675 million.</td>
<td>1986–1993</td>
<td>Mean 3.9% (median 3.4%).</td>
</tr>
<tr>
<td>Lubben (2000)</td>
<td>22 cases; median assets $50 million.</td>
<td>1994</td>
<td>Mean 2.5%.</td>
</tr>
<tr>
<td>LoPucki and Doherty (2004)</td>
<td>48 cases from Delaware and Southern District of NY; mean assets at filing $480 million.</td>
<td>1998–2002</td>
<td>Mean 1.4% of assets at beginning of case.</td>
</tr>
<tr>
<td>Bris, Welch, and Zhu (2006)</td>
<td>225 cases from Arizona and Southern District of NY; mean pre-bankruptcy assets $19.8 million.</td>
<td>1995–2001</td>
<td>Mean 9.5%, median 2%.</td>
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<tr>
<td><strong>Prepackaged bankruptcies:</strong></td>
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</tr>
<tr>
<td>Betker (1997)</td>
<td>48 prepackaged Chapter 11 cases; mean assets FYE before restructuring $675 million.</td>
<td>1986–1993</td>
<td>Mean 2.8% (median 2.4%) of pre-bankruptcy total assets.</td>
</tr>
<tr>
<td>Tashjian, Lease, and McConnell (1996)</td>
<td>39 prepackaged Chapter 11 cases; mean book value assets FYE before filing $570 million.</td>
<td>1986–1993</td>
<td>Mean 1.8%, median 1.4% of book value of assets at fiscal year-end preceding filing.</td>
</tr>
<tr>
<td><strong>Chapter 7 cases and liquidations:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ang, Chua, and McConnell (1982)</td>
<td>86 liquidations, Western District of Oklahoma; estimated mean pre-bankruptcy assets $615,516.</td>
<td>1963–1979</td>
<td>Mean 7.5% (median 1.7%) of total liquidating value of assets.</td>
</tr>
<tr>
<td>Lawless and Ferris (1997)</td>
<td>98 Chapter 7 cases from 6 bankruptcy courts; median total assets $107,603.</td>
<td>1991–1995</td>
<td>Mean 6.1% (median 1.1%) of total assets at filing.</td>
</tr>
<tr>
<td>Bris, Welch, and Zhu (2006)</td>
<td>61 Arizona and S.D.N.Y. Chapter 7 cases; mean pre-bankruptcy assets $501,866.</td>
<td>1995–2001</td>
<td>Mean 8.1%, median 2.5% of pre-bankruptcy assets.</td>
</tr>
</tbody>
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*Source: Altman & Hotchkiss (2006), p. 95.*
source of comprehensive information for Chapter 11 cases, studies make use of court
documents collected from one or more of the federal bankruptcy courts. The studies
cover a wide variety of firms, including everything from large railroads (Warner, 1977)
to relatively small firms (Lawless and Ferris, 1997). The range of estimates of direct
costs is therefore quite wide, with means ranging from 1 to 10% and medians from
2 to 6%.

Researchers generally interpret these numbers as evidence of relatively low direct
costs, particularly in relation to the potential tax benefits of using debt. The direct costs
also appear to have a fixed component, explaining why a Chapter 11 reorganization may
not be feasible for some smaller firms. For large public companies in bankruptcy, the
mean professional fees as a percentage of pre-filing assets ranges from 1 to 3% (Lubben,
2000; Weiss, 1990). Though relatively small on a percentage basis, the dollar amount of
fees in large public bankruptcy cases can be significant.

Firms undertaking prepackaged bankruptcies seek agreement among claimholders
on terms of the financial restructuring prior to filing. Prepackaged bankruptcies gen-
erally allow firms to exit bankruptcy within months and are therefore expected to
have lower direct costs than a lengthier bankruptcy proceeding. Betker (1997) finds
direct costs for prepackaged bankruptcies of on average 2.8% of the pre-bankruptcy
total assets. This cost estimate includes all the pre-bankruptcy expenses of informal
bondholder committees and banks, where most of the costs are incurred and for which the
bankrupt firm routinely pays. Tashjian, Lease, and McConnell (1996) show that direct
costs for prepacks average 1.8% of the book value of pre-filing assets and 1.6% for
the subsample of cases that are pre-voted. Thus, the costs of prepackaged bankrupt-
cies appear to fall somewhere between those observed for traditional Chapter 11 cases
and those documented by Gilson, John, and Lang (1990) for out-of-court exchange
offers.

While most attention is devoted to the costs of Chapter 11 proceedings, a few studies
examine the costs of liquidations under Chapter 7. Bris, Welch, and Zhu (2006) document
bankruptcy expenses of on average 8.1% (median 2.5%) of pre-bankruptcy assets for a
sample of 61 smaller nonpublic firms. Based on their estimates of the post-bankruptcy
remaining value, however, the bankruptcy fees exceed the value of the entire estate in
two-thirds of the cases. Lawless and Ferris (1997) find that the fees in Chapter 7 on
average amount to 6.1% of total assets.

Bankruptcy costs are likely to increase with the time that the firm spends in bankruptcy.
Franks and Torous (1989) report that the average bankruptcy takes 2.7 years for 14 firms
filing after the 1978 Bankruptcy Code took effect. The average time from filing of the
bankruptcy petition to resolution is 2.5 years in Weiss (1990) and 2.2 years in Franks and
Torous (1994). For the sample in Bris, Welsh, and Zhu (2006), which is both more recent
and contains smaller firms, the average Chapter 11 proceeding lasts 2.3 years (median
2.4 years). They show that the length of the bankruptcy procedure is independent of firm
size but varies with the specific judge overseeing the case. The duration of Chapter 11
reorganization is further found to decrease with the operating profitability of the industry
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(Denis and Rodgers, 2007). Bharath, Panchapegesan, and Werner (2007) show that the time to resolution in Chapter 11 has declined and on average is 16 months in the 2000–2005 period. Morrison (2007) finds a median duration of 8 months for the 36 small business Chapter 11 cases in 1998 that emerge as going concerns.14

The relatively low direct costs of exchange offers discussed in Section 4.2, as well as the increasing use of prepackaged bankruptcies, suggest that cost savings can be significant for firms that successfully restructure without entering a traditional Chapter 11 procedure.

6.2. Indirect costs

The magnitude of indirect costs relative to direct costs, and therefore their importance to theories of debt structure and reorganization, can be large. Indirect costs, however, are unobservable and therefore more challenging to estimate empirically.

One of the first attempts to study indirect costs is Altman (1984). Altman compares expected profits to actual profits over the three years prior to bankruptcy (years $-3$ to $-1$) for a sample of 19 firms entering Chapter 11. Expected profits are based either on a comparison of each firm’s sales and profit margin to industry levels prior to year $-3$ or on security analyst estimates. He finds that the indirect costs, that is, the difference in profits, average 10% of firm value just prior to bankruptcy. The combined direct and indirect costs are on average 17% of firm value. It is, however, impossible to distinguish whether the decline in profits is a result of the financial distress itself (and therefore is an indirect cost) or a result of the same economic factors that caused financial distress in the first place.

Opler and Titman (1994) address this causality problem by selecting firms in industries that experience economic distress, defined as declining industry sales and median stock returns below −30%. They find that firms with higher leverage ratios prior to the onset of industry economic distress experience a greater decline in market share and operating profits, consistent with the notion that there are significant indirect costs of financial distress.

Subsequent studies recognize that in order to provide specific estimates of indirect costs, it is useful to separate the effects of financial versus economic distress. Andrade and Kaplan (1998) examine 31 firms that become distressed subsequent to a highly leveraged transaction. Given the high ex-ante leverage of these firms, they are largely financially distressed but not economically distressed, allowing an observation of the costs of “pure” financial distress. Andrade and Kaplan (1998) report that the distressed firms cut capital expenditures, sell assets, and delay restructuring or filing for Chapter 11 in a way that appears to be costly. Based on changes in firm market value over time, they estimate the net costs of financial distress to range from 10 to 20% of firm value. In addition, they find that these costs are concentrated in the period after the firm becomes distressed, but

14 See also Flynn (1989), Gilson, John, and Lang (1990), Hotchkiss (1995), and Betker (1997) for evidence on the length of Chapter 11 proceedings.
before it enters Chapter 11, suggesting that the indirect costs are not caused by Chapter 11 itself.15

As discussed in Section 3.2, Maksimovic and Phillips (1998) show that industry conditions are much more important than bankruptcy status to explain the productivity, asset sales, and closure decisions of Chapter 11 firms. Similar to Andrade and Kaplan (1998), this indicates that few real economic costs are attributable to Chapter 11 and that bankruptcy status is marginal to indirect costs. Pulvino (1999), in contrast, finds that bankrupt airlines sell aircrafts at prices that generally are lower than those received by distressed but nonbankrupt firms, implying that bankruptcy status could influence these costs.

A bankruptcy filing may convey negative private information about industrywide business conditions. Studying the effect of the bankruptcy announcements of 59 failing firms, Lang and Stulz (1992) find a 1% price decline in a value-weighted portfolio of competitor stock. The effect is greater for relatively highly leveraged industries. In contrast, competitors in concentrated industries with low leverage experience positive announcement returns, perhaps because the exit creates a windfall for the surviving rival firms. The negative stock price reaction of industry rivals to the bankruptcy announcement of large firms is confirmed by Ferris, Jayaraman, and Makhija (1997). They further show that competitors who subsequently file for bankruptcy experience the greatest decline in equity value. Haensly, Theis, and Swanson (2001), in contrast, find insignificant announcement returns for industry rivals. The stock returns are negative, however, in industries with relatively high leverage. Hertzel, Li, Officer, and Rodgers (2007) show that distress related to bankruptcy filing also is associated with negative and significant stock price effects for suppliers, in particular when intra-industry contagion is severe.

Debt recovery rates, defined as the bankruptcy payoff to creditors as a fraction of the face value of their claims, reflect the value of the distressed firm’s assets net of all direct and indirect costs. Franks and Torous (1994) report total recovery rates of on average 51% for 37 Chapter 11 cases. Bris, Welch, and Zhu (2006) document average recovery rates in Chapter 11 of 69% (median 79%). A caveat with these recovery rate estimates, however, is that a majority of the distributions are in the form of new claims valued at face value. For a subsample of 12 firms in Frank and Torous with available market values for all claims in the reorganized firm, the median recovery rate is a lower 41%.

Although the evidence is mixed with respect to whether indirect costs are largely incurred during the period of financial distress prior to bankruptcy or while in formal bankruptcy, such costs appear to be of greater magnitude than the direct bankruptcy costs. Thus, firms with potentially large opportunity costs of operating in financial distress are more likely to choose lower debt levels ex ante and, once in financial distress,

15 Kaplan (1989, 1994) provides an illustration of the indirect costs of financial distress in the context of Campeau’s acquisition of Federated. See also Cutler and Summer’s (1988) analysis of the Texaco-Pennzoil litigation.
select a restructuring mechanism that resolves the financial distress both faster and more fully.

7. The success of chapter 11 reorganization

One measure of a “successful” restructuring is that a consensual agreement between claimants is ultimately reached, putting in place a modified set of financial contracts and/or liquidating all or a portion of the firm’s assets to meet its obligations. In terms of Chapter 11, however, “success” implies that the firm is able to reorganize rather than liquidate. If the Bankruptcy Code is structured such that some inefficient firms are allowed to reorganize (i.e., their estimated going-concern value is less than their unobserved liquidation value at the time of reorganization), researchers need to consider the performance of the firm some time after it has emerged to ultimately argue whether the restructuring has been successful. In this section, we focus on these aspects of Chapter 11 restructurings, rather than on outcomes of private restructurings, as this literature relates to the important debate over the efficient design of a bankruptcy code.

7.1. Outcomes of chapter 11 filings

The Executive Office for U.S. Trustees provides statistics for confirmation rates of Chapter 11 cases in the United States. It is clear from their statistics that many firms entering Chapter 11 ultimately are not successful in having a plan of reorganization confirmed; for the years 1990 through 2003, confirmation rates do not exceed 45% in any single year. The national average confirmation rate for this time period is only 29% of cases. Furthermore, many of the plans that are confirmed are “liquidating Chapter 11” plans, providing an alternative mechanism for liquidation other than the Chapter 7 process. The large number of cases that do not reach confirmation are ultimately closed with no remaining value, or converted to a Chapter 7 case.16

For the subset of Chapter 11 cases successfully confirming a plan, the disposition of the firm’s assets can still vary in significant ways. Unfortunately, information is generally not available for nonpublic companies, and for public firms it must be compiled from various sources including news services. Hotchkiss and Mooradian (2004) examine 1770 public companies that filed for Chapter 11 between 1979 and 2002. A publicly cited resolution of the outcome by June 2004 is available for some 1400 cases (80%). The remaining cases are either still in bankruptcy as of 2004 or have likely ended in liquidation. The bankrupt firm emerges as a public company (44% of cases) or a deregistered private company (27%), is liquidated (21%, including conversions to Chapter 7), or merges with another operating company (8%). Similar proportions are

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reported by Hotchkiss (1995) for the subset of firms filing prior to 1988. Using data from two courts (Arizona and the Southern District of New York) where bankruptcy documents are available electronically, Bris, Welch, and Zhu (2006) find that 52% of 150 firms reorganized under Chapter 11 firms continue as independent companies.\textsuperscript{17}

A smaller number of firms merge with another operating company while in bankruptcy. Hotchkiss and Mooradian (1998) show that the combined cash flows of the merged company increase by more than is observed for similar nonbankrupt transactions, suggesting that these mergers represent a successful restructuring outcome. For smaller firms, acquisitions are more common. White (1984) finds that in a sample of 64 small corporations in Chapter 11, 23% of the firms are sold as going concerns, 47% adopt reorganization plans, and the remaining 30% are eventually liquidated. Examining 95 relatively small corporate bankruptcy filings in Chicago during 1998, Morrison (2007) reports that 9 firms (9%) are sold as a going concern and another 27 firms (28%) exit as a reorganized entity, while 28 firms (29%) are shut down in bankruptcy and the remaining 31 firms (33%) exit Chapter 11 without a new capital structure, typically followed by a subsequent liquidation.\textsuperscript{18}

Several studies have examined factors influencing the probability that a firm successfully emerges from Chapter 11. Hotchkiss (1993) shows that firm size, measured by pre-petition assets, is the utmost important characteristic determining whether a firm will be successfully reorganized rather than liquidated. Many of the emerging firms have considerably downsized while in bankruptcy. She suggests that the ability to divest assets and use the proceeds to fund the remaining operations is critical to the firm’s survival in Chapter 11. Similarly, Denis and Rodgers (2007) provide documentation that firms with significant reductions in assets and liabilities in bankruptcy are more likely to emerge as going concerns. If asset prices are temporarily depressed by low industry demand, a liquidation or sale may be relatively costly to the creditors of defaulted firms. Acharya, Bharath, and Srinivasan (2007) show that most distressed firms emerge as restructured entities during periods of industry distress, possibly as a way of avoiding costly asset fire sales.

Carapeto (1999) and Dahiya, John, Puri, and Ramirez (2003) argue that access to DIP financing is an important factor in a successful reorganization. The availability of DIP financing is particularly important to firms in desperate need of fresh working capital, such as retailers whose suppliers might otherwise discontinue business. Using a sample of 538 public companies in Chapter 11, Dahiya et al. (2003) show that the probability of emerging as a reorganized entity is higher for firms receiving DIP financing. The benefits from DIP financing are further documented by Chatterjee, Dhillon, and Ramirez (2004), who report significantly positive abnormal stock and bond returns at the announcement of DIP loans.

Another factor that could affect the reorganization is the individual judge’s interpretation and application of the bankruptcy law. Chang and Schoar (2006) find significant

\textsuperscript{17} For evidence on the outcome of public firm Chapter 11 reorganization, see also Weiss (1990), LoPucki and Whitford (1993), Denis and Rodgers (2007), and Kalay, Singhal, and Tashjian (2007).

\textsuperscript{18} See also Flynn (1989) for the outcome of small-firm bankruptcies.
differences across judges in the propensity to grant or deny creditor motions (e.g., to
dismiss a case, lift an automatic stay, extend the exclusivity period, and use cash collateral). Their evidence is consistent with Hotchkiss (1995): she uses a dummy variable to indicate cases filed in the Southern District of New York, which at the time had a reputation for pro-debtor rulings favoring management attempts to reorganize (Weiss, 1990; LoPucki and Whitford, 1991). Cases filed in this district have a somewhat higher probability of subsequently entering a second bankruptcy or distressed restructuring.

Baird and Rasmussen (2003) argue that modern Chapter 11 practices are quite different from those observed a decade ago, with creditor control now being a dominant theme. They examine the 93 public large firms that completed their Chapter 11 reorganization in 2002. Of these, 52 (or 56% of the sample) are sales under Section 363 of the Bankruptcy Code or as part of a reorganization plan. Of the remaining cases, two-thirds (26 firms) reach an agreement with creditors prior to filing a prepackaged bankruptcy and one-third (15 firms) are reorganized in a traditional Chapter 11 proceeding.

Although the use of Chapter 11 may have changed over time, it is still true that large public firms are more likely to survive Chapter 11 as a going concern, while small firms have a higher probability of liquidation.

7.2. Post-bankruptcy performance

In choosing a restructuring mechanism, firms consider both the cost of the restructuring itself and the extent to which the restructuring is able to resolve the financial difficulties. Distressed firms with plenty of intangible assets, and thus high indirect costs of bankruptcy, are more likely to choose a restructuring mechanism that minimizes the chance of a subsequent bankruptcy filing. In other words, these firms may choose to incur the immediate high costs of a comprehensive restructuring as long as it leads to greater debt reduction and a superior post-restructuring operating performance.

Conflicts of interests may further explain why firms fail to fully correct corporate investment policy in a restructuring. Incumbent managers are more likely to push for a continuation of the operations that preserves their private benefits of control rather than a more comprehensive restructuring involving the sale of a substantial part of the firm’s assets. Management looking out for the interests of equityholders may also choose to file for Chapter 11 in order to take advantage of the bargaining power allocated to equity and the preservation of shareholder value.

If financial distress is not fully resolved for firms reorganizing in bankruptcy or if Chapter 11 suffers from economically important biases toward continuation of unprofitable firms, poor investment decisions will be reflected in the post-bankruptcy performance of emerging firms. Hotchkiss (1995) examines the operating performance of firms that emerge as public companies from Chapter 11 by 1989. Over 40% of the firms continue to experience operating losses in the first three years following bankruptcy. Accounting ratios such as return on assets and profit margins are substantially lower than for industry
rivals. In the first year after emerging from Chapter 11, almost 75% of the sample firms have a lower operating performance (EBITDA/sales) than that of nonbankrupt firms in the same industry. Hotchkiss and Mooradian (2004) find similar results for a more recent time period. More than two-thirds of their sample firms underperform industry peers for up to five years following bankruptcy, and over 18% of the firms have negative operating income in the year following emergence.

Maksimovic and Phillips (1998) examine changes in the asset composition for firms that survive Chapter 11. By tracking the productivity of individual plants, regardless of whether these plants are sold or closed down, they are able to avoid the impact of survivorship bias, since they can examine asset performance even if the original owner of the assets is liquidated or emerges from Chapter 11 as a private company. They show that plants that are retained by bankrupt firms have lower productivity compared to the assets that are sold off, suggesting that firms in bankruptcy retain their least profitable assets. Thus, the performance changes may partially be a result of asset sales and closures, and not of changes in the efficiency of the retained assets.

In a recent paper, Kalay, Singhal, and Tashjian (2007) study changes in the operating performance of 113 firms that reorganized in Chapter 11 in the 1990s. The failed firms experienced significant profitability improvements while in bankruptcy in absolute terms as well as compared to industry rivals, suggesting that the reorganization may provide net benefits to the distressed firms. The performance improvements are smaller for firms with complex debt structure (more classes of debt) and greater for firms with higher pre-filing debt ratios, possibly because the automatic stay on debt payments is particularly valuable to these firms.

An alternative to examining accounting-based performance measures is provided by Alderson and Betker (1999), who estimate the return that could have been earned by liquidating the firm’s remaining assets and investing the proceeds in a portfolio of securities. Alderson and Betker (1999) compare the market value of 89 firms five years after emerging from bankruptcy (including all cash distributions to claimholders) to an estimated value if the assets would have been liquidated at emergence. The annualized return is then compared to the return of the S&P index over the same time period. They find that reorganized firms on average neither underperform nor overperform the S&P index. One interpretation of this study is that based on cash flow returns, emerging firms perform at par with the market overall, ignoring any differences in systematic risk.

Measures of operating profitability after emergence are likely to be strongly related to stock price performance as well. However, studies of stock price performance largely address the efficiency of pricing the securities at emergence, rather than the efficiency of the decision to reorganize. Still, these studies provide yet another view of post-bankruptcy success, in particular from an investment point of view. One difficulty in interpreting studies of emerging firm stock returns, however, is that only a fraction of firms that emerge relists their stock. For example, only 60% of the emerging firms studied by Hotchkiss (1995) relist their stock on NYSE, AMEX, or NASDAQ post-bankruptcy. If the worst firms are systematically unable to relist their stock, studies of post-bankruptcy stock performance may be biased to reflect the better performing firms.
The most comprehensive study of post-bankruptcy stock price performance to date is that of Eberhart, Altman, and Aggarwal (1999), who examine the equity performance of 131 firms emerging from Chapter 11 by 1993. They report large positive excess stock returns over the 200 trading days following emergence using different benchmarks. Compared to the return of a portfolio of nonbankrupt firms matched on industry and size, the average cumulative abnormal return (ACAR) is 25% (median 6%). Using the market model, the ACAR of the reorganized firms over the same period is 139% (median 5% to 7%). In sum, emerging firms exhibit large positive and significant abnormal stock returns in the first year post-bankruptcy. For a smaller sample but over a much longer time interval (five years subsequent to distress), Goyal, Kahl, and Torous (2003) document average abnormal returns close to zero using a value-weighted reference portfolio, but highly negative abnormal returns (−51%) using a size and book-to-market reference portfolio.

As a whole, the research suggests that a considerable portion of firms emerging from bankruptcy continue to perform poorly based on various performance measures. Underperformance may be related to firms that insufficiently reduced their debt burden with the restructuring, or that failed to undertake sufficient asset restructuring, enabling them to implement a feasible reorganization plan. The ultimate measure of success, therefore, is whether the firm is able to subsequently avoid another distressed restructuring or bankruptcy.

A number of studies have documented the incidence of repeated failures of distressed firms. The high rate of subsequent failures occurs despite the Chapter 11 requirements that the company must demonstrate the feasibility of the reorganization plan before it can be confirmed. Among the earliest, LoPucki and Whitford (1993) report that 32% of 43 large Chapter 11 cases confirmed by March 1988 reenter Chapter 11 within four years. Hotchkiss (1995) shows that one-third of the emerging firms in her sample need to again restructure either through a private workout, a second bankruptcy, or an out-of-court liquidation. Gilson (1997) reports a failure rate of 25% for 108 distressed firms that recontracted with creditors in Chapter 11 or out of court. More recent statistics for the incidence of “Chapter 22” filings show that this pattern continues.

The high rate of subsequent failures has several potential explanations. One possibility is that firms have not sufficiently reduced their debt in the restructuring. Gilson (1997) finds that firms remain highly leveraged after emerging from Chapter 11, though less so than firms completing an out-of-court restructuring. Firms emerging from bankruptcy have a median ratio of long-term debt to total capitalization of 47%, and three-quarters of the firms are more highly leveraged than their industry rivals. Another explanation is that management is overly optimistic about the prospects for the reorganized firm. Hotchkiss (1995) shows that the continued involvement of incumbent management in the restructuring process increases the probability of post-bankruptcy failure. Finally, it has been

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19 According to §1129(a)(11) of the Bankruptcy Code, the reorganization plan must be feasible. The statute specifically requires the bankruptcy judge to find that approval of the reorganization plan “is not likely to be followed by the liquidation or the need for further financial reorganization of the debtor.”
suggested that the pro-debtor orientation of the Bankruptcy Code and the courts permit inefficient firms to reorganize. It is likely that all these factors combined play a role in the high failure rate of firms reorganized under Chapter 11.

The governance structure of the reorganized firm, however, appears to have an important relationship to post-bankruptcy success. Hotchkiss and Mooradian (1997) find that when a vulture investor remains active in the governance of the firm post-Chapter 11, the fraction of firms experiencing operating losses is a mere 8%. Improvements in performance relative to pre-default levels are greater when a distressed investor joins the board, becomes the CEO or chairman, or gains control of the firm. When there is evidence of vulture involvement but this investor subsequently is passive in the restructured company, performance appears no better than for those firms with no evidence of vulture involvement. Thus, the continued presence of distressed investors in the governance of the restructured firm is strongly related to different measures of post-bankruptcy success.

To sum up, a majority of large public firms emerge from Chapter 11 as independent companies, while small private firms are more likely to be liquidated in bankruptcy. Surviving firms frequently exhibit poor operating performance and frequently default on their debt again. Nevertheless, stock returns of surviving firms exceed various benchmarks in the first year following bankruptcy, raising the possibility that the market initially undervalues some reorganized firms.

8. International evidence

Bankruptcy laws vary considerably across the world. All countries provide liquidation procedures, where control over the firm shifts to creditors and assets are sold piecemeal or as a going concern. There are, however, major differences in the provisions for court-supervised reorganization—that is, a court settlement that permits the firm to continue as an ongoing concern while the financial claims are restructured. Some countries offer fewer alternatives to a sale of the distressed firm’s assets. Other codes provide substantial shelter for incumbent management and equityholders, typically favoring a continuation of the operations. The degree to which the company’s business is protected from creditors also varies. In some bankruptcy systems, the existing debt contracts are stayed and new debt receives super-priority status. Under other codes, secured claimholders have the right to seize collateral, potentially thwarting a continuation of the business.

Although there is substantial variation, two distinct systems stand out: reorganization and auction codes. A reorganization code provides strong provisions for a court-supervised renegotiation of the firm’s capital structure. Creditors have limited influence over the bankrupt firm, and incumbent management is typically allowed to continue to

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20 See, for example, Bradley and Rosenzweig (1992). The Southern District of New York and Delaware have been mentioned in this context.

21 For a specific situation related to the enforcement of a debt contract against a hotel, Djankov, Hart, McLiesh, and Shleifer (2006) show that the contract is enforced more efficiently in countries with higher per capita income and quality of contract enforcement, and predicts debt market development.
run the operations. Chapter 11 of the U.S. Bankruptcy Code is a prominent example of a reorganization code. An auction code, in contrast, mandates a public sale of the bankrupt firm’s assets. \(^{22}\) The bidder offering the highest price decides whether the firm is liquidated piecemeal or survives as a going concern. Creditor interests are at the forefront, and the fate of management is determined by the buyer in the auction. As discussed later in this section, the Swedish bankruptcy code is a good example of an auction code.

Proponents of reorganization codes point to the perceived weaknesses of auction codes. There are concerns that the markets for distressed firms’ assets are illiquid, forcing fire sales at depressed prices and perhaps producing a suboptimal allocation of assets. Moreover, bidding costs may be prohibitive due to uncertainty about the distressed firm’s prospects, deterring potential bidders from entering the auction (Aghion, Hart, and Moore, 1992). It has also been suggested that managers, dreading the uncertainty about their position that the auction implies, may delay filing and engage in value-destroying, risk-shifting activities in an attempt to entirely avoid bankruptcy (White, 1996; Hart, 2000). In contrast, managers may be encouraged to file promptly under a management-friendly reorganization code, hence preserving firm value and increasing the likelihood of a successful reorganization.

Obviously, reorganization codes embrace a different set of inefficiencies. While an auction makes use of the market, the reorganization code uses negotiations to determine the value and future use of the bankrupt firm’s assets. Since a restructuring of the capital structure entails the distribution of new financial claims, the negotiations also involve how much and what type of securities the various creditors will receive. Reaching one negotiated solution covering all these aspects can be a lengthy and costly procedure for the distressed firm. The auction, on the other hand, separates these decisions and thus provides a speedier resolution.

Another potential issue associated with a reorganization code is the substantial control rights given to incumbent management, effectively removing the residual claimholders (creditors) from the decision making. While this approach may encourage management to file without delay, it also opens the way for decisions that benefit self-interested managers. It is possible that the default is a result of managerial incompetence. Allowing the incumbent managers to retain control of the firm may delay a necessary change in management or prevent closure of the operations when a piecemeal liquidation of the assets is optimal. \(^{23}\) In contrast, in the auction, the highest bidder who has its own money at stake determines whether the firm will continue to operate as a going concern or whether the assets are to be redeployed.

The total costs imposed by the bankruptcy code determine claimholders’ incentives to voluntarily restructure the claims outside of the formal bankruptcy procedure. Claessens

\(^{22}\) Mandatory auctions are often referred to as liquidations. In this context, however, liquidation simply implies that the assets are redeployed through a sale. This may or may not imply a termination of the operations.

\(^{23}\) Franks and Loranth (2005) suggest that lack of court oversight and poorly designed trustee compensation contracts lead to inefficient continuation of poorly performing firms under the Hungarian reorganization code.
and Klapper (2005) find that the bankruptcy filing rate generally is higher in countries with an efficient judicial system. Moreover, controlling for judicial efficiency, bankruptcy tends to be used more frequently in countries where the insolvency procedures give creditors more rights. Thus, when comparing outcomes under different bankruptcy codes, one should keep in mind the caveat that a distinct set of firms may file for bankruptcy under each code.

The magnitude of the potential inefficiencies in different bankruptcy systems is an empirical question. Nevertheless, evidence on bankruptcy reorganization outside the United States is sparse. In the following section, we review evidence on the restructuring of distressed firms in the UK, Sweden, France, Germany, and Japan.

8.1. The United Kingdom: receivership

UK companies have access to several court-supervised procedures. In the dominant procedure, Receivership, a secured creditor appoints a receiver representing the interests of this creditor. The receiver realizes the security and, after deducting his expenses and paying any higher priority claims, uses the proceeds to pay off the appointing creditor. If the claim is secured by floating charge collateral, an administrative receiver gets full control over the firm and can reorganize the firm or sell assets without permission from other creditors or the court. There is no automatic stay of debt claims. Creditors secured with fixed liens on particular assets have the right to repossess their collateral, even if the assets are vital for the firm’s operations. Any excess balance is distributed to remaining claimholders according to the absolute priority of their claims. Unsecured creditors have little influence over the procedure.

The UK also provides two court-administered reorganization procedures, Administration and, for small firms, Company Voluntary Arrangements (CVAs), which give the firm temporary relief from its creditors. A secured creditor can veto these procedures, however, and instead appoint a receiver. Thus, in practice, the court can appoint an administrator that represents all creditors only in the absence of secured creditors. Reformed UK insolvency procedures took effect in 2003. The new UK law cuts back the rights of creditors secured by floating charge, including that to appoint an administrative receiver. Holders of floating charge claims issued prior to September 15, 2003, however, retain the same rights as before. Overall, UK insolvency procedures are considered to be creditor-oriented.

In general, the UK receivership code provides little protection of the operations. The liquidation decision is typically left to secured creditors, who lack incentives to generate

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24 See also Claessens, Djankov, and Klapper (2003) for an examination of the use of bankruptcy in East Asia.
25 The design of the bankruptcy code may also have other ex-ante effects. Acharya and Subramanian (2007) suggest, for example, that firms generate more patents in economies with weaker creditor rights.
26 The collateral of a floating charge claim includes inventory, accounts receivables, working capital, and intangible assets.
proceeds above the value of their claim. Franks, Nyborg, and Torous (1996) propose that the allocation of control rights to secured creditors leads to underinvestment and excessive termination of economically viable firms. Franks and Nyborg (1996), however, argue that premature liquidation can be avoided if the creditor appointing the receiver has large private benefits of control associated with the survival of the bankrupt firm.

Interestingly, the evidence indicates that a large fraction of distressed UK firms indeed survive as ongoing concerns. Franks and Sussman (2005) examine 542 small-to-medium-sized financially distressed UK firms that are transferred to their bank’s workout unit. They report that 60% of sample firms filing for the UK receivership code continue to operate as going concerns after bankruptcy. In a sample of UK firms filing for administrative receivership, Kaiser (1996) finds that almost half are sold as going concerns. Similarly, Davydenko and Franks (2006) show that 43% of small UK firms that default on their debt are liquidated piecemeal.

Franks, Nyborg, and Torous (1996) suggest that the UK receivership code is speedy, which would imply low direct costs. Nevertheless, Franks and Sussman (2005) report direct costs averaging 33% of asset values. They note that a lack of competition among receivers may explain the high costs and point to much lower costs (mean 14%) when the Royal Bank of Scotland recently required receivers to tender for their appointments. We are not aware of specific data on the duration of the UK bankruptcy procedure. Nevertheless, the firms in Franks and Sussman (2005) spend on average 7.5 months in the bank’s workout unit, and the median length of reorganization is 1.4 years for a subset of the defaulted firms in Davydenko and Franks (2006).

Secured creditors seem to fare relatively well in the UK procedure, as expected. Franks and Sussman (2005) document average bank recovery rates of 75%, with a median of 100%. Nearly all of the firms’ assets are pledged as collateral to the bank. Interestingly, banks tend to liquidate collateral at prices close to the face value of the secured claim, possibly because secured creditors have few incentives to generate additional proceeds for junior claimants. Similarly, Davydenko and Franks (2006) report an average bank recovery rate of 69% (median 82%).

Since secured creditors fare relatively well in formal bankruptcy, one would predict voluntary workouts to be relatively rare in the UK. Davydenko and Franks find that 75% of small firms that default on their debt enter formal bankruptcy, with the remaining 25% of firms reorganizing out of court. When large distressed companies issue new equity, however, UK banks appear quite willing to make concessions out of court. Franks and Sanzhar (2006) show that banks make concessions for one-third of 111 financially distressed, publicly traded UK firms that issue new equity. These concessions include forgiveness of principal, debt for equity swaps, and provisions for new loans. Concessions are offered to firms with higher leverage and greater debt impairment, representing situations where the expected wealth transfer to debtholders is relatively large.

Acharya, John, and Sundaram (2005) contend that the allocation of control rights in bankruptcy determines the impact of asset specificity on the firm’s optimal capital structure. On one hand, when assets are specific to the industry, liquidation values may
be low and a forced liquidation relatively costly to the firm. On the other hand, when assets are nonspecific, the costs from inefficiently continuing the firm may be high. Thus, firms with high asset specificity will choose a lower debt level under a creditor-friendly system, which is prone to inefficient liquidations, than under a reorganization-oriented code. In contrast, firms with low asset specificity will choose a lower debt level under a debtor-oriented code, which risks allowing excessive continuation. Contrasting firms in the UK and the United States—classified as having creditor-friendly and debtor-friendly bankruptcy systems, respectively—Acharya, John, and Sundaram (2005) find variations in debt ratios consistent with their predictions.27

Overall, the weak protection of the firm’s operations and the strong rights allocated to secured creditors in UK bankruptcy may raise concerns of excessive liquidations. Nevertheless, firm survival and recovery rates in the UK compare well to the U.S. Chapter 11. Thus, the strong creditor orientation in formal bankruptcy does not appear to be detrimental to the restructuring of distressed UK firms.

8.2. Sweden: auctions

In Sweden, bankruptcy is resolved through a mandatory auction. The proceeding is run by a court-appointed trustee with fiduciary responsibility to all creditors. This trustee organizes the sale of the firm in an auction. The winning bidder determines whether the firm is liquidated piecemeal or continues to operate as an ongoing concern. Payment must be in cash, and creditors are paid strictly according to the absolute priority of their claims.

The trustee typically retains the incumbent management team to run the operations of the firm in bankruptcy. In contrast to the UK, the Swedish code restricts the liquidation rights of creditors. Debt payments are stayed, and collateral cannot be repossessed. Moreover, trade credits and other debt raised while in bankruptcy get super-priority. These provisions help protect the operations until the firm is auctioned off.

Swedish insolvency law provides a forum for renegotiation of unsecured debt called composition (ackerd). Secured debt and priority claims (taxes and wages) must be offered full repayment, and junior creditors at least 25% of their claim. These high thresholds make composition unfeasible for the vast majority of distressed firms. A new reorganization law was enacted in 1996, but Buttwill and Wihlborg (2004) argue that the new law shares many of the weaknesses of the old composition procedures and is rarely used. Thus, in Sweden, court-supervised renegotiation of the firm’s debt contracts is effectively not an alternative to auction bankruptcy.

Thorburn (2000) examines a sample of 263 small, private Swedish firms filing for bankruptcy between 1991 and 1998. Her evidence counters widespread fears that bankruptcy auctions tend to excessively force liquidation. She demonstrates that three-quarters of firms continue as a going concern under the buyer’s reign, with the remaining

27 See also Vig (2007), who argues that a recent change in bankruptcy law in India that strengthens the rights of secured creditors has had an important influence on capital structure and the use of secured financing.
one-quarter of firms being liquidated piecemeal.\textsuperscript{28} The probability for a going concern sale increases in the fraction of intangible assets, perhaps because these assets generate little value in a piecemeal liquidation. To gauge the quality of the continuation decision, Eckbo and Thorburn (2003) examine the operating profitability of the Swedish firms emerging from bankruptcy. They show that auctioned firms perform at par with industry competitors for several years, also when the incumbent CEO retains control. This contrasts to the evidence in Hotchkiss (2005) that firms emerging from U.S. Chapter 11 tend to underperform their industry rivals.

Thorburn (2000) also estimates the costs of Swedish bankruptcy proceedings. She reports direct costs of on average 6\% of pre-filing book value of assets, with an average of 4\% for the one-third largest firms in her sample.\textsuperscript{29} When measured as a fraction of the market value of assets in bankruptcy, costs average 19\%, with a median of 13\%. The direct costs decrease with firm size and increase with measures of industry distress, suggesting that trustees may increase their sales effort in periods when auction demand is relatively low. Importantly, the auction is speedy, with an average time from filing to sale of the assets of only two months, implying relatively low indirect costs.\textsuperscript{30}

The value of the assets remaining at the end of the bankruptcy process reflects all the different costs imposed on the financially distressed firm. This value is split between the firm’s creditors. The higher the total costs of bankruptcy, the lower are creditor recovery rates. In Swedish bankruptcy, creditors’ claims are paid with the cash generated in the auction. Thorburn (2000) reports average recovery rates of 35\% (median 34\%). Recovery rates are higher in going-concern sales (mean 39\%) than in piecemeal liquidations (mean 27\%). Secured creditors receive on average 69\% (median 83\%).\textsuperscript{31}

A potential issue with a creditor-oriented code is that it may encourage management to delay filing and undertake value-reducing risk-shifting investments in an effort to stay out of bankruptcy. Eckbo and Thorburn (2003) argue, however, that managerial incentives to preserve private benefits of control may counteract potential risk-shifting incentives. Specifically, managers may implement a conservative value-maximizing investment policy for the financially distressed firm in an attempt to increase the joint likelihood that the firm survives as a going concern and that current management gets rehired by the buyer in the auction. For the sample of Swedish small-firm bankruptcy filings, Eckbo and Thorburn (2003) show that the probability that the incumbent manager continues to run the auctioned firm increases in a measure for the private benefits of control. They

\textsuperscript{28} Prior to 1993, Finnish bankruptcy also mandated a sale of the firm. In a sample of 72 small firms filing under the old Finnish code, Ravid and Sundgren (1998) find that only 29\% of the firms are sold as a going concern.

\textsuperscript{29} Ravid and Sundgren (1998) report average direct costs of 8\% of pre-filing book value of assets for the small firm bankruptcies in Finland.

\textsuperscript{30} Note that while the firm’s operations are auctioned off quickly, the bankruptcy proceeding continues and last on average around three years.

\textsuperscript{31} Ravid and Sundgren (1998) find average recovery rates of 34\% in going-concern sales and 36\% in piecemeal liquidations in Finnish bankruptcy.
also find that bidders screen managers on quality in the rehiring decision and that CEOs suffer large income declines conditional on bankruptcy filing (about 40% relative to CEOs of nonbankrupt companies). Their evidence supports the notion that managers’ drive to retain control of the operations conditional on default may counterbalance ex-ante incentives to risk shift.

Most European countries hold directors and managers personally liable and impose civil and criminal penalties if they fail to file in a timely manner or to inform creditors when the firm becomes insolvent. To the extent that these laws are enforced, such penalties may help trigger prompt action, further offsetting potential tendencies to delay filing.

A common objection to auctioning firms in bankruptcy is the concern that markets for distressed firms’ assets are illiquid, forcing fire sales at depressed prices. Stromberg (2000) suggests, however, that salebacks may help avoid costly asset fire sales in periods of industry distress. He shows that the probability that the old owner buys back the firm in the bankruptcy auction increases with industry leverage and operating performance, and decreases with the proportion of nonspecific assets.

Eckbo and Thorburn (2008) model the participation in the auction of a secured creditor with an impaired debt claim on the bankrupt firm. The more impaired the secured claim, the greater incentive the creditor has to provide financing to rival bidders and encourage aggressive bidding, thus increasing the expected recovery. Eckbo and Thorburn show that the bankrupt firm’s bank frequently enhances auction liquid-ity by providing bid financing. The premiums paid by the winning bidder decrease with an estimate of the secured creditor’s expected recovery in the event of piecemeal liquidation, consistent with the predicted bidding behavior.

In a companion paper, Eckbo and Thorburn (2007) test the implications of industry distress using prices paid and debt recovery rates in the bankruptcy auctions. They estimate fundamental values of the auctioned assets in a cross-sectional model and examine how industry liquidity factors (leverage and interest coverage ratios) affect the standard-ized residuals from the price regression. There is some evidence of fire-sales discounts in piecemeal liquidations, but not when the bankrupt firm is acquired as a going concern. Neither industry-wide distress nor the industry affiliations of the buyer affect the prices in going-concern sales. Eckbo and Thorburn (2007) further show that bids often are structured as leveraged buyouts, which relaxes liquidity constraints and reduces bidder underinvestment incentives in the presence of debt overhang. It is possible that distressed industry insiders overcome liquidity constraints by using LBO financing. Eckbo and Thorburn (2007) also find evidence that prices are lower in prepackaged filings than in other going-concern sales, suggesting that prepacks may help preempt excessive liquidation when the auction is expected to be illiquid. Liquidation preemption seems to be a risky strategy, however, as prepackaged bankruptcies have much higher refiling rates than firms sold in a regular auction.

Overall, the evidence on Swedish bankruptcy filings suggests that mandatory auctions provide a relatively efficient mechanism for restructuring financially distressed firms.
Survival rates, direct costs, and recovery rates compare well with extant evidence from the United States and the UK. Moreover, there is no evidence that firm value is destroyed because of distorted ex-ante incentives to risk-shift. While bankruptcy auctions risk forcing asset sales at depressed prices, the evidence suggests that the incentives of secured creditors and old owners combined with opportunities for LBO financing help increase auction demand, effectively counteracting fire-sales tendencies.

8.3. France: weak creditor rights

France provides very strong protection of distressed businesses through its formal reorganization procedure, *Redressement Judiciaire*.32 The objectives of the procedure are, in order of priority, to continue the firm’s operations, to maintain employment, and to pay back creditors. A court-appointed administrator oversees the reorganization. Debtholders are restricted from directly participating in the restructuring process. They are represented by a court officer and can raise their concerns only through this court-appointed creditor representative. Employees, however, may appoint their own representative.

The administrator evaluates the prospects for reorganization and presents a reorganization plan to the court. Creditors cannot reject the court’s decision, nor does confirmation of a reorganization plan or sale of collateral require approval of secured creditors. Creditors are offered new, altered claims in place of their old impaired debt claims. Although the court cannot force creditors to write down their claims, it can redefine the terms of the loan, including maturity. Thus, in practice, creditors often prefer to accept a write-down with timely repayment to a promised repayment in full in an uncertain distant future.

Debt payments are stayed during the bankruptcy process, and the administrator can raise new super-priority financing without creditor approval. If the firm is sold, the court can choose a lower bid that provides better prospects for continued operations and employment. Moreover, government and employee claims have first priority to proceeds generated in a sale of collateral, effectively forcing a deviation from absolute priority rules.33

The French code, with its explicit objective to maintain operations and preserve jobs, has a predisposition to allow continuation of inefficient firms. Nevertheless, the evidence indicates that relatively few firms survive bankruptcy in France. Kaiser (1996) reports that only 15% of filing firms continue to operate as a going concern after bankruptcy reorganization. In a broader sample comprised of bankruptcy filings and voluntary work-outs, Davydenko and Franks (2006) find that 62% of French firms are liquidated piecemeal, which is a higher fraction than in the UK. Despite the poor odds for survival, they show that a vast majority (87%) of firms that default on their debt enter formal bankruptcy.

32 French insolvency law also provides a separate proceeding for liquidation (*Liquidation Judiciaire*) and a rarely used procedure for renegotiation of debt contracts prior to default (*Reglement Amiable*).

33 Certain types of collateral, such as receivables and guarantees, are exempt from this rule.
The low survival rates in France translate into relatively low creditor recovery rates. Davydenko and Franks (2006) document an average bank recovery rate in French proceedings of 47% (median 39%), which is much lower than the recovery rates reported for UK banks. The median reorganization takes three years. Moreover, French banks take more collateral than bank lenders in the UK and Germany, possibly reflecting the poor standing of banks in French bankruptcy.

Overall, although bankruptcy law in France is set up to promote firm survival, the actual result seems to be the opposite. Firm survival rates and creditor recovery in France compare poorly with evidence from the UK and the United States. It is possible that the costs associated with the extremely creditor-hostile French insolvency procedures ultimately are borne by the distressed firms and their claimholders. Or perhaps French firms restructure their debt prior to default in order to entirely avoid reaching the point where they are subject to insolvency laws, leaving only the lemons to the bankruptcy procedure.

8.4. Germany: bank-driven reorganizations

The German 1999 reorganization procedure, Insolvenzordnung, gives the financially distressed firm three months to engineer a reorganization plan under the supervision of a court-appointed administrator. This plan outlines the financial and asset restructuring of the firm, including a potential sale of the firm as a going concern. The reorganization plan must receive creditor approval before it can be implemented. Creditors vote with a simple majority rule. Similar to the United States, the court may cram down a plan on a dissenting class of creditors as long as the plan leaves the class better off than would be the case with a piecemeal liquidation of the assets. Creditor claims are stayed during the three-month reorganization period. The firm can raise new debt financing with super-priority subject to creditor approval.

The evidence on distressed firms in Germany primarily dates from the period before the new reorganization code took effect. Davydenko and Franks (2006), for example, examine firms that defaulted on their debt between 1984 and 2003. They document that 57% of distressed German firms are liquidated piecemeal, which is higher than liquidation ratios reported for Sweden and the UK and lower than liquidation ratios in France. The median duration of the reorganization procedure in Germany is 3.8 years, and banks recover on average 59% (median 61%) of their claims.

An important impediment to out-of-court agreements is holdout problems among dispersed creditors. In Germany, the debt is typically concentrated with a house bank that often also has an equity interest. As a result, one should expect coordination failures to be relatively rare in Germany. According to Kaiser (1996), most German firms with a chance of survival are reorganized in an out-of-court workout. Davydenko and Franks (2006), however, find that 78% of the distressed firms in their sample enter formal

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34 Prior to 1999, German insolvency law offered an auction liquidation process (Konkursordnung) and a rarely used procedure for the reorganization of unsecured claims (Vergleichsordnung).
bankruptcy, with the remaining 22% of sample firms working things out with creditors informally.

Elsas and Krahnen (2002) study the role of lending relationships for 75 financially distressed German firms initiating private workouts. They find that house banks and banks holding a secured claim are more likely to participate in a voluntary restructuring. Brunner and Krahnen (2004) show that German bank lenders often coordinate their reorganization efforts by forming a bank pool when medium-sized firms become financially distressed. They report that banks strike a formal contractual pool arrangement for 45% of the distressed firms, and the probability of bank pool formation increases with the number of bank relationships and the degree of distress.

While the German procedure has some resemblance to the U.S. Chapter 11, it imposes a strict three-month limit on the reorganization. This period risks being too short to allow a firm with complex operations and capital structure to carefully develop a reorganization plan. The evidence on the new reorganization procedure, however, is at this point insufficient for us to draw any conclusions about how well the new German code works.

8.5. Japan: keiretsu banks

Japan’s bankruptcy code has historically been oriented toward a liquidation of the filing firm. Managers typically lost their jobs, and creditors controlled the outcome of the bankruptcy proceeding. Over the last decade, however, Japan has undertaken a series of revisions of its insolvency procedures aimed at strengthening the provisions for restructuring financially distressed firms as ongoing concerns.

A prominent feature of the Japanese business environment is industrial groups called keiretsus. At the core of a keiretsu are banks, which finance much of the industrial operations, both as creditors and equityholders of the firms affiliated with the group. Hoshi, Kashyap, and Scharfstein (1990) examine the role of a keiretsu affiliation for a sample of 125 publicly traded firms that become financially distressed. They find that distressed firms associated with a keiretsu invest more and sell more than nonkeiretsu firms in the years following the onset of financial distress. This suggests that keiretsu banks help relax financial constraints, possibly mitigating the costs of financial distress. Helwege and Packer (2003) study the role of keiretsu banks for the outcome of bankruptcy for 172 troubled Japanese firms. They report that the probability of liquidation is higher for firms affiliated with keiretsu banks than for nonkeiretsu firms, controlling for firm size. However, since there is no discernible difference in the profitability of the liquidated firms, they conclude that there is no evidence that keiretsu banks force excessive liquidations.

In sum, Japan has traditionally provided creditor-oriented insolvency procedures often dominated by large keiretsu banks. There is insufficient evidence at this point, however, to determine whether financial ties with keiretsu banks help or are detrimental to the reorganization of distressed firms.

35 Claessens, Djankov, and Klapper (2003) show that financially distressed firms in East Asia are less likely to file for bankruptcy if they are owned by banks or affiliated with a business group.
9. Conclusion

This chapter surveys the body of empirical research that focuses on the use of private and court-supervised mechanisms for resolving default by restructuring companies in financial distress. We organize and synthesize this literature in the context of a simple model of financial distress. After a quick overview of the theoretical issues, we identify some main themes to anchor the empirical research in the areas of financial distress, asset and debt restructuring, and the formal bankruptcy procedures in the United States and abroad. Studies of out-of-court restructurings (workouts and exchange offers), corporate governance issues related to distressed restructurings, the magnitude of costs and outcomes of bankruptcy reorganizations, and the relative efficiency of bankruptcy codes in different countries are among the topics surveyed.

It is customary (as we have done in this survey) to make a distinction between two types of systems for resolving default: one in which the business is sold to a third party, possibly through an auction; and another in which the firm is reorganized under the current claimholders. Although these two philosophies of resolving default—liquidation and reorganization—have been viewed as entirely different approaches (we have discussed their relative merits in Section 8), claimholders in the U.S. Chapter 11 reorganization system are increasingly relying on the market to mimic solutions provided by an auction (liquidation) system. Most of the research on firms reorganizing under the U.S. Bankruptcy Code, however, dates from the 1980s and early 1990s. The peak in default rates in 2002, combined with creeping changes in insolvency practices and an escalation in the enforcement of creditor rights, has caused a growing demand for new research that can help us understand the process that governs the restructuring of financially distressed firms in the current environment.

The active trading of distressed debt at all priority levels combined with the participation of sophisticated investors is significantly affecting Chapter 11 mechanisms. The extensive trading in distressed debt has led to high turnover in the identity of the creditors of companies in financial distress. Nontraditional investors, such as private equity investors and hedge funds, have increased their role in these markets and therefore as creditors of troubled firms. Based on their estimate of the value of the business and the legal priority of the various claims, many strategic investors acquire the fulcrum class of claims, that is, the securities where they expect that the equity value will reside after the reorganization is completed. Taking a private equity perspective on their investment, these investors seek to become owners of the enterprise, fix it, and then sell it at an optimal time. In this manner, the multiple creditors basically replicate the characteristics of a third-party sale, although the restructuring process is that of a conventional reorganization. Moreover, creditors frequently require, and courts are more willing to approve of, an outright sale of major assets of the distressed firm, either through an auction under Section 363 of the U.S. Bankruptcy Code or as part of the reorganization plan. The overall effect of all these changes on the efficiency of the U.S. bankruptcy procedures yet remains to be documented and analyzed.
With emerging economies searching for an optimal bankruptcy system and the opportunity for the European Union to harmonize its insolvency rules, the efficiency of various systems across the industrial economies has received increasing attention. The differences in the insolvency codes of the advanced economies and the differential degree of creditor rights available in the legal systems of those economies have been the focus of policy makers in many countries. It is also recognized that changes in insolvency codes and their enforcement could have important influence on how firms access capital as well as on the efficiency of investment in the economy. It is evident from our review of the research on insolvency procedures outside the United States that a lot still remains to be done in this area. One important and still mainly unanswered question is how different institutional characteristics of individual countries interact with their respective insolvency rules. For example, to what degree is the success of Swedish bankruptcy auctions tied to the dominant role of banks in this economy?

The argument has often been made that the direct costs of bankruptcy seem too small to justify the relatively low leverage ratios that we typically observe. A response to this observation has been that leverage and financial distress might have other indirect costs that need to be taken into consideration. Our understanding of the nature and magnitude of these indirect costs of financial distress is still very preliminary. In some sense, the indirect costs of bankruptcy arise from the value lost from investments that optimally should but in practice are not undertaken (an opportunity cost). Finding reliable measures of such unobservable phenomena is very difficult and requires clever empirical strategies.

In designing bankruptcy systems, it is important to consider their effect on a variety of issues, including capital structure choices, investment incentives, and risk choices that arise from the law and its implementation. For obvious reasons, most of the existing literature has focused on the ex-post efficiency of the mechanisms for resolving default, that is, on events following the onset of financial distress. In order to assess the optimality of various mechanisms for resolving default, however, we also need to consider their ex-ante efficiency. The international evidence plays an important role in the search for an optimal bankruptcy system.

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Overview of Bankruptcy Law

Prof. Susan Block-Lieb, Fordham Law School
Allan L. Gropper, U.S. Bankruptcy Judge, S.D.N.Y. (Retired) and Adjunct Prof. of Law, Fordham Law School
Jeffrey S. Hellman, PVH Corp. and Adjunct Prof. of Law, Fordham Law School
Introduction:

- What are the purposes of bankruptcy law?
- What are the purposes of a Chapter 11 reorganization?
Purposes:

- Ensure equality of distribution among insolvent debtor’s creditors
- Maximize value of assets and distributions to creditors
- Rehabilitate financially viable business—preserve operations and save jobs
- Provide discharge from indebtedness and “fresh start” to debtor
Topics of Discussion:

- Allowance and Disallowance of Claims – secured, priority and general unsecured
- Property of the Estate
- Automatic Stay
- Executory Contracts and Unexpired Leases
- Adequate Protection
- DIP’s Powers to Use, Sell, and Lease POE, including Cash Collateral
- Post-Petition Financing
Allowance and Disallowance of Claims

- Filing Proofs of Claim in Chapter 11
- “Allowed unsecured claim” -- §502
  - Post-petition interest
- “Allowed secured claim” -- §506
  - Post-petition interest
  - Obligation to turnover assets repossessed pre-petition
- Priority Claims
Proof of Claim

- Official Form No. 10
- No need to file proof of claim if debtor scheduled claim as liquidated and undisputed – Rule 3003(c)(2)
- Must be filed by “bar date” set by court
- Prima facie valid, absent objection
Allowed Unsecured Claim

- Liquidated and Undisputed
- State and non-bankruptcy federal law grounds for disputing claim
- Bankruptcy grounds for disputing claim
  - “Unmatured interest” claims
  - Long-term lease claims
  - Certain contingent claims
Allowed Secured Claim

- “Allowed secured claim” up to value of collateral
- If claim is less than or equal to value of collateral, claim is “fully secured”
- Secured claims “ride through” bankruptcy, but may need to file proof of claim in chapter 11

- If claim is greater than value of collateral, claim is “partially secured”
- “Allowed unsecured claim” to the extent of any deficiency claim
Post-Petition Interest

- Unsecured creditors’ claims for “unmatured interest” are disallowed -- §502(b)(2)
- Partially secured creditors’ claims for post-petition interest also disallowed -- §502(b)(2)
- Fully secured creditors are entitled to post-petition interest up to value of collateral – whether security interest created by agreement or statute -- §506(b)
Priority Claims

- Pre-petition:
  - Nine statutory priorities in §507
  - Wage claims and claims for contribution to employee benefit plan -- §507(a)(3)&(4)
  - Tax claims -- §507(a)(8)

- Post-petition:
  - Administrative expense claims for “actual & necessary costs and expenses of preserving estate”

  Requires:
  - Transaction with estate
  - Benefit to estate
Property of Estate

- “All legal or equitable interests of the debtor in property as of the commencement of the case” -- §541(a)(1)

- “Proceeds, product, offspring, rents, or profits of or from property of the estate” -- §541(a)(6)

- Any interest in property that the estate acquires after the commencement of the case -- §541(a)(7)
Automatic Stay -- Scope

- “Any act to obtain . . . control over POE” -- §362(a)(3)
- “Any act to collect, assess or recover” on a pre-petition claim -- §362(a)(6)
- Commencement or continuation of judicial, administrative or other proceeding against debtor on pre-petition claim, including tax proceedings -- §362(a)(1)&(8)
- Creation, perfection, or enforcement of liens against POE -- §362(a)(4)&(5)
- Setoff -- §362(a)(7)
Automatic Stay - Exceptions

- Criminal proceedings -- §362(b)(1)
- Acts to perfect, or maintain or continue perfection of, security interest in property if permitted elsewhere in Code -- §362(a)(3)
- Proceedings by governmental unit to enforce its “police and regulatory” power -- §362(b)(4)&(5)
Relief from Automatic Stay

- §362(d)(1) – “for cause”
- Abstention from proceeding
- Bad faith filing
- Lack of adequate protection

- §362(d)(2) – lack of equity in collateral that isn’t needed for an effective reorganization
Adequate Protection

- §361 states that “adequate protection” may be provided by –
  - Requiring estate to make periodic cash payments
  - Provide additional or replacement lien
  - Grant the “indubitable equivalent” of the above
Executory Contracts and Unexpired Leases

- Rejection derives from power to abandon valueless assets
- Constitutes breach of pre-petition agreement and entitles non-dr party to unsecured claim for damages
- Effective upon ct approval
- Governed by “business judgment” standard
Executory Contracts and Unexpired Leases

- Power to assume derives from estate authority over POE
- Constitutes agreement by estate to perform pre-petition agreement
- Damages for subsequent breach of assumed contract or lease entitled to administrative expense claim status
- Trustee or DIP can assume agreement that was breached pre-petition, if it cures and compensates for breach and provides adequate assurance of future performance
- However, cannot assume if could not assign
Executory Contracts and Unexpired Leases

- Trustee and DIP entitled to assign valuable contracts and leases
- To assign, must first assume and also provide adequate assurance of assignee’s future performance
- §365 invalidates contract clauses that “prohibit, restrict or condition” assignment
- §365 validates non-bankruptcy legal rules (statutory or common law; State or federal) that preclude or limit assignability of class of contracts
Power to Use, Sell, or Lease Property of Estate

- There is no need for court approval
  - To conduct business in ordinary course
  - To enter into transactions in OCB
  - To use, sell or lease property (other than cash collateral) in OCB

- Ordinary course of business considers:
  - vertical test and
  - horizontal test
Use of Cash Collateral

“Cash collateral” means

– Cash and cash equivalents

– Proceeds, product, offspring, rents or profits, including fees for use of hotel

Whether or not in the ordinary course of business, trustee or DIP cannot use cash collateral, unless:

– It receives the consent of the secured creditor, or

– The bankruptcy court authorizes such use on the grounds that it provides “adequate protection”
Invalidation of Pre-Petition Security Interest in Post-Petition Property

- §552 provides that property acquired post-petition is not subject to pre-petition security interest, except to the extent that
  - the pre-petition security interest extends to “proceeds, product, offspring, profits” or rent from pre-petition POE.
- Revised UCC Art. 9 expands the definition of proceeds.
Post-Petition Financing

- Administrative Expense Claim
- Super-priority Administrative Expense Claim
- Secured by Unencumbered POE, or Junior Lien on POE
- Secured by Senior or Equal Lien on POE
  - Judicial limitations on cross-collateralization
Avoidance Actions

• Trustee (and DIP) can bring avoidance and other actions on behalf of the estate; trustee can access state law if an affected unsecured creditor still exists (sec. 544(b)).

• Preferences (sec. 547)
  – Payment on an antecedent debt while debtor insolvent
  – 90-day general look-back period; one year for insiders
Avoidance Actions

– Creditor must have received more than it would receive in a hypothetical Chapter 7 liquidation
– Debtor presumed insolvent in 90-day period
– Defenses include ordinary course of business, contemporary exchange for value, subsequent new value
Avoidance Actions

• Fraudulent Conveyances (sec. 548)
  – Intentional: Transfers made with intent to hinder, delay, or defraud creditors
  – Constructive: Transfers made for less than reasonably equivalent value while debtor insolvent, with inadequate capital or without ability to pay debts as they mature
  – 2-year look-back period under Federal law; state law can also be accessed (New York Debtor and Creditor Law (DCL))
Individual Bankruptcy Issues

- **Exemptions**
  - Federal exemptions listed in sec. 522
  - However, State law generally controls
    - Except 2005 limitation on homestead exemption

- **Exceptions to Discharge (sec. 523)**
  - In Chapter 7, the following debts (among others) are “nondischargeable”:
    - Taxes (unless more than two years old)
    - Debts for money, property or credit to the extent obtained by false pretenses or “actual fraud”, other than a statement respecting the debtor’s or an insider’s financial condition
Individual Bankruptcy Issues (Nondischargeability)

- Use of a false statement respecting the debtor’s financial condition on which the creditor reasonably relied, except that there is a presumption involving debts incurred during the 90 days prior to filing if for luxury goods or services.
- Debts for fraud while serving in a fiduciary capacity, larceny and willful and malicious injury to the person or property of another
- Debts for domestic support obligations
- Student loans, unless “excepting such debt from discharge …would impose an undue hardship on the debtor and the debtor’s dependents”.

Individual Debtor Issues (Distribution)

- Chapter 7 Cases
  - Secured debt generally rides through to the extent of the security
  - Assets collected by the Chapter 7 trustee and sold are distributed generally as follows (sec. 726):
    - To priority creditors
    - To unsecured creditors (timely and then late-filed)
    - To fines, penalties and similar damages
    - Interest on the above
    - To the Debtor
Individual Debtor Issues (Distribution)

• Chapter 13
  – Plan proposed for payment of all disposable income of the debtor for up to five years
    • Payments on secured debt (mortgage debt may not be “written down”)
    • Payments on unsecured debt (may be de minimis)

• Chapter 11
  • Similar to business Chapter 11 cases
Individual Debtor Issues (Discharge)

• Discharge
  – Debtor receives a discharge unless
    • Debtor with intent has concealed or destroyed property of the estate or has falsified records
    • Debtor has knowingly and fraudulently made a false statement in connection with the case or has withheld information
    • Debtor has failed to explain a deficiency in assets or has refused to obey a court order
    • Debtor has received a discharge within 8 years
Individual Debtor Issues (Post Discharge)

• Discharge immediate in Chapter 7 cases; at end of plan period in Chapter 13 cases

• Reaffirmation Agreements
  – Complex requirements; if debtor is without counsel agreement must be approved by court
Business Debtors — Reorganization (Ch. 11)

• Business Plan

• Negotiation of Business Plan and Terms of Plan of Reorganization: Creditors Committee (other committees also possible in rare cases)
  – Allocation of consideration: cash, debt, equity
  – Classification of Claims (sec. 1123)
  – Distribution to Impaired Classes
    • Unimpaired creditors (sec. 1124)
  – Exclusivity (sec. 1121)
Business Debtors —
Reorganization (Ch. 11)

• Disclosure Statement
  – Adequate information (sec. 1125)

• Vote on Plan by Impaired Classes
  – 2/3 in amount and more than ½ in number (sec. 1126)

• Confirmation of Plan
  – Consensual confirmation (sec. 1129(a))
    • Plan must pay priority creditors in full (tax claims may be stretched)
    • Plan must be feasible
Business Debtors — Reorganization (Ch. 11)

• Confirmation (cont’d.)
  – Consensual confirmation (cont’d.)
    • Plan must satisfy best interests test (pay at least as much as in a Chapter 7 liquidation)
  – Non-consensual confirmation (cramdown)(sec 1129(b))
    • In addition to other requirements:
      • Plan must not discriminate unfairly
      • Plan must satisfy fair and equitable test
        – For secured creditors (keep lien and get deferred cash payments equal to value of collateral or the indubitable equivalent)
        – For unsecured creditors (no distribution to classes lower than dissenting class on account of such junior claim or interest)
Effect of Confirmation in Chapter 11 Case

• Discharge
  – No discharge in a liquidating Chapter 11
  – Revesting of property
  – Distribution of property to be dealt with under the Plan

• Prepackaged Plans
  – Compared to Pre-arranged and Pre-negotiated plans
Chapter 15

• Ancillary proceeding to recognize and provide assistance to foreign proceeding
  – Recognition of foreign representative
  – Formerly sec. 304 of Bankruptcy Code

• Cooperation and coordination with foreign cases

• Comity can be granted to foreign proceedings after recognition of foreign representative
Jurisdiction

• District Courts have exclusive jurisdiction over all cases under title 11 (28 USC 1334)
  – Referred to Bankruptcy Judges

• Non-exclusive jurisdiction over all civil proceedings arising under title 11 or arising in or related to cases under title 11 (adversary proceedings)

• Core and non-core jurisdiction (28 USC 157)
Jurisdiction

- Withdrawal of the Reference (28 USC 157(d))
  - Mandatory and discretionary
- Removal and Remand (28 USC 1452)
- Abstention (28 USC 1334(c))
  - Mandatory and discretionary
- Appeals to District Court (no Bankruptcy Appellate Panel in 2d Circuit) and then to Circuit Court and Supreme Court (28 USC 158)
  - Certification and Acceptance of Direct Review by Circuit Court
When ‘Not Guilty’ Is a Life Sentence

What happens after a defendant is found not guilty by reason of insanity? Often the answer is involuntary confinement in a state psychiatric hospital — with no end in sight.

By Mac McClelland
Sept. 27, 2017

Despite Ann’s determination to betray no emotion, a drop of sweat rolled down her temple as a guard painstakingly examined her lunch items. That Sunday morning, she had taken two buses, two trains and a shuttle to get from her home to the New York state psychiatric facility where her son is confined. Frustrated, she pushed back a little, but just a little, when the guard took away two sealed bottles of fruit-flavored water, a special treat that Ann had made an extra stop to buy. She watched as he held them up to examine them and concluded that they must contain caffeine — which is not allowed — because they did not read, “Does not contain caffeine.”

“They’re testing you,” she said to her son, James, after she was finally cleared, metal-detected and led upstairs to the visiting room, a spare, linoleum-floor space inside the hospital’s high-security building. Ann, who asked that her nickname and her son’s middle name be used to protect their privacy, usually comes to see James three times a week. Obstacles like these are routine. James, a middle-aged white man with thinning hair and a thickening waistline, listened to her complaints in a routine way, too, glancing up from the newspaper his mother had brought, the two of them sitting at a table, the same arch in their brown eyebrows, eating homemade coleslaw and sandwiches. They’ve been doing this a long time.

At some point in the next five hours — while the three of us ate lunch, and dessert, and later snacks between rounds of Bananagrams and Kings in the Corner — James said to me, “I shouldn’t have taken the plea.”

By the time of the arrest that would lead to James’s confinement here, he had already been hospitalized multiple times for threatening to kill himself. His problems stemmed, he said, from being sexually abused by his stepfather. But he had held down jobs — at a pizza shop, banquet setup in hotels — and after an intellectual disability was diagnosed, he and his mother say, he ran track and field in the Special Olympics, competing in Minnesota, Colorado, Germany and London. When I asked what charge, exactly, led to his arrest, he lowered his voice and said: “rape.” His mother added that a kidnapping count was “tacked on.”

In 1996, when James was 20, the police responded to a frantic 911 call near the house where he lived with his mother. At the scene, the officers found a woman bloodied and in distress. She said that James had lured her inside for a housekeeping interview — and that he’d been screaming when he started ripping her clothes off and beating her. The cops later picked him up at his grandmother’s house, a few miles away. At the police station, James signed a statement saying he understood his rights. He waived the right to representation. He signed a confession. (He and his mother now claim that the confession was coerced and that he is innocent.) When doctors subsequently evaluated him, they found him so unstable that they ruled him incompetent to stand trial. He was remanded to a hospital for several months, then sent back to jail, where he regressed again, then sent back to the hospital for several more months, stabilized once again, then sent back to jail, where in preparation for his trial, he was returned to the hospital to be evaluated for mental illness. Doctors diagnosed borderline-personality disorder, his mother says — which enabled him to plead “not responsible by reason of insanity.”

James says that he understood the plea he took. In the abstract sense, he did. But the specifics of it were as mysterious to him and his family as they are to most people. Before he was arrested, James and his mother were set to move to Georgia, where they had relatives, and where Ann had friends and a job lined up. After his plea deal, Ann says, she “put everything
on hold,” for what she thought would be a few years.

Instead, James, now in his 40s, has been in the hospital for almost two decades. This isn’t because he was sentenced to 20 years, or to 25. He was not sentenced at all; he is technically, legally, not responsible. The court believes beyond a reasonable doubt that he committed the act he was accused of, a prerequisite for the state to accept an insanity plea. The plea does not, however, prescribe or limit the duration of his stay. The laws that govern the practice of committing people who are acquitted because of mental illness dictate that they be hospitalized until they’re deemed safe to release to the public, no matter how long that takes.

James’s insanity acquittal placed him in an obscure, multibillion-dollar segment of domestic detention. According to a 2017 study conducted by the National Association of State Mental Health Program Directors, more than 10,000 mentally ill Americans who haven’t been convicted of a crime — people who have been found not guilty by reason of insanity or who have been arrested but found incompetent to stand trial — are involuntarily confined to psychiatric hospitals. Even a contributor to the study concedes that no one knows the exact number. While seemingly every conceivable data point in America’s prison system is meticulously compiled, not much is known about the confinement of “forensic” patients, people committed to psychiatric hospitals by the criminal-justice system. No federal agency is charged with monitoring them. No national registry or organization tracks how long they have been incarcerated or why.

In 1992, the Supreme Court ruled, in Foucah v. Louisiana, that a forensic patient must be both mentally ill and dangerous in order to be hospitalized against his will. But in practice, “states have ignored Foucah to a pretty substantial degree,” says W. Lawrence Fitch, a consultant to the National Association of State Mental Health Program Directors and former director of forensic services for Maryland’s Mental Hygiene Administration. “People are kept not because their dangerousness is because of mental illness. People stay in too long, and for the wrong reasons.”

Michael Bien, a lawyer who helped bring a successful lawsuit against the California prison system on behalf of prisoners with psychiatric illnesses, concurs. “Under constitutional law, they’re supposed to be incarcerated only if they’re getting treatment, and only if the treatment is likely to restore sanity,” he says. “You can’t just punish someone for having mental illness. But that’s happening.”

In the visiting room in New York that Sunday, as the hours went by, families came and went. Ann settled in. On James’s birthday, she brings a party: relatives, presents, a cake. And almost every week, on every visiting day, she and James try to make a life here together at the hospital — because it now seems possible that he could die there.

The insanity defense has been part of the American judicial system from its founding, carried over from our English forebears. British law has long reflected the moral sense that society has a duty not to punish people who can’t comprehend or control their crimes. But the insanity defense has always sat uneasily with the public, which tends to regard it as a means to escape justice. In the United States, such sentiments reached fever pitch in 1981, when a 25-year-old named John Hinckley Jr., hoping to win Jodie Foster’s heart, tried to assassinate President Reagan, wounding the president and three others, including James Brady, the White House press secretary, who was left permanently disabled. Hinckley was found not guilty by reason of insanity (N.G.R.I., as it is frequently abbreviated) and sent to St. Elizabeths Hospital in Washington. The country was outraged. Dan Quayle, then a senator from Indiana, called the verdict “decadent” and said the insanity defense “pampered criminals.” His Senate colleague Strom Thurmond equated it to a free ride.

In fact, despite its reputation as a “get out of jail free” card, the insanity defense has never been an easy way out — or easy to get. After a defendant is charged, the defendant, her lawyer or a judge can request evaluation by a psychiatrist. A defendant may be found incompetent to stand trial and committed for rehabilitation if she isn’t stable enough or intellectually capable of participating in the proceedings. If she is rehabilitated, she may be tried; if she cannot be, she may languish in a psychiatric hospital for years or decades. But mental illness is not exculpatory in itself: A defendant may be found mentally ill and still competent enough to stand trial. At that point, the district attorney may offer an insanity plea — some 90 percent of N.G.R.I. verdicts are plea deals. If the district attorney doesn’t offer a plea, or the defendant doesn’t take it, the case goes to trial. The defendant may still choose insanity as a defense, but then her case will be decided by a jury.
If N.G.R.I. was always difficult to get, it became even harder after Hinckley. With the Insanity Defense Reform Act of 1984, Congress restricted the judicial definition of “insanity” to only the most severe cases. Some states — Idaho, Utah, Kansas and Montana — have eliminated the defense altogether. In trials in which it is attempted, doctors may disagree, and jurors are often influenced by emotional considerations. Today, only an estimated one-tenth of 1 percent of contested felony cases end in a successful N.G.R.I. defense — that is, the prosecutor disputes the insanity defense, the case goes to trial and the jury finds the defendant not guilty by reason of insanity. In addition, the legal standards for “insanity” vary among states; some define it as a defendant’s inability to know the crime was wrong or the inability to act in accordance with the law, but most define it, post-Hinckley, as only the first of these. At the trial of James Holmes, who killed 12 people and injured 70 in a movie theater in Aurora, Colo., one psychiatrist testified that he was mentally ill but that he knew right from wrong and should be considered “sane.” Another testified that he was mentally ill and incapable of reason (and, by extension, guilt). All four who examined him agreed that he had some form of schizophrenia. Jurors rejected his insanity plea.

And when an N.G.R.I. defense does succeed, it tends to resemble a conviction more than an acquittal. N.G.R.I. patients can wind up with longer, not shorter, periods of incarceration, as they are pulled into a mental-health system that can be harder to leave than prison. In 1983, the Supreme Court ruled, in Jones v. the United States, that it wasn’t a violation of due process to commit N.G.R.I. defendants automatically and indefinitely, for the safety of the public. (Michael Jones, who was a paranoid schizophrenic, had been hospitalized since 1975, after pleading N.G.R.I. to petty larceny for trying to steal a jacket.) In almost all states, N.G.R.I. means automatic commitment to a psychiatric facility. In most states, like New York, there is no limit to the duration of that commitment. In the states that do have limits, like California, the limits are based on the maximum prison sentence for the offense, a model that belies the idea of hospitalization as treatment rather than punishment. As Suzanna Gee, an attorney with Disability Rights California (a protection and advocacy agency with counterparts in every state), points out, the law allows two-year extensions as patients approach a “top date,” the limit set on their confinement. And so, she says, “it can be extended in perpetuity.”

James’s mother, Ann, now knows the predicament of forensic confinement well. At some point during James's stay at the state hospital, she became an advocate for mentally ill offenders. “It’s like a roach motel,” she says. “At least in prison, inmates know they're leaving. Once you check into the hospital, it's hard to check out.”

Though forensic detentions get little attention, they can range from ethically questionable to flagrantly unconstitutional and illegal. In 1983, a national study found that N.G.R.I. patients often lost their freedom twice as long as those actually convicted of the same offense. A study of N.G.R.I. patients in seven states between 1976 and 1985 found that in four of those states, they were confined for less time than people who were found guilty, and that in three, they were confined for longer. Scant research, conducted decades ago, seems to constitute the most recent survey of the fate of the country's forensic commitments.

“There’s not been a lot done,” Fitch says. The federal government doesn’t collect data on forensic patients’ lengths of stay, crimes or treatment. In some cases, neither do the state or local departments in charge of their custody. In 2015, I began collecting, via request or the Freedom of Information Act, all individual length-of-stay data by legal status that existed in each state and Washington, Colorado, Wyoming, Arkansas, Missouri, California, Maine, New Hampshire, Kentucky, Wisconsin, Delaware, New Jersey, Ohio and South Carolina said they simply didn’t have that information. Alabama may or may not: In response to repeated queries, it “decided not to release forensic data,” and hospital reports are excluded from its public-records law.

Many of the above states have reported legal status and average lengths of stay. In 2014, Fitch, on behalf of the National Association of State Mental Health Program Directors, estimated, based on states' self-reported average lengths of stay, that the national average for all N.G.R.I.s was around five to seven years. He says he finds that “horrendous,” given that civil commitments with the same diagnoses as forensic commitments can get out in under 30 days. There is no accepted body of research to suggest that lengthy institutionalization leads to better treatment outcomes. On the contrary, says Marthagem Whitlock, an assistant commissioner in Tennessee's Department of Mental Health and Substance Abuse Services, “The deeper penetration into the system usually means more complications for the individual.” There are, as Fitch acknowledges, “people who don't respond to treatment or who refuse treatment.” But, he argues, “it should almost never be necessary to hospitalize people that long.”
According to the state records collected for this article, in 2015, Florida had 24 N.G.R.I. patients who had been hospitalized for longer than 15 years. Texas had 27. Connecticut had 40, and Georgia had 43. New York and Washington had around 60 apiece. That’s six of the 28 states from which such data can be extrapolated, along with the District of Columbia. In those states — which exclude thousands of N.G.R.I. patients — a significant portion of N.G.R.I. patients had been hospitalized more than two years. Nearly 1,000 had been hospitalized for five to 15 years. More than 400 had been in for longer than 15. Of these, more than 100 had been in longer than 25 years and at least 60 for more than 30. And those numbers don’t present the whole picture, either: Many factors, like hospital transfers or conversion to civil commitment, can start the clock over or obscure patients’ histories. In many cases, Gee says, when patients reach out to Disability Rights California to advocate on their behalf, “if they’d not pled N.G.R.I. and just gone to prison, they might have gotten out earlier.”

Which is not to say there aren’t protocols for release. Most states do have a formal review process to judge whether N.G.R.I.s no longer fit commitment criteria: They are no longer mentally ill or are no longer dangerous as a result of their mental illness. Some states review cases on a schedule — every year, say, or in the case of New Hampshire, every five years. In others, patients (or their lawyers) have to request the review. Doctors can recommend patients for discharge at any time. Patients’ lawyers can also file writs of habeas corpus or petitions for restoration of sanity to have their cases heard in court.

At the psychiatric facility where James is a patient, as at every New York state hospital, cases are reviewed every two years or so, in a joint process by the hospital and the Office of Mental Health (O.M.H.) in Albany. In 2002, when the hospital and O.M.H. review declared James unfit for release, James requested that the court appoint him an independent evaluator and grant him a hearing.
That doctor found that he wasn’t dangerous and was ready to be transferred. The judge agreed and ordered it.

But James didn’t leave.

“Even the mechanisms for getting out,” says Pat McConahay, communications director for Disability Rights California, “are not really mechanisms for getting out.”

**James’s almost-transfer** 15 years ago fell under the jurisdiction of Guy Arcidiacono, now 61, the district attorney in charge of the Suffolk County Forensic Psychiatric Litigation Unit, who has handled 130 N.G.R.I. cases over 25 years. After the judge approved James for transfer, Arcidiacono and the Suffolk County district attorney’s office, joined by the New York State attorney general’s office, which represents the hospital, appealed to have the transfer order overturned. Under another judge, it was.

James’s police files are terrible to read. There was never a trial, but the allegations are disturbing. They include a statement by the woman whom the police responded to near his house saying that James sexually assaulted her, beat her unconscious, then threw her down the basement stairs. She told the police that when she came to, naked, she realized she was locked in. This, you might presume, was the basis for the rape and kidnapping charges that James said put him in the state hospital.

“Well,” Arcidiacono clarified when I contacted him, “there were two cases, actually.”

Two months earlier, James had been arrested based on another woman’s statement, taken at the emergency room, that she was pinned by her throat and raped in an empty field. (In his statement, James said she had agreed to have sex with him in exchange for crack, and that he didn’t actually intend to make good on his promise.) Charges were filed, and James was released to his mother’s custody — Arcidiacono says there’s no record of why, but it could have been because James hadn’t been indicted yet. When James pleaded N.G.R.I. to the subsequent attack, the charges from the first incident were lumped together with the new ones: in total, second-degree kidnapping, second-degree assault, second-degree aggravated sexual abuse, first-degree sexual abuse, first-degree rape and third-degree robbery.
Not everyone in the family is so sympathetic, says Houston’s half sister, Cameron McDowell, 43. “We have some family members who just hate him and will never forgive him. It was just such an awful thing. And I wish Dad were here every day. I can’t even imagine what he went through that night — oh, God, it was so awful.” But, she says, “he’s gone. And we have Houston now. We have to support him. This is going to sound strange, but I’ve not once been mad at him. I really, truly, passionately believe that it’s not the person that commits the crime. It’s the illness.”

At the same time, she understands why people are afraid. Cameron’s own husband isn’t yet comfortable with the idea of Houston’s hanging around their two young kids; though he loves Houston, he’s “a little bit freaked.” “I hope my husband will change his mind when Houston gets out,” she says. She, too, worries about what will happen after his release, though for entirely different reasons. “Is he going to be so institutionalized that he won’t know how to live? That’s what breaks my heart for him.”

Like Houston’s sisters, the judicial and medical systems struggle to find a balance between the blamelessness of N.G.R.I. patients and the gravity of many of their crimes. The rights of the patient are always weighed against the public good, a standard that may include a more or less explicit desire for retribution. Those who provide treatment for forensic patients, says Michael Norko, professor of psychiatry at Yale and director of forensic services for the Connecticut Department of Mental Health and Addiction Services, “still have to answer to a court, or to the board, or to the court of public opinion. Every facility has people in it who have so violated a community, a community that is so angry, so hurt, that they’re basically pariahs.” He recalls one patient who shot a police officer; at hearings for his release, a crowd of uniformed cops repeatedly showed up and stood silently, facing the review panel. The question of a patient’s
commitment standard,” Whitlock says. “Once you get someone into the hospital, it’s hard to get the court to take them back out. We could probably determine it in a day.” Now only 55 percent of Tennessee’s N.G.R.I.s are committed. Their typical length of stay ranges between seven months and 4.5 years, and they get out, on average, in about two. The state’s new initiative adds to the body of evidence that less hospitalization doesn’t lead to higher crime rates. Since Tennessee stopped automatically committing N.G.R.I.s, says Jeff Feix, the state’s director of forensic services, “the recidivism rate we have is no different than it was before.”

Despite the clinical benefits and cost savings — in 2015, according to a Samhsa report, the average annual cost of one forensic patient, nationwide, was $341,614 — Tennessee’s model is still unusual. There is no outcry, from the public or politicians, for alternatives to indefinitely institutionalizing N.G.R.I.s. After 45 years of studying the issue and filing lawsuits on behalf of patients, Michael Perlin, an emeritus professor at New York Law School and an expert on mental-disability law, thinks he knows why: “Everybody except for people who take the Constitution seriously and people who are in the hospital are happy the patients are there. Prosecutors, police, they’re glad they’re not going anywhere. I believe that the disability rights community has never gotten substantially involved in the issue because some of the people have been charged with very horrific crimes.”

As he put it: “This is an area that everybody kind of wishes would go away.”

Nearly two decades into James’s confinement, it remains unclear if he will ever be considered fit for release. He says that currently his entire medication regimen consists of “fish oil twice a day, calcium, vitamin D and two Kool-Aids and prune juice and Metamucil.” In the 2004 appellate court overturning of his transfer, the hospital doctor testifying in favor of his continued retention pointed out that there was no medication for his diagnosis of antisocial personality disorder — just therapy, to which he was resistant. The hospital forensic committee said that they believed James was insufficiently willing to take responsibility for his actions. One of his doctors called him “sexually preoccupied”; the appellate court concluded that “the disorder will continue to cause him to be dangerous at least until such time as he decides he wants to change and begins working seriously with his treatment providers.”

The court-appointed psychiatrist at the hearing two years earlier, when James was ordered for transfer, said quite the opposite. In his opinion, James “acknowledged the wrongfulness of his actions, and although he does not show much remorse or regret for his actions as a result of limited insight, he certainly realizes that what he did was wrong and against the law.” He said that James “has benefited from [the state psychiatric facility] as much as he will benefit, and at this point he could be transferred to a civil hospital, where he will continue to benefit from the structured environment and continue to receive individual treatment, hoping that he will eventually gain further insight.” But in its appeal at that time, as in every review since, the hospital successfully petitioned to retain him.

How much James’s perceived dangerousness is due to his illness and how much to his extended hospitalization can be difficult to untangle. During a phone call last year, he confessed that lately he’d been “going through a lot of crap.” He was referring to recent fights on the ward. The 2004 appeal notes that he was assaulted twice in 2002 and “got into an altercation with another patient” that year; all of the incidents read as demerits against him. Such disputes are not uncommon for patients with personality disorders, says Norko, the Yale professor and clinician. A hospital is generally “not a good place for them,” he says. “Clinically you try very hard not to hospitalize people who have personality disorders. They can’t quite seem to ever get it right. To them it looks like: ‘The staff want me to do this, they want me to do that, they keep changing the rules,’ and they don’t understand the rules, and they get into arguments, they get into fights. It’s all part of their personality disorder, which in itself isn't necessarily all that dangerous, but it's kind of hard to move somebody along when their record is dotted with all of these altercations.”

Perhaps the most cleareyed view of the compromises inherent in N.G.R.I. commitments comes from Paul Appelbaum, professor and director of the division of law, ethics and psychiatry at Columbia University. Appelbaum acknowledges that some N.G.R.I.s are “unnecessarily detained for a longer period than what seems to be warranted by their mental disorder and its impact on their likelihood of being violent in the future.” But, he says, such exaggerated concerns about public safety may be necessary to the survival of the insanity defense. “There are injustices that are imposed on individuals,” Appelbaum says. “But I also see at a 30,000-foot level why the system works that way, and recognize perhaps the paradox that if it didn’t work that way, we might lose the insanity defense altogether, or at the very least have an even more restrictive system that we have to deal with.”
For many, Appelbaum says, an N.G.R.I. verdict is still superior to a conviction. “It exempts them from a formal finding of guilt, which can be important later in their lives. It enables them to serve their time of confinement in what is generally a much better and safer environment than an overcrowded state prison.” While one way to look at indefinite confinement is as an unbearable uncertainty, another is that it offers hope: “Compared to a life without the possibility of parole, you know, maybe that’s better.”

Yet for the insanity defense to live up to the moral imperative it was designed to embody — exculpating those with diminished responsibility for their acts — better mechanisms for evaluating release will need to be adopted, Slobogin says. In an attempt, in part, to protect N.G.R.I.s’ constitutional rights to be released when they don’t fit commitment criteria, the American Bar Association recently revised its criminal-justice mental-health standards, which were adopted in 1986. The association recommended that forensic patients be detained only if there is clear and convincing evidence — a standard that, if it had to be quantified, means about 75 percent certainty — that they’re mentally ill and dangerous; the current legal burden of proof in most jurisdictions is a “preponderance of the evidence,” or 51 percent certainty.

“It’s immoral to deprive someone of liberty because you’re mad at them for being found N.G.R.I.,” says Slobogin, who was on the task force. “Under our new standards, after a year you have to have very strong proof of dangerousness, or you can’t detain them.” But the standards are just recommendations, and some states didn’t even follow the ones from the ’80s. Slobogin concedes that in many jurisdictions, they may have no impact at all.
Despite Ann's determination to betray no emotion, a drop of sweat rolled down her temple as a guard painstakingly examined her lunch items. That Sunday morning, she had taken two buses, two trains and a shuttle to get from her home to the New York state psychiatric facility where her son is confined. Frustrated, she pushed back a little, but just a little, when the guard took away two sealed bottles of fruit-flavored water, a special treat that Ann had made an extra stop to buy. She watched as he held them up to examine them and concluded that they must contain caffeine — which is not allowed — because they did not read, “Does not contain caffeine.”

“They’re testing you,” she said to her son, James, after she was finally cleared, metal-detected and led upstairs to the visiting room, a spare, linoleum-floored space inside the hospital’s high-security building. Ann, who asked that her nickname and her son's middle name be used to protect their privacy, usually comes to see James three times a week. Obstacles like these are routine. James, a middle-aged white man with thinning hair and a thickening waistline, listened to her complaints in a routine way, too, glancing up from the newspaper his mother had brought, the two of them sitting at a table, the same arch in their brown eyebrows, eating homemade coleslaw and sandwiches. They’ve been doing this a long time.

At some point in the next five hours — while the three of us ate lunch, and dessert, and later snacks between rounds of Bananagrams and Kings in the Corner — James said to me, “I shouldn’t have taken the plea.”

By the time of the arrest that would lead to James's confinement here, he had already been hospitalized multiple times for threatening to kill himself. His problems stemmed, he said, from being sexually abused by his stepfather. But he had held down jobs — at a pizza shop, banquet setup in hotels — and after an intellectual disability was diagnosed, he and his mother say, he ran track and field in the Special Olympics, competing in Minnesota, Colorado, Germany and London. When I asked what charge, exactly, led to his arrest, he lowered his voice and said: “rape.” His mother added that a kidnapping count was “tacked on.”

In 1996, when James was 20, the police responded to a frantic 911 call near the house where he lived with his mother. At the scene, the officers found a woman bloodied and in distress. She said that James had lured her inside for a housekeeping interview — and that he’d been screaming when he started ripping her clothes off and beating her. The cops later picked him up at his grandmother's house, a few miles away. At the police station, James signed a statement saying he understood his rights. He waived the right to representation. He signed a confession. (He and his mother now claim that the confession was coerced and that he is innocent.) When doctors subsequently evaluated him, they found him so unstable that they ruled him incompetent to stand trial. He was remanded to a hospital for several months, then sent back to jail, where he regressed again, then sent back to the hospital for several more months, stabilized once again, then sent back to jail, where in preparation for his trial, he was returned to the hospital to be evaluated for mental illness. Doctors diagnosed borderline-personality disorder; his mother says — which enabled him to plead “not responsible by reason of insanity.”

James says that he understood the plea he took. In the abstract sense, he did. But the specifics of it were as mysterious to him and his family as they are to most people. Before he was arrested, James and his mother were set to move to Georgia, where they had relatives, and where Ann had friends and a job lined up. After his plea deal, Ann says, she “put everything
on hold,” for what she thought would be a few years.

Instead, James, now in his 40s, has been in the hospital for almost two decades. This isn't because he was sentenced to 20 years, or to 25. He was not sentenced at all; he is technically, legally, not responsible. The court believes beyond a reasonable doubt that he committed the act he was accused of, a prerequisite for the state to accept an insanity plea. The plea does not, however, prescribe or limit the duration of his stay. The laws that govern the practice of committing people who are acquitted because of mental illness dictate that they be hospitalized until they’re deemed safe to release to the public, no matter how long that takes.

James’s insanity acquittal placed him in an obscure, multibillion-dollar segment of domestic detention. According to a 2017 study conducted by the National Association of State Mental Health Program Directors, more than 10,000 mentally ill Americans who haven’t been convicted of a crime — people who have been found not guilty by reason of insanity or who have been arrested but found incompetent to stand trial — are involuntarily confined to psychiatric hospitals. Even a contributor to the study concedes that no one knows the exact number. While seemingly every conceivable data point in America's prison system is meticulously compiled, not much is known about the confinement of “forensic” patients, people committed to psychiatric hospitals by the criminal-justice system. No federal agency is charged with monitoring them. No national registry or organization tracks how long they have been incarcerated or why.

In 1992, the Supreme Court ruled, in Foucha v. Louisiana, that a forensic patient must be both mentally ill and dangerous in order to be hospitalized against his will. But in practice, “states have ignored Foucha to a pretty substantial degree,” says W. Lawrence Fitch, a consultant to the National Association of State Mental Health Program Directors and former director of forensic services for Maryland’s Mental Hygiene Administration. “People are kept not because their dangerousness is because of mental illness. People stay in too long, and for the wrong reasons.”

Michael Bien, a lawyer who helped bring a successful lawsuit against the California prison system on behalf of prisoners with psychiatric illnesses, concurs. “Under constitutional law, they’re supposed to be incarcerated only if they’re getting treatment, and only if the treatment is likely to restore sanity,” he says. “You can’t just punish someone for having mental illness. But that’s happening.”

In the visiting room in New York that Sunday, as the hours went by, families came and went. Ann settled in. On James’s birthday, she brings a party: relatives, presents, a cake. And almost every week, on every visiting day, she and James try to make a life here together at the hospital — because it now seems possible that he could die there.

The insanity defense has been part of the American judicial system from its founding, carried over from our English forebears. British law has long reflected the moral sense that society has a duty not to punish people who can't comprehend or control their crimes. But the insanity defense has always sat uneasily with the public, which tends to regard it as a means to escape justice. In the United States, such sentiments reached fever pitch in 1981, when a 25-year-old named John Hinckley Jr., hoping to win Jodie Foster's heart, tried to assassinate President Reagan, wounding the president and three others, including James Brady, the White House press secretary, who was left permanently disabled. Hinckley was found not guilty by reason of insanity (N.G.R.I., as it is frequently abbreviated) and sent to St. Elizabeths Hospital in Washington. The country was outraged. Dan Quayle, then a senator from Indiana, called the verdict “decadent” and said the insanity defense “pampered criminals.” His Senate colleague Strom Thurmond equated it to a free ride.

In fact, despite its reputation as a “get out of jail free” card, the insanity defense has never been an easy way out — or easy to get. After a defendant is charged, the defendant, her lawyer or a judge can request evaluation by a psychiatrist. A defendant may be found incompetent to stand trial and committed for rehabilitation if she isn't stable enough or intellectually capable of participating in the proceedings. If she is rehabilitated, she may be tried; if she cannot be, she may languish in a psychiatric hospital for years or decades. But mental illness is not exculpatory in itself: A defendant may be found mentally ill and still competent enough to stand trial. At that point, the district attorney may offer an insanity plea — some 90 percent of N.G.R.I. verdicts are plea deals. If the district attorney doesn’t offer a plea, or the defendant doesn’t take it, the case goes to trial. The defendant may still choose insanity as a defense, but then her case will be decided by a jury.
If N.G.R.I. was always difficult to get, it became even harder after Hinckley. With the Insanity Defense Reform Act of 1984, Congress restricted the judicial definition of “insanity” to only the most severe cases. Some states — Idaho, Utah, Kansas and Montana — have eliminated the defense altogether. In trials in which it is attempted, doctors may disagree, and jurors are often influenced by emotional considerations. Today, only an estimated one-in-120th of 1 percent of contested felony cases end in a successful N.G.R.I. defense — that is, the prosecutor disputes the insanity defense, the case goes to trial and the jury finds the defendant not guilty by reason of insanity. In addition, the legal standards for “insanity” vary among states; some define it as a defendant’s inability to know the crime was wrong or the inability to act in accordance with the law, but most define it, post-Hinckley, as only the first of these. At the trial of James Holmes, who killed 12 people and injured 70 in a movie theater in Aurora, Colo., one psychiatrist testified that he was mentally ill but that he knew right from wrong and should be considered “sane.” Another testified that he was mentally ill and incapable of reason (and, by extension, guilt). All four who examined him agreed that he had some form of schizophrenia. Jurors rejected his insanity plea.

And when an N.G.R.I. defense does succeed, it tends to resemble a conviction more than an acquittal. N.G.R.I. patients can wind up with longer, not shorter, periods of incarceration, as they are pulled into a mental-health system that can be harder to leave than prison. In 1983, the Supreme Court ruled, in Jones v. the United States, that it wasn’t a violation of due process to commit N.G.R.I. defendants automatically and indefinitely, for the safety of the public. (Michael Jones, who was a paranoid schizophrenic, had been hospitalized since 1975, after pleading N.G.R.I. to petty larceny for trying to steal a jacket.) In almost all states, N.G.R.I. means automatic commitment to a psychiatric facility. In most states, like New York, there is no limit to the duration of that commitment. In the states that do have limits, like California, the limits are based on the maximum prison sentence for the offense, a model that belies the idea of hospitalization as treatment rather than punishment. As Suzanna Gee, an attorney with Disability Rights California (a protection and advocacy agency with counterparts in every state), points out, the law allows two-year extensions as patients approach a “top date,” the limit set on their confinement. And so, she says, “it can be extended in perpetuity.”

James’s mother, Ann, now knows the predicament of forensic confinement well. At some point during James’s stay at the state hospital, she became an advocate for mentally ill offenders. “It’s like a roach motel,” she says. “At least in prison, inmates know they’re leaving. Once you check into the hospital, it’s hard to check out.”

Though forensic detentions get little attention, they can range from ethically questionable to flagrantly unconstitutional and illegal. In 1983, a national study found that N.G.R.I. patients often lost their freedom for twice as long as those actually convicted of the same offense. A study of N.G.R.I. patients in seven states between 1976 and 1985 found that in four of those states, they were confined for less time than people who were found guilty, and that in three, they were confined for longer. Scant research, conducted decades ago, seems to constitute the most recent survey of the fate of the country’s forensic commitments.

“There’s not been a lot done,” Fitch says. The federal government doesn’t collect data on forensic patients’ lengths of stay, crimes or treatment. In some cases, neither do the state or local departments in charge of their custody. In 2015, I began collecting, via request or the Freedom of Information Act, all individual length-of-stay data by legal status that existed in each state and Washington. Colorado, Wyoming, Arkansas, Missouri, California, Maine, New Hampshire, Kentucky, Wisconsin, Delaware, New Jersey, Ohio and South Carolina said they simply didn’t have that information. Alabama may or may not: In response to repeated queries, it “decided not to release forensic data,” and hospital reports are excluded from its public-records law.

Many of the above states have reported legal status and average lengths of stay. In 2014, Fitch, on behalf of the National Association of State Mental Health Program Directors, estimated, based on states’ self-reported average lengths of stay, that the national average for all N.G.R.I.s was around five to seven years. He says he finds that “horrendous,” given that civil commitments with the same diagnoses as forensic commitments can get out in under 30 days. There is no accepted body of research to suggest that lengthy institutionalization leads to better treatment outcomes. On the contrary, says Marthagem Whitlock, an assistant commissioner in Tennessee’s Department of Mental Health and Substance Abuse Services, “The deeper penetration into the system usually means more complications for the individual.” There are, as Fitch acknowledges, “people who don’t respond to treatment or who refuse treatment.” But, he argues, “It should almost never be necessary to hospitalize people that long.”
According to the state records collected for this article, in 2015, Florida had 24 N.G.R.I. patients who had been hospitalized for longer than 15 years. Texas had 27. Connecticut had 40, and Georgia had 43. New York and Washington had around 60 apiece. That’s six of the 28 states from which such data can be extrapolated, along with the District of Columbia. In those states — which exclude thousands of N.G.R.I. patients — a significant portion of N.G.R.I. patients had been hospitalized more than two years. Nearly 1,000 had been hospitalized for five to 15 years. More than 400 had been in for longer than 15. Of these, more than 100 had been in longer than 25 years and at least 60 for more than 30. And those numbers don’t present the whole picture, either: Many factors, like hospital transfers or conversion to civil commitment, can start the clock over or obscure patients’ histories. In many cases, Gee says, when patients reach out to Disability Rights California to advocate on their behalf, “if they’d not pled N.G.R.I. and just gone to prison, they might have gotten out earlier.”

Which is not to say there aren’t protocols for release. Most states do have a formal review process to judge whether N.G.R.I.s no longer fit commitment criteria: They are no longer mentally ill or are no longer dangerous as a result of their mental illness. Some states review cases on a schedule — every year, say, or in the case of New Hampshire, every five years. In others, patients (or their lawyers) have to request the review. Doctors can recommend patients for discharge at any time. Patients’ lawyers can also file writs of habeas corpus or petitions for restoration of sanity to have their cases heard in court.

At the psychiatric facility where James is a patient, as at every New York state hospital, cases are reviewed every two years or so, in a joint process by the hospital and the Office of Mental Health (O.M.H.) in Albany. In 2002, when the hospital and O.M.H. review declared James unfit for release, James requested that the court appoint him an independent evaluator and grant him a hearing.
That doctor found that he wasn’t dangerous and was ready to be transferred. The judge agreed and ordered it.

But James didn’t leave.

“Even the mechanisms for getting out,” says Pat McConahay, communications director for Disability Rights California, “are not really mechanisms for getting out.”

**James’s almost-transfer** 15 years ago fell under the jurisdiction of Guy Arcidiacono, now 61, the district attorney in charge of the Suffolk County Forensic Psychiatric Litigation Unit, who has handled 130 N.G.R.I. cases over 25 years. After the judge approved James for transfer, Arcidiacono and the Suffolk County district attorney’s office, joined by the New York State attorney general’s office, which represents the hospital, appealed to have the transfer order overturned. Under another judge, it was.

James’s police files are terrible to read. There was never a trial, but the allegations are disturbing. They include a statement by the woman whom the police responded to near his house saying that James sexually assaulted her, beat her unconscious, then threw her down the basement stairs. She told the police that when she came to, naked, she realized she was locked in. This, you might presume, was the basis for the rape and kidnapping charges that James said put him in the state hospital.

“Well,” Arcidiacono clarified when I contacted him, “there were two cases, actually.”

Two months earlier, James had been arrested based on another woman’s statement, taken at the emergency room, that she was pinned by her throat and raped in an empty field. (In his statement, James said she had agreed to have sex with him in exchange for crack, and that he didn’t actually intend to make good on his promise.) Charges were filed, and James was released to his mother’s custody — Arcidiacono says there’s no record of why, but it could have been because James hadn’t been indicted yet. When James pleaded N.G.R.I. to the subsequent attack, the charges from the first incident were lumped together with the new ones: in total, second-degree kidnapping, second-degree assault, second-degree aggravated sexual abuse, first-degree sexual abuse, first-degree rape and third-degree robbery.
“You can see in his case,” Arcidiacono said, “that they were serious charges.”

Like most district attorneys, Arcidiacono has substantial discretion when an N.G.R.I. patient comes up for review. Any time a hospital wants to release or transfer an N.G.R.I. patient, his office can demand a hearing. In contesting transfer or release, Arcidiacono can compel the patient to be examined by a doctor he selects. Even if that doctor agrees that the patient is ready to leave, the district attorney can still contest the release. Arcidiacono has done this and won. If a patient does win release or transfer (in New York, a forensic patient is almost always transferred to a civil, less secure facility for another unspecified amount of time before release), the district attorney can appeal, as in James’s case. When you’re dealing not with facts but with opinions, Arcidiacono told me, “reasonable people can differ.”

He went on to explain: “There are two considerations here. What is good for the defendant, and also, the safety of the public. And that’s the difficult part of these cases, balancing those two interests.”

All this adds up to a difficult path to freedom for some N.G.R.I.s. In most states, as in New York, the courts have final review over forensic releases and transfers, and judges have the prerogative to side with the prosecution regardless of what doctors advise. Cas Shearin, director of investigations and monitoring at Disability Rights North Carolina, recalls a 1988 case in which, during an alcohol-related psychotic break, a man shot four strangers he thought were demons. “Year after year after year, his treating doctors went to the judge and said, ‘He’s ready to be released.’” The hospital where he was committed gave him increasing leave privileges, including reporting to a full-time job and visiting a girlfriend with whom he had children. After 21 years of incarceration and seven psychologists and psychiatrists testifying that he was no longer mentally ill and posed no threat to the public, he was released — though the judge still ordered that he submit to random drug tests for a year.

Politics, says Joel Dvoskin, a former New York State Office of Mental Health forensic director, can determine if “you’re going to stay locked up for a really long time, regardless of whether it’s safe to let you go.” Elected judges, fearing bad publicity, may be loath to release an offender into the community. As Ira Burnim, legal director of the Bazelon Center for Mental Health Law, a national advocacy organization based in Washington, explains the situation: “You have a mechanism to confine, for the protection of the public, these individuals when they’re mentally ill and dangerous, and the further you stray from that, the less it’s legally justified.”

John Hinckley Jr. became a famous example. Last September, Hinckley was released from St. Elizabeths Hospital in Washington, 35 years after being found not guilty. It had been two decades since his doctors declared his mental illnesses in full remission, which should have provided the basis for his release. “That anyone can justify keeping him in the hospital” for so long, Fitch says, “is just nuts.”

The question, according to Dvoskin, “becomes one of risk tolerance. America has become — to an extreme level that’s almost impossible to exaggerate — a risk-intolerant society.” Fears of people with mental illness persist, even though, according to the best estimates, only 4 percent of violent acts in the United States are uniquely attributable to serious mental illness. One study has found that those with mental illness are actually less likely to be seriously violent than the general population. (In addition, some N.G.R.I.s have been acquitted of nonviolent crimes, like public-order offenses, traffic offenses and prostitution.) Even if a mentally ill person has committed a crime, says Chris Slobogin, director of the criminal-justice program at Vanderbilt University Law School, “it doesn’t mean they’re going to do it again,” especially because their encounter with the forensic psychiatric system means they’ve received treatment. “This is a group of people that are incredibly stigmatized and misunderstood in terms of how dangerous they are.”

Recidivism for N.G.R.I.s is relatively low. Whereas, nationally, recidivism for released prisoners is above 60 percent, “people who are found N.G.R.I. tend to go back out into the community, and they tend to do really, really well,” Fitch says. The arrest rate for people in Maryland on conditional release, a kind of mental-health parole from the hospital, is less than half the arrest rate of the general population in the state. “If you provide treatment of illness and provide the supports they need, then they don’t reoffend,” Fitch says. As a 2016 study of N.G.R.I. recidivism in Connecticut — which has a post-release supervision program, too — also concluded: “The vast majority of individuals are not rearrested.”

It is not sober data analysis, however, that sticks in the public’s mind — or influences judges’ rulings. Hearing that a man in Nebraska whose most recent diagnosis was “cannabis abuse, unspecified” had been in the hospital for 37 years may evoke less sympathy or outrage when you learn that he killed six people, three of them children. Two of his victims he
raped. One of them was dead when he did it. The other one, who was alive for the assault, was 10.

“It’s not an easy population to represent,” Bien says. “No one likes these people.”

**On Nov. 21, 2011,** after months of having delusions about aliens, conspiracies and poison, Houston Herczog, then 21, partly decapitated his father, Mark. Six days earlier, Mark Herczog had written a letter to God (“God — Help!”) asking him to save his newly unrecognizable son. After Houston was arrested in the bloodied family kitchen, he told the police: “The look in his eyes! I had to!”

I heard about the murder from my mother. Houston is my distant cousin, though I had never met him or his immediate family. During his trial, as psychiatrists testified about a psychotic break related to an onset of schizophrenia, his family — my family — prayed that he would be found not guilty by reason of insanity and sent somewhere for treatment. Charged with first-degree murder, Houston was facing 25 years to life. When he was found N.G.R.I. and sent to nearby Napa State Hospital, it was a relief.

It wasn't until he was inside that any of us realized, from the mounting anxiety in his phone calls, the rules and restrictions that governed the possibility of his getting out.

Houston has now been in the hospital for four years. In 2015, I visited him there for the first time. After passing through a prison fence and four locked doors, I sat with him in an all-beige room. Schizoaffective disorder is the current diagnosis, and he is stable on medication, though he has periods of deep hopelessness. He struggles with what he has done; at the beginning of his incarceration, when, pharmacologically stabilized for the first time, he was suddenly lucid, he couldn’t do anything but lie in bed and cry. But he also struggles with the uncertainty of how long his confinement will last. Had he been convicted and received the minimum sentence, he would be out before his 50th birthday. His “top date,” according to his hospital paperwork, is Dec. 31, 2600 — 587 years after he was admitted.

Houston doesn't dispute that he did what he did, but he does dispute the basis for his continued detention. “What are they rehabilitating?” he asked me that day, shaking his legs up and down when the caffeine from a Mountain Dew Code Red kicked in, his blue eyes wide behind wire glasses. He held his hand up, ticking the points off on his fingers. “Not a pattern of violent behavior, since I have no record of violent behavior before my crime. Is it my insanity? Because the treatment for my disease is medication, and I’m medicated and stable now.” And he is — high-functioning as you please. Before we began talking about his incarceration, he kept trying to engage me in a debate about feminist theory.

When he calls, Houston sometimes apologizes for not having much to say about his life — what would he have to say? — in limbo as it is. He would love to have a girlfriend, his first, but it seems unlikely to happen at the hospital. (“You know, I came here for the women,” he joked once.) He spends a portion of his unnumbered, many-numbered days arguing with staff about how many packets of sweetener he’s allowed to use at a time. (Patients are restricted to two at lunch; he likes his tea quite sweet.) His schedule consists of shuffling from group activity to group activity in a beige uniform, between feedings of institutional food three times a day, mind-numbing TV in the background, no internet or cellphones.

Houston's plan is to wait until he has been hospitalized for at least five years before he bothers to file any writs or petitions for release. That number has nothing to do with what he thinks of his mental state but with comments his first social worker at Napa made: that because of what he did, he can't possibly be let go for a long time. (When reached for comment about whether this was a plausible conversation, a spokesman for the hospital said, "A patient with a determinate sentence length of life for a high-profile crime might end up staying in the hospital for many years. It is reasonable and therapeutic for a treatment team to discuss these realities with patients.")

Houston's sister Savannah says that she gets it — the urge to confine forever someone who did something horrific. Savannah was home the night her brother killed their father. Only 17 at the time, she “had to walk past them to get the phone” to call 911. When she ran to her room to dial, Houston followed her, still holding a knife, but stopped when she shut the door on him. “Part of me thinks he should still have to pay in some way, whether he was in his right mind or not,” she says. “It’s hard though, too, because it is ‘not guilty.’ I have to remind myself of that a lot. I think that’s because I was there. I saw it happen.” But, she went on, “it’s my brother, and obviously I don't want him to spend his whole life there, because even seeing what he has to eat makes me want to cry. Being there just deteriorates him more and breaks his spirit. He realizes what he did and where he is, and he's depressed.”
Not everyone in the family is so sympathetic, says Houston's half sister, Cameron McDowell, 43. “We have some family members who just hate him and will never forgive him. It was just such an awful thing. And I wish Dad were here every day. I can’t even imagine what he went through that night — oh, God, it was so awful.” But, she says, “he’s gone. And we have Houston now. We have to support him. This is going to sound strange, but I’ve not once been mad at him. I really, truly, passionately believe that it’s not the person that commits the crime. It’s the illness.”

At the same time, she understands why people are afraid. Cameron's own husband isn't yet comfortable with the idea of Houston's hanging around their two young kids; though he loves Houston, he's “a little bit freaked.” “I hope my husband will change his mind when Houston gets out,” she says. She, too, worries about what will happen after his release, though for entirely different reasons. “Is he going to be so institutionalized that he won't know how to live? That's what breaks my heart for him.”

Like Houston's sisters, the judicial and medical systems struggle to find a balance between the blamelessness of N.G.R.I. patients and the gravity of many of their crimes. The rights of the patient are always weighed against the public good, a standard that may include a more or less explicit desire for retribution. Those who provide treatment for forensic patients, says Michael Norko, professor of psychiatry at Yale and director of forensic services for the Connecticut Department of Mental Health and Addiction Services, “still have to answer to a court, or to the board, or to the court of public opinion. Every facility has people in it who have so violated a community, a community that is so angry, so hurt, that they're basically pariahs.” He recalls one patient who shot a police officer; at hearings for his release, a crowd of uniformed cops repeatedly showed up and stood silently, facing the review panel. The question of a patient's
hospitalization can be “reduced to people’s grief, people’s anger, people’s fear — and the complexity of the patient’s rights and their recovery, all of those complexities get overshadowed very quickly.” When I asked Norko what happened to the patient who shot the officer, he said, “Well — well, eventually, he died.”

Because diagnoses and treatment assessments cannot predict future behavior, the standards for involuntary confinement — degree of mental illness and dangerousness — are necessarily subjective. Emotions and prejudice easily come into play, even from experts. A 2003 study in The American Journal of Forensic Psychology, for example, showed that doctors are more likely to find minorities incompetent to stand trial and more likely to diagnose psychotic disorders in African-Americans. At Napa, I spoke with a patient, a friend of Houston’s, who pleaded N.G.R.I. to a murder charge and had been hospitalized for nearly 20 years. When he was granted a hearing in which, according to court transcripts, multiple clinicians recommended his release, one doctor dissented — a doctor with whom he had had an ugly dispute and who, another doctor testified, wasn't objective. The patient's release was denied.

Stephen Seager, a 67-year-old psychiatrist who was at Napa for five years, writes openly about his own reactions to his patients in his 2014 memoir, “Behind the Gates of Gomorrah: A Year With the Criminally Insane.” He describes being in the hallway with a group of them heading to lunch as being “engulfed in a wave of hungry psychopaths.” When one of his patients tells him a story about his childhood, he writes, “I didn't like thinking that some of the men even had childhoods.” Asked in court about a patient’s diagnosis, he gave the admitting diagnosis — bipolar disorder, manic with psychotic features — though he writes that he knew he wasn't currently mentally ill. But he did think he was dangerous. When I asked him about this, he said: “The point is they’re supposed to be dangerous because they're mentally ill, but if they get better and they’re still dangerous, what do you do?” He is well aware of the import of expert testimony in retention decisions. “Most of the time,” he said, “judges take our opinion on it.

“I look for the safety of the community,” he went on. “I live here. Sometimes you just have to say something for everybody's best interest, regardless of whether they’re mentally ill or not.”

Of patients who “just never quite get better,” in doctors’ estimations, Seager said: “Oh, they'll be here till they die.”

Napa State Hospital’s vast, drought-dry campus is roamed by a pack of screeching peacocks. At 1,255 beds, it is one of the largest state psychiatric hospitals in the country. For most of his time there, Houston has been on what’s called a discharge unit, with one to three roommates, where it’s possible to get privileges like walking to the visitors’ center alone. After a bout of suicidal thoughts, he was moved, indefinitely, to a locked unit where all activities and access to the courtyard are supervised.

Houston's treatment consists of up to 20 hours of group classes a week. His schedule at one point included Emotional Management, Substance Recovery, Current Issues in Mental Health, Self-Esteem, Fitness/Easy Exercise, Leisure Skills/Computer, Fitness/Weight Lifting, Discharge Planning, Wellness Recovery Action Plan, Coping Skills/Fitness, Leisure Skills/Journal and Conditional Release Prep. He says they watch a lot of videos. I once talked to a fellow patient of Houston's on the phone who said he was heading to a class where the day's lesson was learning to make cheesecake.

“Cheesecake!” he said. “Imagine that.”

State forensic hospitals vary widely in size — anywhere from just one ward to 1,500 beds — and they also vary in the activities and treatments they offer. Public psychiatric hospitals across the country may be accredited by an independent nonprofit called the Joint Commission. But it doesn't require, for a start, the use of evidence-based therapies. One-on-one psychotherapy can be hard to get. (Houston began receiving such therapy only after his mother spent two years asking for it, his family says. Napa declined to comment, citing privacy laws.) State mental-health agencies may not be required to report what kind of care hospitals are giving, unless something goes so wrong that it attracts the attention of federal authorities. (Many do, however, voluntarily participate in national data-collection systems.)

The American archetype of bad mental-health practices is the movie “One Flew Over the Cuckoo's Nest”: doped-up patients locked away from society to suffer and, ultimately, to perish. Some advocates argue that the conditions at psychiatric institutions aren't always much better. Until recently, Oregon State Hospital, where “Cuckoo's Nest” was filmed, may in ways have been worse.
In 2006, The Oregonian won a Pulitzer Prize for its exposé of the institution. It reported that there was a male staff member who worked on one ward for only a year in the late '80s but still managed to sexually abuse six female patients; there was a wrongful-death suit in 2003; a rape lawsuit in 1995 that accused the hospital of what The Oregonian described as a “longstanding pattern of sex abuse,” some of it by a staff member who, the paper reported, had nearly been fired the year before, “after he and several other staff asphyxiated a patient while restraining him for refusing to take off his shoe.”

The problems weren't unique to Oregon: Nebraska state psychiatric hospitals settled two major lawsuits, one in 1996 and another in 2006, which claimed that staff members and patients raped and sexually assaulted female patients; two lawsuits have been brought against Massachusetts in the last 10 years by families of forensic patients who were subjected to illegal restraining methods, one whose condition declined and another who died. Napa had more than 4,000 reported patient-on-patient or patient-on-staff assaults in 2014; in 2010, a staff member was killed.

Today Oregon State Hospital still has the towering 1883 brick face of the “Cuckoo” era, but inside, it's all sparkling new facilities, yoga props and a physical-therapy pool — thanks, in part, to a state senator, Peter Courtney. On a 2004 tour of the hospital, Courtney was astonished to learn of 3,600 badly corroded cans of cremains in an outbuilding, still unclaimed. Around the same time, after the death of yet another patient, the Justice Department became involved. Oregon State is now the first state psychiatric hospital in the nation to use “collaborative problem solving,” instead of, say, automatic “seclusion and restraint” of patients who start to become difficult. Courtney pushed funding for the reforms through Oregon's State Legislature and brought in a new superintendent, Greg Roberts.

“Very often when you find serious problems, the problem is one of three things: leadership, leadership or leadership,” Roberts says. (A notable problem of leadership was found at Napa: The man who was its executive director between 2007 and 2010, Claude Edward Foulk, is now serving 248 years in prison for sexually molesting children.) Before Roberts came to Oregon, he was the person New Jersey sent to take over “problematic” hospitals that had “a serious negative incident or series of negative incidents.” He revamped three there, one of them twice.

More than 10 years into its transformation, Oregon State has come a long way. But, Roberts acknowledges, it still has a long way to go. Among the hospital's 937 forensic patients, there were 1,908 incidents of seclusion and restraint in 2014. And while Roberts' reforms included securing timely releases for patients — between 2012 and 2015, the hospital discharged 90 percent of its “guilty except insanity” (Oregon's N.G.R.I.) patients with “top dates” early — it still has several patients who've been in for more than 15 years, who it acknowledges long ago ceased to be dangerous. Staff recently discharged one patient who had been in for more than 30.

Unfortunately, there aren't a lot of other places for forensic patients to go. When the push to deinstitutionalize psychiatric patients began in the 1970s, many inpatient facilities were shut down or downsized in favor of community integration and outpatient services, which never adequately materialized because of a lack of funding. But institutions have remained the preferred repository for forensic patients, who fill an increasing share of the remaining 42,000 state psychiatric hospital beds. In Pennsylvania, the proportion of forensic patients increased by 379 percent between 1988 and 2008. In California, some 90 percent of approximately 7,000 state-hospital patients are now forensic. Nationwide, nearly one-third of “consumers” in state hospitals in 2007 were forensic, and that number is “rapidly expanding,” according to the federal Substance Abuse and Mental Health Services Administration (Samhsa). In the last 10 years, forensic patients’ costs jumped to $4.25 billion from $2.5 billion; forensic patients now account for 43.9 percent of total state psychiatric hospital expenditures. This means less room for others who might be seeking psychiatric care, while at the same time, states have cut billions from mental health, leaving even scantier outpatient systems. In Hawaii, as a 2015 Samhsa report notes, “There is no voluntary admission to the [state psychiatric] facility because of the volume of admissions from the court system.” The same lack of services that contributes to people's reaching a mental-health crisis that ends in arrest also keeps people institutionalized longer afterward.

Whitlock, of Tennessee's mental-health department, says that there are N.G.R.I patients whom her state's hospitals are trying to discharge but for whom they “just can't find a provider.” Under her lead, Tennessee, more than any other state, has been trying not to commit forensic patients to begin with. Since 1974, it has done its pretrial competency evaluations on an outpatient basis, no insignificant matter given that elsewhere these can take six months or longer. In 2009, the state also started doing post-N.G.R.I. evaluations to see if N.G.R.I.s even needed hospitalization, also on an outpatient basis. “We did not think there was a need to spend 60 or 90 days in the hospital to determine if N.G.R.I.s fit the involuntary-
commitment standard,” Whitlock says. “Once you get someone into the hospital, it’s hard to get the court to take them back out. We could probably determine it in a day.” Now only 55 percent of Tennessee’s N.G.R.I.s are committed. Their typical length of stay ranges between seven months and 4.5 years, and they get out, on average, in about two. The state’s new initiative adds to the body of evidence that less hospitalization doesn’t lead to higher crime rates. Since Tennessee stopped automatically committing N.G.R.I.s, says Jeff Feix, the state’s director of forensic services, “the recidivism rate we have is no different than it was before.”

Despite the clinical benefits and cost savings — in 2015, according to a Samhsa report, the average annual cost of one forensic patient, nationwide, was $341,614 — Tennessee’s model is still unusual. There is no outcry, from the public or politicians, for alternatives to indefinitely institutionalizing N.G.R.I.s. After 45 years of studying the issue and filing lawsuits on behalf of patients, Michael Perlin, an emeritus professor at New York Law School and an expert on mental-disability law, thinks he knows why: “Everybody except for people who take the Constitution seriously and people who are in the hospital are happy the patients are there. Prosecutors, police, they’re glad they’re not going anywhere. I believe that the disability rights community has never gotten substantially involved in the issue because some of the people have been charged with very horrific crimes.”

As he put it: “This is an area that everybody kind of wishes would go away.”

Nearly two decades into James’s confinement, it remains unclear if he will ever be considered fit for release. He says that currently his entire medication regimen consists of “fish oil twice a day, calcium, vitamin D and two Kool-Aids and prune juice and Metamucil.” In the 2004 appellate court overturning of his transfer, the hospital doctor testifying in favor of his continued retention pointed out that there was no medication for his diagnosis of antisocial personality disorder — just therapy, to which he was resistant. The hospital forensic committee said that they believed James was insufficiently willing to take responsibility for his actions. One of his doctors called him “sexually preoccupied”; the appellate court concluded that “the disorder will continue to cause him to be dangerous at least until such time as he decides he wants to change and begins working seriously with his treatment providers.”

The court-appointed psychiatrist at the hearing two years earlier, when James was ordered for transfer, said quite the opposite. In his opinion, James “acknowledged the wrongfulness of his actions, and although he does not show much remorse or regret for his actions as a result of limited insight, he certainly realizes that what he did was wrong and against the law.” He said that James “has benefited from [the state psychiatric facility] as much as he will benefit, and at this point he could be transferred to a civil hospital, where he will continue to benefit from the structured environment and continue to receive individual treatment, hoping that he will eventually gain further insight.” But in its appeal at that time, as in every review since, the hospital successfully petitioned to retain him.

How much James’s perceived dangerousness is due to his illness and how much to his extended hospitalization can be difficult to untangle. During a phone call last year, he confessed that lately he’d been “going through a lot of crap.” He was referring to recent fights on the ward. The 2004 appeal notes that he was assaulted twice in 2002 and “got into an altercation with another patient” that year; all of the incidents read as demerits against him. Such disputes are not uncommon for patients with personality disorders, says Norko, the Yale professor and clinician. A hospital is generally “not a good place for them,” he says. “Clinically you try very hard not to hospitalize people who have personality disorders. They can't quite seem to ever get it right. To them it looks like: ‘The staff want me to do this, they want me to do that, they keep changing the rules,’ and they don’t understand the rules, and they get into arguments, they get into fights. It’s all part of their personality disorder, which in itself isn't necessarily all that dangerous, but it’s kind of hard to move somebody along when their record is dotted with all of these altercations.”

Perhaps the most cleareyed view of the compromises inherent in N.G.R.I. commitments comes from Paul Appelbaum, professor and director of the division of law, ethics and psychiatry at Columbia University. Appelbaum acknowledges that some N.G.R.I.s are “unnecessarily detained for a longer period than what seems to be warranted by their mental disorder and its impact on their likelihood of being violent in the future.” But, he says, such exaggerated concerns about public safety may be necessary to the survival of the insanity defense. “There are injustices that are imposed on individuals,” Appelbaum says. “But I also see at a 30,000-foot level why the system works that way, and recognize perhaps the paradox that if it didn't work that way, we might lose the insanity defense altogether, or at the very least have an even more restrictive system that we have to deal with.”
For many, Appelbaum says, an N.G.R.I. verdict is still superior to a conviction. “It exempts them from a formal finding of guilt, which can be important later in their lives. It enables them to serve their time of confinement in what is generally a much better and safer environment than an overcrowded state prison.” While one way to look at indefinite confinement is as an unbearable uncertainty, another is that it offers hope: “Compared to a life without the possibility of parole, you know, maybe that’s better.”

Yet for the insanity defense to live up to the moral imperative it was designed to embody — exculpating those with diminished responsibility for their acts — better mechanisms for evaluating release will need to be adopted, Slobogin says. In an attempt, in part, to protect N.G.R.I.s’ constitutional rights to be released when they don’t fit commitment criteria, the American Bar Association recently revised its criminal-justice mental-health standards, which were adopted in 1986. The association recommended that forensic patients be detained only if there is clear and convincing evidence — a standard that, if it had to be quantified, means about 75 percent certainty — that they’re mentally ill and dangerous; the current legal burden of proof in most jurisdictions is a “preponderance of the evidence,” or 51 percent certainty.

“It’s immoral to deprive someone of liberty because you're mad at them for being found N.G.R.I.,” says Slobogin, who was on the task force. “Under our new standards, after a year you have to have very strong proof of dangerousness, or you can't detain them.” But the standards are just recommendations, and some states didn’t even follow the ones from the ’80s. Slobogin concedes that in many jurisdictions, they may have no impact at all.
ARRAIGNMENT NOTES

- **PURPOSE:** (1) formal reading of charges, (2) accusatory instrument provided to deft., (3) deft. either given bail, R.O.R. of remanded, (4) prosecutor and defense counsel give “notices”, (5) there may be plea bargaining
- **Deft.** should waive a formal reading of rights and charges
- Defense Counsel should listen to everything the ADA says at arraignment and take notes
- Defense counsel should not attribute any facts directly to the deft. at arraignment, prosecutor may use them against him later if you do so
- Defense counsel should ask the court to have the ADA provide clarifying facts, i.e., why did the police stop the deft., or which co-deft. actually had the gun - don’t ever ask a question that you don’t know the answer to because facts could also hurt the deft.

PRELIMINARY STEPS

- "CJA Report" - Review the report. if the deft. has not been interviewed by CJA, ask them to conduct the interview.
- “Court papers” - (1) compare the accusatory instrument charge with the penal law section
- “NYSID sheet” use computer in the arraignment clerk’s office to verify clients criminal history and if he has made all court appearances in NYC

INTERVIEW OF DEFT.

- Introduce yourself and make sure that he knows that you are his attorney.
- Read him the accusatory instrument and explain the charges
- Obtain from the Deft.: (1) facts of the case, (2) client’s version of events, (3) names and addresses of witnesses, (4) exact location of events, (5) get deft.’s physical description in case I.D. is at issue, (5) when and where was the arrest made, (6) did he make any statements or sign anything, (7) was there a showup or a lineup, (8) did the police take any of his property and was anything vouchedered, (9) is he a U.S. citizen or what is his immigration status, (10) his medical condition and does he have any disabilities, (11) what is his psychological history, (12) does he have financial resources for bail

ACCUSATORY INSTRUMENT

- Must be a “valid” and “sufficient” instrument, *People v. Alejandro*, 70 N.Y.2d 133 (1987) & CPL § 100.05
- A Superior Court information cannot be used to commence a criminal action in a local Criminal Court.
• If the instrument is "defective", move to dismiss under CPL § 170.30 & 210.20, Judge may refuse to grant oral application or reserve the decision for written motion, but it should still help the bail application.
• A prosecutor may move to "amend" under CPL § 170.35(1)(a)
• "Defective" means if it is impossible to draw a legally sufficient instrument, the case must be dismissed under CPL § 140.45
• All accusatory instruments must be legally sufficient, CPL § 100.40
• Do not waive right on misd. Charge to be prosecuted by "information" only, CPL § 100.10(4) & 170.65(3)
• Accusatory part = offense charged, fact part = evidence that satisfies the elements of offense. They must establish "reasonable cause.", must be verified
• Supporting Deposition, CPL § 100.25(2) - a misd. Complaint is converted to a misd. Information with a supporting deposition, CPL § 100.20
• Felony Complaint - CPL § 180.80, either an indictment, convert to an information or have a preliminary hearing within 120 hours from arrest, or if falls on Sat., Sun., or legal holiday, then 144 hours - if not, the defendant must be released
• Misd. Complaint - CPL § 170.70, must be converted to an information within 5 days of the arraignment, excluding Sun., or must release the deft. absent a deft. waiver or "good cause."
• Time for Arraignment - if arrested and not given a D.A.T., deft. must be produced by the police for arraignment without "unnecessary delay", no more than 24 hours unless there is an acceptable explanation, CPL § 120.90(1), 140.20(1), 140.27(2), People ex rel. Maxian v. Brown, 77 N.Y.2d 422 (1991).

NOTICES
• Prosecutor's CPL § 190.50 Notice - grand jury, deft. may serve written notice at arraignment of intent to testify, you should do this if counsel is unsure of whether deft. is or should testify at grand jury, or if counsel is unsure if he will continue to represent the deft., this is not required and may be withdrawn later if served
• Prosecutor’s CPL § 250.20 Notice - demand for deft. to provide alibi information, deft. has (8) days to answer
• Prosecutor’s CPL § 710.30 Notice - notice of intent to offer statement (710.30(1)(a)) made by deft. or testimony of person who previously I.D.'ed the deft. (710.30(1)(b)).
• Prosecutor’s CPL § 450.10 Notice - notice that victim wants his property returned, property could be returned in as little as (48) hours for perishables, etc. or property needed by victim, otherwise, (15) days
• Prosecutor’s CPL § 170.20 has raised a misd. to a felony

BAIL - CPL Art. 500
• No constitutional guarantee to bail, but bail cannot be excessive, U.S. Const. Amend. VIII, NY Const. Art. 1 § 5
• Deft. must make bail application (1) get facts of case first, (2) get deft.'s background info
• Misd. = Judge must set bail or R.O.R.
• Felony = Judge must either, set bail, R.O.R., or remand
The court must receive a report of the defendant’s criminal record, unless the prosecutor consents to bail determination without a review of the criminal record, or there is an emergency, defendant’s counsel is entitled to a copy of the record, **CPL § 530.20 (2)(b)(ii)**.

Bail is only to ensure the defendant’s return to court, it cannot be for preventive detention, i.e. because the defendant is a “danger to the community” *Sardino v. State Comm’n on Judicial Conduct, 58 N.Y.2d 286 (1983)*.

Bail should be no more than necessary to ensure the defendant’s return, *People ex. rel. Lobel v. McDonnell, 296 N.Y. 109 (1947)*.

The criteria for setting bail that must be considered by the Court is: **CPL § 510.30(2)**

1. Character
2. Reputation
3. Habits
4. Mental condition
5. Medical condition
6. *Employment history
7. Financial Resources for bail
8. Educational background
9. Participation in any alcohol or drug programs
10. *Family Ties
11. *Time of residence in community, i.e., roots in the community
12. Criminal Record
13. J.D. Adjudication
14. Y.O. Adjudication
15. *Previous Record of Returning to Court
16. *Weight of Evidence in Pending Action
17. *Any other factor, ex: risk of flight is minimal because possibility of jail is so low that there is no motive to flee.
18. *Speak to the ADA first

Try to have family members, friends, employers or co-workers present at arraignment for bail application, it shows “roots in the community”

Emphasize any mitigating factors, i.e., no weapon used in the crime, etc.

Put your strongest point up front, ex: (1) weak case, but (2) defendant has a bad record, OR, (1) defendant has no previous record, but (2) strong case against the defendant.

Prosecutor’s strongest argument will be that the defendant is likely to flee, or that the defendant has the ability to flee, i.e., money, or perhaps both

“Bail Alternative” - if the defendant does not have the financial resources, offer psychological, alcohol or drug treatment program attendance

Review/Appeal of Bail Determination = if bail set at local criminal court, can have reviewed by a Superior Court Judge one time de novo review that cannot be appealed **CPL § 530.30**, OR, via a writ of habeas corpus, **CPLR § 7002, 7004**, to a specific supreme court part, this can be appealed to the appellate division

Procedure for posting cash bail or bail bond, **CPL § 520.30**

“Cash Bail” - amount set must be paid

“Bail Bond” - assets are deposited with bailbonds man (hardly any left in NY)
“Bond posted with Court” - surety bond = a guarantor, appearance bond = deft. signs a promise to pay if he does not appear, all of these bonds may be unsecured, partially secured or fully secured

“Bail Sufficiency Hearing” - CPL § 520.30

ORDER OF PROTECTION

- Is there a possibility of future contact between the deft. and compl. warranting an order of protection?
- There must be a foundation or supporting evidence for the order
- A violation of the order of protection must be “willful.”
- Def’t’s counsel should seek to limit the order if it is too broad

OTHER ISSUES

- Any mistreatment by the police should be detailed on the record at the arraignment.
- Does the deft. require “protective custody” if incarcerated?
- Request a psychiatric examination if deft. lack the capacity to understand the proceedings or to defend himself CPL § 730.30, CPL § 730.10(1) - defense counsel is entitled to be present at mental competency hearing but cannot play an “active” role
- Consider requesting a “suicide watch” for a severely depressed deft.

DISPOSITION

- Defense counsel should be careful about plea bargaining at arraignment because at this time, he knows a lot less about the case than the prosecution
- Local criminal court cannot accept a guilty plea to a felony charge, no jurisdiction, CPL § 10.20(1)(a)
- Prosecutor may move to reduce all of the charges on a felony complaint to a misd.
- Deft. may not plead guilty to misd. without waiving right to be prosecuted by “an information”, CPL § 170.60, 170.65(3)
- Guilty plea to a charge less than in the accusatory instrument requires D.A. consent, CPL § 220.10(3)(4), 340.20
- “Adjournment Contemplating Dismissal” = is for six months, unless it is a family offense, than it is for one year, CPL § 170.56(2), 530.11(1) - fingerprints and photos are returned and the record of the arrest is sealed, CPL § 160.50, 160.60, 170.55 - prosecutor may request that deft. be served with a T.O.P., or do community service, attend mediation, etc. as part of “ACD”
- Marijuana (misd. possession or sale), must get an ACD for one year, don’t need prosecutor’s consent if: CPL § 170.56 (1) no previous ACD received, (2) no previous convictions
- “Violation Guilty Plea” = not a crime, it’s an “offense”, in most violations the record will be sealed, CPL § 170.56(3), except for CPL § 160.50(1)(d) - record can be viewed if you are applying for a job as a police officer, etc.
- “Disorderly Conduct Plea” - must be first added to the accusatory instrument for deft. to plea guilty.
ARRAIGNMENT SHEET

Defendant’s Name: ________________________________________________________________

DOB: _______________ AGE: _____

Address: _____________________________________________________________
______________________________________________ Tel. No.: ______________

Charges:
Top Count: ____________________________________________________________
_____________________________________ ______________________
_____________________________________________________ _______

T/P/O: _______________________________________________________________
_________________________________________ ______________________
_________________________________________ ______________________

Notices by People:
CPL § 190.50 (G.J.) (Y) ____ (N) ____ PL § 450.10 (Vic. Prop.) (Y) ____ (N) ____
CPL § 710.30 (1B) (Y) ____ (N) ____ Type of Identification: _______________________
CPL § 710.30 (1A) (Y) ____ (N) ____ Substance of Statement: _______________________

Defendant’s Notices:
CPL § 190.50 (G.J.) (Y) ____ (N) ____ CPL § 250.20 (Alibi) (Y) ____ (N) ____
PL § 450.10 (Deft. Prop.) (Y) ____ (N) ____
The Criminal Defense Attorney’s Ethical Obligations in the Representation of Mentally-Ill Client

Frank J. Nebush, Jr., Esq.
Onedia County Public Defender
Criminal Division
An Overview of a Lawyers Ethical Obligations In a Criminal Proceeding When an Attorney Believes the Client May be Mentally-III

**Ethical Concerns:** You have an ethical obligation to zealously represent your client and act in his or her best interest. This can be especially difficult when a client is obviously suffering from a mental illness or is clearly incompetent. The law allows clients to control their own destinies and the attorney has to respect those choices even when the client is not fully capable of making the best decisions.

More than any other type of case, a criminal defense attorney has to make every effort to develop the client’s personal and social history as well as his medical and mental health history to gauge the extent of the mental disability. The pitfalls of representing this type of client is outlined in the attached article by John Fabian. “Practice Points: How to Deal with Difficult Clients from a Mental Health Perspective” where he deals with tensions and conflicts in the attorney-client relationship developing from the client’s mental impairment. An awareness of your ethical obligations is essential to taking actions in the best interests of the client and avoid making decisions for the client that are his right to make.

**Competency v. Affirmative Defenses:** The two are distinguishable and are not to be confused with each other although they are often intertwined. Competency or fitness to proceed under CPL Article 730 does NOT deal with the client’s mental state at the time the crime was committed, it only deals with his **PRESENT** mental capacity and can brought before the court at any time, i.e. arraignment, pretrial, plea or sentencing. (See Matter of Westchester Rockland Newspapers, Inc. v. Leggett. 1979, 48 N.Y.2d 430).

**Affirmative defenses** based on mental disease or defect relate to the client’s mental state at the time the crime was actually committed.

Simply put, competency deals with the mental state of the client at the present time:

i. **Does he understand the proceedings against him?**

ii. **Is he able to assist in his defense?**

This two-pronged test comes from Dusky v. United States, 1960, 80 S.Ct. 788, 362 U.S. 402, 4 L.Ed.2d 824 which clearly set forth the standard from which our Criminal Procedure Law emanated when, in setting forth the definition of an “incapacitated person” it declared that in making such a determination “it is not enough that the defendant is oriented to time and place and has some recollection of events, but that the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – AND whether he has a rational as well as factual understanding of the proceedings against him.” (emphasis added).

**NOTE:** The statute does not say charges it says “proceedings”. Attorneys and judges often state “charges” while the statute contemplates that the defendant understand the legal proceedings against him which encompasses the charges but has a wider meaning, i.e. the judges and prosecutors role, the defense attorney is there to help him, a jury hears the evidence in the case, etc.

**Why is this important?** Usually the client understands the charge, that doesn’t always mean he understands the court proceedings. If a client is found to be an incapacitated person, the mental
institution will work with him or her on definitions of court, judge, prosecutor, and attorney. Upon the return of the client to court after being found competent, you will see in his medical records references to the staff of the institution instructing the client on all of these areas. Often, clients will understand that they are charged with a crime and what the crime is and therefore it seems that the first part of the prong is satisfied. It is necessary for you on your initial interview to determine if in fact the client does understand the charge, but you must go further and discuss with the client, if you can, whether he actually does understand what a court is and what the roles of the judge, jury, prosecutor and defense attorney are. Take notes because the result of this line of questioning can be surprising. On more than one occasion clients will state they were in jail because “they killed” somebody and it is the job of the judge, jury, prosecutor and the defense attorney to send them to prison or he may make other statements to you that indicate his understanding of the proceedings is not rational.

**Is he able to assist in his own defense?**

This is the most often used grounds for asserting incompetency. As defense counsel, you want to BUILD your case and the client’s revelations can do that especially if his version of events is filled with obvious delusions and hallucinations. So how do you determine whether or not your client can assist in his own defense?

Ask the client to tell you what happened and do not engage in direct examination, let him talk Take good notes on the conversation. Especially with paranoid schizophrenics, some of the events they tell you may seem plausible, i.e. family gatherings, arguments or confrontations. They will repeat in great detail the same occurrence to you every time you interview them, but when you interview family members the incidents never happened. When the client recounts obviously bizarre and fanciful events, write it down.

**Ethical Concerns in Dealing With a Client You Believe May Not Be Competent**

If you were representing a client who had been assaulted, the first thing you would do is have a picture taken of the client’s injuries - a picture taken not when you get around to it or two weeks or a month after, but a picture taken as soon as possible. Then you would want him to see a doctor as soon as possible so the injuries are medically documented.

An attorney must treat a mental ill client with the same urgency. **AS SOON AFTER THE COMMISSION OF THE CRIME AS POSSIBLE** the attorney needs to interview the client.

Document the client’s demeanor, manner of speech, ability to communicate and physical appearance. You need to see the client “in the raw.” In essence, you are taking a picture of the client’s mental and physical state. This will not only assist you in making a decision on requesting a CPI. §730 evaluation, but it also assists you in building an affirmative defense of mental disease or defect. The client may be decompensating. Particularly after the crime, especially in homicides or violent crimes, stress and fatigue can cause the mental process of clients suffering from a mental illness to disintegrate. Basically they come apart emotionally and mentally. Their stressQ overcomeQ their ability to cope. The attorney needs to attempt to communicate with the client and record his observations so they can be communicated to the court.

**Look for:**
Blunted affect or flat affect. A severe reduction in emotional expressiveness. There are no signs of joy, pleasure, sadness or emotion of any kind. The client may speak in a droning monotone showing no vocal or facial emotion when describing his actions. The client will not react with you, look at you or address you directly. This is characteristic of clients suffering from schizophrenia and post-traumatic stress syndrome.

Lack of concentration. The client will bounce from subject to subject or not answer your questions, or take a long time answering you.

"Thought Blocking." Regular interruptions in the stream of thought. This is more than simply losing one's place, it is a complete halt to the process of thought. Outward signs are abrupt, repeated interruptions in the flow of conversation or actions.

Staring. The client will look about and stare expressionless. Combat veterans suffering from PTS will have the "thousand yard stare." Schizophrenics act the same way.

Disorganized speech. The client will wander from topic to topic randomly with no thread linking his thoughts, or stop in the middle of a sentence and go on to some unrelated subject.

Persecutory delusions. Commonly, the client believes that he is being "tormented, followed, tricked, spied on or ridiculed." (DSM 5, p. 87, 90-91)

Referential delusions. Also quite common, the client will express a belief that "comments, passages in books, newspapers, song lyrics" are directed at him. (DSM 5, p. 87)

Bizarre delusions. It is common for schizophrenics to relate to you their delusions. These common delusions were taken from the DSM-5:

"A stranger removed his internal organs and replaced them with someone else's organs"

"His thoughts are being taken away by some outside force." "Alien thoughts have been put into his mind."

"His body or actions are being acted on or manipulated by some outside force."

Auditory or visual hallucinations. Be sure to ask if the client hears voices or sees things. Usually a client will offer that information. Ask him who is talking to him and what he is saying or what he is seeing.. Audio hallucinations are much more common than visual.

Hyper-religiousity. The client has grandiose delusions about God and religion. The following are some observations made by friends or relatives of schizophrenics:

"He thought he was Jesus' son. He did not talk about it much, but spent a lot of time reading the bible and looking off into space."

"He says that he felt that the things in his life that have happened to him were like being crucified. That he was suffering like Jesus did, and that it was because he was Jesus' son."
“He thinks he is Satan, and if he goes to church or reads the Bible, he thinks he is Satan or one of the characters from the Bible. He is petrified of going to hell and thinks people are talking about us on TV NEWS, or radio.”

“He thinks he is the latest prophet and has a mission to change the world. He also talks about Hitler and how he killed his retinue in order to gain the power he wanted. My boyfriend wants this kind of power.”

The attorney also needs to obtain from the client the names, addresses and telephone numbers of the client’s family, friends, associates, doctors and anyone that has had recent contact with him or he has communicated with so you can investigate his personal, social, medical and psychiatric history. These people have to be interviewed so you can make a more informed decision on whether to request a CPL §730 evaluation and at the same time start exploring whether you have sufficient evidence to validate the affirmative defense of mental disease or defect.

**Bring copies of releases with you for the client to sign:**

- Medical releases (HIPPA)
- School records
- College records
- Social Service records

**ARRAIGNMENT AND THE PRELIMINARY HEARING.** After arraignment and prior to the preliminary hearing on the felony, if a felony is charged, a decision must be made whether you will be holding the hearing or requesting a competency evaluation under CPL §730.

Although the preliminary hearing may provide valuable information, it is critical to establish the client’s mental state as soon after the crime as possible. If after interviewing the client, an attorney believes the client is an “incapacitated person” and not competent, you want that documented by psychiatric professionals and CPL §730 evaluation will do that.

**PRACTICE TIP:** If you have an indication that a client is not competent prior to arraignment in the local criminal court (the judge, district attorney, sheriff’s deputies, court personnel, family members often will tell you that the client is displaying symptoms of mental dysfunction), **at the arraignment** request that the court provide you with the longest period of time possible to prepare for the preliminary hearing, even if you have to waive the time periods in CPL §180.80. This provides you with time to interview the client and more importantly, talk to family, friends, relatives and any other people associated with your client. You need to obtain his personal and mental health history along with specific details of any incidents your client was involved in indicative of a mental health problem. The history and actions need to be setforth before the court to justify your request for a CPL §730 evaluation.

**Do not take for granted that the Court will automatically order the evaluation or the District Attorney will consent to it.** Set forth for the Court specific details of your client’s actions that you believe will convince the court that your client is an incapacitated person and not able to either understand the proceedings against him or be able to assist in his defense, or both. If you decide to have the preliminary hearing and thereafter request a CPL §730 evaluation the court will likely inform you that your client has been held for the action of the grand jury and therefore the court is divested of jurisdiction and does not have the power to order a CPL §730 order. *(See CPL Article 180)*
Ethically, the decision to request a competency evaluation under CPL §730 is a decision the attorney has to make, but should not be made without thoroughly interviewing the client when there are indications either from the client or someone else that the client may be incompetent. By not requesting a competency evaluation when one may be strongly indicated is doing your client a disservice, even when your client objects. The best evidence of a mental disability will come from the psychiatric evaluators. Conversely, if the attorney is clearly able to communicate with the client, the client is cooperative, indicates an understanding of the proceedings after an in-depth review by the attorney, and seems to be able to assist in his defense, a CPL §730 evaluation is not required and will be of little value in building an affirmative defense based on mental disease or defect.

Remember: In order to enter a plea of not responsible by reason of mental disease or defect, a client MUST be competent and defense counsel must state that on the record at the time of the plea. (CPL §220.15).

**The CPL §730 Evaluation: Procedure**

Once a local criminal court orders a CPL §730 evaluation on your client, the order will normally go to the county director of mental health. (See CPL §730.10 and §730.20).

The director has to appoint two (2) psychiatric examiners.

As defined by CPL §730.10, a psychiatric examiner may be

"a qualified psychiatrist or a certified psychologist" Both are defined in CPL sections 730.10(5) and (6)

- The psychiatric examiners may conduct their evaluations on an out-patient basis if the client is not incarcerated, otherwise it must be conducted where the client is being held in custody,

- The examiners have 30 days to complete their examination and prepare their reports but the court may extend that period for another 30 days. (CPL §730.20(4),

- If the psychiatric examiners do not agree, the director must appoint a third examiner,

- Statements made by the client to the examiners are inadmissible in evidence in any criminal action on any issue other than that of his mental condition CPL §720.20(6),

- Under CPL §730.30, the client is entitled to a hearing if the psychiatric examiners find the client NOT to be incapacitated,

- If the client is found to be an “incapacitated person”, the court must issue a TEMPORARY or a FINAL ORDER OF OBSERVATION.

**Practice Tip:** If you have information concerning your client’s mental health history, defense counsel should call the county office of mental health and ascertain who the doctors conducting the examination will be. (In Oneida County, Linda Rood at the Oneida County Mental Health Department
is the person to contact at 768-3660, Ext. 3666, email lrood@oegov.net. The doctors presently retained to conduct evaluations are Dr. Lawrence Farago (forensic psychiatrist), Dr. David Stang (psychologist) and the Clinton Therapy & Testing Center (Dr. Brad Bennett, Dr. Kristina Berg, and Dr. Heather Lester – all psychologists).

The examiners normally have very scant information about your client. If you have information, particularly if you have been able to obtain a diagnosis, hospital admissions, or any records relating to the client’s mental health, it is well worth the effort to contact county mental health and find out the names of the doctors retained to perform the evaluations. Call the doctors and provide any information you have to them.

Additionally, after the reports have been submitted, do not hesitate to attempt to contact them to review their findings.

TEMPORARY ORDER OF OBSERVATION
Where a felony has been charged, a Temporary Order of Observation will be issued committing the client to the New York State Office of Mental Health for a period not to exceed 90 days unless the District Attorney consents to a Final Order.

The District Attorney may present the case to the grand jury within 6 months of the expiration of the Temporary Order of Observation. An untimely indictment MUST be dismissed unless good cause is shown.

Under CPL §730.40, subdivision 3, once either the order for the evaluation or a temporary order of observation is issued by a local criminal court, the client is NOT entitled to be heard by the grand jury pursuant to CPL §190.50 unless an application is made to the superior court that impaneled the grand jury and the court finds the client NOT to be incapacitated.

- When the grand jury files an indictment, CPL §730.40, subdivision 4 and subdivision 5 set up two scenarios that defense attorneys should be aware of and be prepared to deal with:

  Scenario One Under Subd. 4
  If the indictment is filed after the local criminal court issued an order of examination, BUT has NOT issued a Temporary Order of Observation;

  1. the client MUST be brought before the superior court for arraignment on the indictment;

  2. all proceedings in the local criminal court terminate and the accusatory instrument dismissed;

  3. If the examination reports have been submitted to the local criminal court, the examination report MUST be forwarded to County Court.

  4. If the director has the reports than he MUST submit them to County Court.
Scenario Two Under Subd. 5
The indictment is filed after the issuance of a temporary order of observation by the local criminal court:

1. County Court or the superior court MUST direct the Sheriff to take the client into custody at the institution in which he is confined (usually Central NY Psychiatric Center, Marcy, New York or Mid-Hudson Forensic Psychiatric Center, New Hampton, NY) and bring him into County Court for arraignment on the indictment;

2. After arraignment, the temporary order of observation and any orders issued pursuant to the mental hygiene law are nullified.

• What Effect Do Those Subdivisions Have On The Client

Despite the language of CPL §730.40, subds. 4 & 5, they are only meant to clear away all of the orders and pending matters in the local criminal court allowing County Court or the superior court a clean slate and can proceed unfettered on the indictment. It does NOT mean that all the proceedings in the local criminal court were a waste of time.

The critical part is contained in subdivision 4 directing that:

• If the local criminal court has the examination reports, it MUST forward them to County Court or the superior court;

• If the director has not submitted the examination reports to the local criminal court, he MUST submit them to County Court or the superior court.

Since County Court has the examination reports, and assuming the reports indicate that the client is incapacitated, counsel simply moves after arraignment on the indictment, for the court to accept the reports. Under CPL §730.30, the District Attorney can either consent or request a hearing.

However, should the District Attorney request a hearing in this situation, he must prove to the court by a preponderance of the evidence that the client is not an incapacitated person AND he will have to do this by calling the psychiatric examiners who will be his witnesses. [See People v. Santos, 43 A.D.2d 73, 75 (1973), People v. Christopher, 65 N.Y.2d 417 (1985), People v. Mendez, 1 NY3d 15 (2003), People v. Frazier, 58 AD3d 468(2009)]. For an in-depth discussion of the right of a client to a competency hearing read Pate v. Robinson, 383 U.S. 375, 15 L.Ed.2d 815 (1966).

NOTE: Any attempt by the district attorney to impeach the examiners while they are on the stand usually meets with repeated sustained objections by the defense counsel because they are his witnesses. HOWEVER, the District Attorney or defense counsel has the right to introduce their own expert witnesses.

WARNING: It is not unusual for the district attorney to request a hearing in high profile cases even it is difficult for him to prevail or for a judge to order a hearing sua sponte. When a judge orders a hearing, it is usually when the psychiatric examiners make a competency finding and the court is not satisfied that the client is fit to proceed. This situation most often involves state prisoners charged with
committing a crime within a state correctional facility and have later been transferred to a state OMH psychiatric facility while the charge is pending.

- The Client is Found to be Incompetent: Temporary & Final Orders of Commitment

TEMPORARY ORDER OF COMMITMENT - FELONY

Once County Court has made a finding that your client is not fit to proceed, the court must issue a Temporary Order of Commitment for a period not to exceed one (1) year which can be renewed by an Order of Retention not to exceed one (1) year. Thereafter, as long as the client remains incapacitated, the court may issue retention orders every two (2) years until the total period of confinement equals two-thirds of the authorized maximum term of imprisonment for the highest class felony contained in the indictment. (See CPL §730.50)

If the client is still in the custody of OMH when that period is reached, the criminal action is terminated. OMH may then apply for civil commitment.

FINAL ORDER OF OBSERVATION

Under CPL §730.40, the Final Order of Observation applies to “an information, prosecutor’s information, or misdemeanor complaint unless of course the District Attorney has consented to the order on a felony complaint. The Final Order of Observation is a final determination of a criminal charge and bars any further prosecution of the charge.

CPL §730.50 mandates that the court:

a) MUST issue a Final Order of Observation committing the client to the custody of the NYS Commissioner of Mental Health for period NOT TO EXCEED 90 DAYS.

b) The criminal proceedings must be dismissed.

Once the client is committed to the custody of OMH, the Commissioner may discharge him at any time prior to expiration of the court order and may treat or transfer him during the duration of the commitment as a patient not in confinement under a criminal court order.
Ethical Obligations of the Attorney When the Court Orders a CPL §730 Evaluation

After the court orders a psychiatric evaluation on your client, the District Attorney is going to be busy preparing his case for presentation to the grand jury. No matter how sure you may be that your client will be found an incapacitated person, **do not sit back** and wait for the report to be submitted to the court. Your ethical obligation to zealously represent your client has not been satisfied. You have been provided valuable time to investigate and prepare your case. **Even if your client is found to be incapacitated, that finding is not a final disposition and in most cases the client will be found competent and returned within a few months.**

**On your list of things to do:**

1. Send out the signed releases as soon as possible;

2. Find out where the client is being held. The county mental health office should know. Patients are assigned a counselor and they are good source of information about your client. Call the facility and find out the counselor’s name and talk to her;

3. Retain a forensic mental health expert, either a psychologist or psychiatrist to consult with. Be sure to check out the expert’s background. You need to know if the expert has testified in court before or has been used by other attorneys in a criminal case and of course, the hourly fee. Assigned counsel will have to make an *ex parte* application under County Law §722-c for approval of these services;

   **Practice Tip:** In one case involving numerous family, friends and potential witnesses, we engaged a psychiatric nurse to help us interview the witnesses. Besides the cost savings, she was able to provide more in-depth and thorough interview reports because she keyed in on the psychiatric indicators much better than an attorney or investigator. Her reports enabled our forensic psychologist to use her reports to evaluate the client without spending the time actually doing the interviewing.

4. Interviewing family, friends, relatives and witnesses is a crucial element in establishing an affirmative defense of not responsible by reason of mental disease or defect. Whether or not there is a diagnosis of a specific mental illness, these interviews will establish indicators used to diagnosis a disorder or illness, and if there is a specific diagnosis, the interviews will substantiate the diagnosis.

5. Review all of the incoming records for other leads and get releases out for their records.

6. **Review the interrogation tapes.** The tapes are often the case maker because usually they totality of the questioning, carefully observing the client’s reactions and behavior. Watch them again and take notes on the questions and the client’s answers to questions. **The client’s behavior is very important. Be sure to have copies of the interrogation tapes made and delivered to your expert witness as soon as you receive them.**

7. Read all of the records you have received from all sources. School and college records can provide great insight into the onset of a mental illness.
The Ethical Obligations When Preparing and Presenting The Affirmative Defense

Unlike the decisions that have to be made when an attorney suspects the client is an incapacitated person which allows the attorney wide latitude in decision making, the affirmative defense of not responsible by reason of mental disease or defect is in the hands of the client. (See EC 7-1, EC 7-7, EC 7-11 and EC 7-12, also Jones v. Barnes, 463 U.S. 745, 77 L.Ed.2d 987. (1983), Florida v. Nixon, 543 U.S. 175, 160 L.Ed.2d 565 (2004) and Fabian’s “Practice Points” in the materials.)

EC 7-7 clearly states and case law reiterates that:
“A defense lawyer in a criminal case has the duty to advise the client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal,

BUT IT IS FOR THE CLIENT TO DECIDE WHAT PLEA SHOULD BE ENTERED AND WHETHER AN APPEAL SHOULD BE TAKEN.”

Justice Ginsberg in Nixon confirms the obligation of the lawyer in criminal cases:

“An attorney undoubtedly has a duty to consult with the client regarding “important decisions,” including questions of overarching defense strategy....That obligation, however, does not require counsel to obtain the defendant’s consent to “every tactical decision...(an attorney has authority to manage most aspects of the defense without obtaining his client’s approval)...But certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate. A defendant...has “the ultimate authority” to determine “whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.”...Concerning these decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action.”

The attorney MUST explain the consequences of the disposition to the client and the client’s family. Usually the family is in favor of the disposition. Clients can present a greater difficulty. The attorney’s ETHICAL OBLIGATION is to insure that the client knows and understands what will happen to him if he decides to:

1) Proceed within the court system and take a plea or go to trial,

2) Enter a plea of not responsible by reason of mental disease or defect or go to trial and be found not responsible by reason of mental disease or defect.

Once the client has been found fit to proceed, he is usually on medication and is easier to communicate with than when he was initially interviewed. Although he receives regular medication and counseling, depending on the disorder or mental illness, the client still suffers from the disorder or illness. A regular discussion with his mental health counselor is critical to determine the ability of the client to understand the proceedings. A regular conversation between the client and the attorney should not be neglected. A client suffering from a severe mental illness like paranoid schizophrenia who has committed a violent offense, especially if the
act was against a family member, has great difficulty coping once they begin to grapple with the enormity of their action.

It is not unusual for the client to “compensate” and then “decompensate” during the course of his therapy as the counselors try to get him to “come to terms” with his actions. The attorney will have the same problem communicating with the client that the mental health professionals have and often, the attorney will question whether the client is able to assist in his defense. Courtroom appearances invariably aggravate the stressors on the client. They may act and communicate effectively in the holding area, but “flip out” or act bizarrely once they are physically in the courtroom. Only through continued interaction with him and his counselor can you gauge his ability to understand you. Remember, a plea of not responsible by reason of mental disease or defect can only be entered if the client is COMPETENT.

BE SURE THE CLIENT UNDERSTANDS HE WILL HAVE TO ADMIT THE ALLEGATIONS IN THE INDICTMENT

Whether the attorney seeks to negotiate a plea of not responsible or is going to trial using the affirmative defense, counsel MUST discuss with the client an admission to the allegations made against him and the client MUST be told that at some point, certainly at the plea or possibly at the trial, he will have to recite the events for which he was charged. Defense counsel has to know how much the client is willing or able to relate to the court. By the time the attorney has reached this point, he should have some indication of how the client is dealing with this issue.

CPL §220.15(3)(e) requires the court during a plea of not responsible to inform the client that “the court will ask him questions about the offense or offenses charged in the indictment”

and

under subdivision 4, the court is obligated to determine “that there is a factual basis for the plea,... The court may make such inquiry as it deems necessary or appropriate for the purpose of making the determinations required by this section.”

If the case is going to trial and the client is going to testify, admissions are going to be necessary. In either event, the subject of the client’s admissions has to be addressed with him.

NOTE: Take the time to review the requirements of CPL. 220.15 carefully with the client, especially in regard to what the client will relate about the offense and WRITE DOWN his response. If the client is providing sufficient details and you are satisfied the court will accept the plea, arrange a plea date. IF NOT, (and this is the usual scenario) meet with the judge and district attorney prior to setting a date certain for the plea. Tell them what your client is able to say regarding the offense to ascertain if your client’s allocution is going to satisfy the court.

Once the attorney has determined that the client understands the consequences of a plea of not responsible by reason of mental disease or defect, and the attorney and client have decided to pursue the defense, obtain a release from your client to share information with the District Attorney (a copy of a release is in the materials.)
NOTICE REQUIREMENT INVOLVING PSYCHIATRIC DEFENSES

When the attorney and the client have decided to pursue the defense of not responsible by reason of mental disease or defect, CPL §250.10(3) requires that written notice be given to the District Attorney “before trial and not more than thirty (30) days after entry of the plea of not guilty to the indictment.” A copy of the Notice of Intent to Proffer Psychiatric Evidence is in the materials. The time requirement is liberally construed however and allows filing in the interests of justice and for good cause shown “at any later time prior to the close of evidence.”

The District Attorney will have the right to obtain their own expert to examine your client under CPL §250.10(3). The District Attorney may then move for an examination of the client. The District Attorney must provide a written copy of the evaluation report prepared by the prosecution expert to defense counsel.

Practice Tip: CPL §250.10(3) allows defense counsel and the district attorney to be present at the examination. In fact, the statute directs the district attorney to give defense counsel notice of the time and place of the evaluation. ATTEND THE EVALUATION AND TAKE GOOD NOTES ON THE QUESTIONS AND ANSWERS.

Although neither defense counsel nor district attorney may actively participate in the evaluation and can only be observers, by attending defense counsel is able to gauge the effectiveness and demeanor of the district attorney’s expert which is invaluable at the trial. If you have turned over documentation of your client’s mental illness, you will also be able to learn whether the expert has taken the time to review those materials. The expert for the defense DOES NOT have the right to be present at the evaluation (See People v. Ceasar, 188 Misc. 2d 219.)

Note: The Notice of Intent to Offer Psychiatric Evidence is also required when defense counsel raises the affirmative defense of Extreme Emotional Disturbance and the District Attorney is allowed to have the client evaluated by an expert EVEN WHERE THE SOLE TESTIMONY SUPPORTING THE DEFENSE WILL BE LAY TESTIMONY AND EVEN WHEN ONLY THE CLIENT WILL BE TESTIFYING FOR THE DEFENSE. (See People v. Dux, 15 NY3 40(2010).

UNDERSTAND THE PROCEEDINGS INVOLVING THE PLEA

There are obligations that the defense attorney, the court and the district attorney MUST fulfill for the plea of not responsible by reason of mental disease or defect to be entered. The materials contain a detailed outline of the proceedings under CPL §220.15 for the entry of the plea and the proceedings under CPL §330.20 after the plea is entered. Your ethical obligation is not complete unless you understand your role in these proceedings. Informing the client and his family of the consequences of a plea is foremost on the list of obligations. The client may be institutionalized in a secure mental health facility for a long time.
Under CPL §220.15

1) The client must enter the plea with permission of the Court and the District Attorney to the ENTIRE indictment.

2) The District Attorney must state for the record
   a.) that he is satisfied the affirmative defense would be proven by a preponderance of the evidence at trial;
   b) detail the evidence against defendant; and
   c) provide the reasons for recommending the plea;

3) Defense counsel must state that
   a) his client understands the proceedings and is able to assist in his defense;
   b) understands the consequences of the plea;
   c) whether he has any other viable defenses; and
   d) detail the psychiatric evidence in support of the plea;

4) The Court must then address the defendant to make a number of determinations as setforth in CPL §220.15, subds. 3, 4 and 5. These are all in the “NGRI Plea” notes in the materials.

Under CPL 220.15 (3) The Court MUST address the defendant in open Court and determine if he understands EACH of the following:
   a) the nature of the charges to which the plea is offered,
   b) the consequences of the plea,
   c) that he has the right to plead NOT Guilty,
   d) that he has the right
      a. to trial by jury,
      b. assistance of counsel,
      c. to confront and cross-examine the witnesses against him, and
      d. the right NOT to be compelled to incriminate himself.
   e) If he pleads “Not Guilty By Reason of Mental Disease or Defect” there will be no trial and he waives his right to a trial,
   f) If he pleads “Not Guilty by Reason of Mental Disease of Defect” the Court will ask him questions about the charges in the indictment and he waives the right not to be compelled to incriminate himself.
   g) The acceptance of the plea of “Not Guilty by Reason of Mental Disease or Defect” it is the equivalent of a conviction after trial of “Not Guilty by Reason of Mental Disease or Defect.”

Under CPL 220.15(4), the Court MUST further determine that there is:
a) A factual basis for the plea,
b) The pleas is voluntary and knowingly made and not the result of force, threats or promises,
c) The Court must inquire whether the defendant’s willingness to plead results from prior discussions between the District Attorney and defense counsel, and
d) The Court must be satisfied that the defendant:
   a. Understands the proceedings against him,
   b. Has sufficient capacity to assist in his own defense,
   c. Understands the consequences of a plea of “Not Guilty by Reason of Mental Disease or Defect.”

Under CPL 220.15(5), before the Court accepts a plea of “Not Guilty by Reason of Mental disease or defect must FIND and STATE EACH of the following on the record IN DETAIL:
   a) That is satisfied that each element of the charge(s) in the indictment would be established beyond a reasonable doubt at trial,
   b) That “Not Guilty by Reason of Mental Disease or Defect” would be proven by the defendant at trial by a preponderance of the evidence,
   c) That the defendant has the capacity to understand the proceedings against him and assist in his own defense,
   d) That defendant’s plea is knowing and voluntary and there is a factual basis for his plea, and
   e) Acceptance of a plea of “Not Guilty by Reason of Mental Disease or Defect” is required in the interest of justice.

CPL §220.15 (6) declares that after the plea of “Not Guilty by Reason of Mental Disease or Defect” has been accepted by the Court, the provisions of “CPL §330.20 shall govern all subsequent proceedings.”

Under CPL §330.20

The procedure after the entry of the plea requires the court to enter an examination order to have the client evaluated by two (2) psychiatric evaluators to determine if the client is:
   1) dangerously mentally ill
   2) mentally-ill, but not dangerously mentally ill,
   3) not mentally-ill

The evaluation must be done within 30 days, but may be extended another 30 days. The Court will then conduct an “Initial Hearing” within ten (10) days of receiving the examination reports. At the hearing, the District Attorney must establish to the “satisfaction of the court” that the client has a dangerous mental disorder or is mentally ill.

“Dangerous Mental Disorder” (Secure Facility)
If the court finds the client to be dangerously mentally ill, the court must issue a commitment order and the client will be placed in a “secure facility” (i.e. – Rochester Psychiatric Center or Mid-Hudson Psychiatric Center) for six (6) months. Thirty days prior to the expiration of that order, the facility may apply for a “First Retention Order.” The court may hold a hearing, but a hearing must be held if requested by the district attorney, defense counsel or the client. If the client is found to be dangerously mentally ill, the court issues a commitment order not to exceed one (1) year. After that, a “Second Retention Order” or “Subsequent Retention” orders may be requested for commitment not to exceed two (2) years.
Mentally-Ill, But Not Dangerous (Non-Secure Facility)
If the court finds the client to be not dangerously mentally ill, but mentally ill, the court issues an “Order of Conditions” and an order committing the client to the NYS Commissioner of Mental Health. The “Order of Conditions” issued by the court basically directs the client to comply with the treatment prescribed by OMH, “or any other condition the court determines to be reasonably necessary and appropriate.” The court may also issue “special conditions” relating to the victim or victims. An order of conditions is good for five (5) years and may be extended another five years for good cause shown.

Not Mentally Ill (Discharge)
If the court finds the client not mentally ill, the court must discharge the client either unconditionally or subject to conditions.
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**Facts:**

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**Strengths:**

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**Weaknesses:**

_________________________________________________________

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**CJA Report:**

Recommended:  (Y) ____  (N) ____  Verified:  (Y) ____  (N) ____

Education:  ____________________________  Where:  ________________

Employment: ____________________________  How Long:  ________________

Residence:  ____________________________  How Long:  ________________

Health Problems:  _______________________________________________________

Family/Friend at Arraignment:  (Y) _____  (N) _____  Relationship:  ________________
CJA Report - Criminal History:

Prior Conviction(s): (Y) ____ (N) ____  Felonies: ____  Misdemeanors: ____

Bench Warrants: _______________________________________________________

Open Cases: __________________________________________________________

Adjournment:

Part: __________  Date: ____________________

Bail Conditions:

________________________ / __________________ / ______________________
(Ins. Bond) (Cash) (Other)

[ ]  ART 730 Exam Ordered  [ ]  Protective Custody
[ ]  Medical Attention  [ ]  Psychiatric Evaluation
[ ]  Suicide Watch  [ ]  T.O.P. or F.O.P.

Disposition:

(Six months) (Twelve Months)
[ ]  Waives Prosecution by Information and Pleads Guilty to PL 240.20 / _________
[ ]  Investigation & Sentence Ordered
[ ]  DNA - Eligible Misdemeanor  [ ]  DNA - Sample Taken

Sentence (or Promise):

[ ]  Jail Term - __________ Days  
[ ]  Conditional Discharge  __________ Days of Community Service
                                __________ Days of Jail Alternative

[ ]  Other: ____________________________________________________________

[ ]  Mandatory Surcharge (and CVAF):
    [ ]  Judgment Entered - All Fees
    [ ]  $200.00 Misd.  [ ]  $120.00 Violation  [ ]  $80 VTL*
    [ ]  $395.00 VTL 1192 Misd.*  [ ]  $255.00 VTL 1192(1) Infraction*
*(For Offenses on or After August 1, 2008)
SUMMARY OF NEW AMENDMENTS TO BAIL, DISCOVERY & MORE

I. BAIL

The new bail law still excludes dangerousness, but expands eligibility for money bail and pre-trial detention. It takes effect in 90 days. (Bill text: See Part UU here.)

EXPANSION OF QUALIFYING OFFENSES:

VIOLENT FELONIES:
- BURGLARY 2ND (140.25(2)) “only where the defendant is charged with entering the living area of the dwelling” (excludes vestibules, hallways in apt. buildings, and attached garages)
- STRANGULATION 2ND (note: this is a D violent so it was already a qualifying)
- SEX TRAFFICKING 230.34(note: 230.34(5)(a) & (b) were already violent B felonies so already a qualifying)
- SEX TRAFFICKING – CHILD, 230.34-a (B violent, so already a qualifying)

NON-VIOLENT FELONIES:
- CLASS A-I DRUG FELONIES
- ALL HOMICIDES (manslaughters, negligent homicides)
  - And, because language is “ANY CRIME THAT THAT IS ALLEGED TO HAVE CAUSED THE DEATH OF ANOTHER PERSON” it could include VTL 511 (if accidentally causes death), VTL 600 (leaving the scene of an accident).
- FAILURE TO REGISTER UNDER SORA WHERE DEFENDANT IS CLASSIFIED LEVEL 3, Corr. L. 168 et al. (1st offense, E felony)
- SEX TRAFFICKING, 230.34(1)-(4) and (5)(c – h) (B felony)
- MONEY LAUNDERING IN SUPPORT OF TERRORISM 3RD AND 4TH, 470.22 (D felony) & 470.21(E felony)
- PROMOTING AN OBSCENE SEXUAL PERFORMANCE BY A CHILD, 263.15 (D felony)
- AGGRAVATED VEHICULAR ASSAULT, 120.04-a (C felony), VEHICULAR ASSAULT 1ST, 120.04 (D felony)
- ASSAULT IN THE 3RD AS HATE CRIME (E FELONY)
- ARSON 3RD AS HATE CRIME (B FELONY)
- AGGRAVATED ASSAULT UPON A PERSON LESS THAN 11 YEARS OLD, 120.12 (E FELONY)
- CRIMINAL POSSESSION OF A WEAPON ON SCHOOL GROUNDS, 265.01-a (E felony) (a student brings a pocket knife to school)
- GRAND LARCENY 1ST, 155.42 (B felony)($1M)
- ENTERPRISE CORRUPTION, 460.20 (B FELONY)
- MONEY LAUNDERING 1ST, 470.20 (B FELONY)
- BAIL JUMPING 1ST AND 2ND, 215.57 & 215.56 (D AND E FELONIES)
- ESCAPE 1ST AND 2ND 205.15 & 205.10 (D AND E FELONIES)
• UNLAWFUL IMPRISONMENT 1ST, 135.10 (E felony)
• FOR REPEAT OFFENSES/ARRESTS
  o ANY FELONY WHILE ON PROBATION OR POST RELEASE SUPERVISION
  o ANY FELONY IF QUALIFIES FOR LIFE SENTENCE AS A DISCRETIONARY PERSISTENT OFFENDER UNDER PENAL LAW 70.10
  o FELONY WHERE "HARM" OCCURRED TO AN IDENTIFIABLE PERSON OR PROPERTY WHILE OUT ON A SEPARATE FELONY OR CLASS A MISDEMEANOR WHERE HARM OCCURRED TO AN IDENTIFIABLE PERSON OR PROPERTY. PROSECUTORS MUST SHOW "REASONABLE CAUSE" THAT THE DEFENDANT COMMITTED BOTH OFFENSES.

CLASS A MISDEMEANORS
• DOMESTIC VIOLENCE: OBSTRUCTION OF BREATHING, 121.11
• ENDANGERING WELFARE OF A CHILD, 260.20 – ONLY IF A LEVEL 3 (highest) SEX OFFENDER
• BAIL JUMPING 3RD, 215.55
• ESCAPE 3RD, 205.05
• FOR REPEAT ARRESTS
  o ANY CLASS A MISDEMEANOR WHILE ON PROBATION OR POST-RELEASE SUPERVISION (BUT NOT PAROLE OR CONDITIONAL RELEASE)
  o ANY CLASS A MISDEMEANOR WHERE HARM OCCURS TO AN IDENTIFIABLE PERSON OR PROPERTY (ASSAULT 3, CRIMINAL MISCHIEF) WHILE OUT ON A SEPARATE FELONY OR CLASS A MISDEMEANOR WHERE HARM OCCURRED TO AN IDENTIFIABLE PERSON OR PROPERTY. PROSECUTORS MUST SHOW "REASONABLE CAUSE" THAT THE DEFENDANT COMMITTED BOTH OFFENSES.

EXPANSION OF NON-MONETARY CONDITIONS OF RELEASE – "...shall be the least restrictive conditions that will reasonably assure the principal's return to court and reasonably assure the principal's compliance with court conditions.” NON-EXCLUSIVE (JUDGE CAN ADD MORE NOT SPECIFIED):
• SURRENDERING PASSPORT
• MANDATORY PROGRAMS (counseling, treatment, intimate partner violence, placement in hospital under MHL 9.43) WHILE IN PRE-TRIAL SERVICES – no longer maintaining contact or just “supervision”
• REFRAIN FROM "ASSOCIATING" WITH PERSON CONNECTED TO THE ALLEGED CRIME (not just victims and eyewitnesses, also co-defendants)
• MAKE DILIGENT EFFORTS TO MAINTAIN EMPLOYMENT HOUSING OR ENROLLMENT IN SCHOOL/EDUCATIONAL PROGRAMMING
• OBEY AN ORDER OF PROTECTION
• CONDITIONS SET BY COURT ADDRESSED TO SAFETY OF VICTIM OF FAMILY OFFENSE, INCLUDING REASONABLE CONDITIONS REQUESTED BY OR BEHALF OF VICTIM
• ELECTRONIC MONITORING - MUNICIPALITIES CAN CONTRACT WITH PRIVATE COMPANIES BUT THE COMPANIES CANNOT INTERACT WITH DEFENDANT
• DEFENDANT STILL CANNOT BE MADE TO PAY FOR ANY CONDITIONS OF RELEASE, INCLUDING ELECTRONIC MONITORING.

DATA COLLECTION BY OCA AND DCJS – DISAGGREGATED TO PROTECT CONFIDENTIALITY OF DEFENDANTS.

• RACE, GENDER, ETHNIC, CHARGE TYPE, RELEASE, RELEASE WITH CONDITIONS, BAIL, DETENTION, LENGTH OF TIME IN JAIL, OUTCOMES

APPEARANCE TICKETS – 20 DAY RETURN PERIOD EXTENDED IF COURT DOES NOT MEET WITHIN 20 DAYS OF THE ISSUANCE DATE

CLARIFICATION THAT BAIL/REMAND AUTHORIZED FOR CONVICTION BUT PENDING SENTENCE OR APPEAL.

CONTACT INFORMATION – IF DEFENDANT REFUSES TO PROVIDE THEN HE OR SHE FORFEITS THE RIGHT TO GET COURT NOTIFICATION.

II. DISCOVERY

The new law takes effect in 30 days. See full text at Part HHH here.

TIMELINES EXPANDED:
   IF IN CUSTODY while case is pending – 20 days
   IF NOT - 35 days

Under automatic 30-day extension: “VOLUMINOUS” clarified –may include body worn camera, video surveillance and dashboard cameras

THESE TIMELINES DO NOT APPLY WHERE:–
• Simplified information charges a traffic infraction (DWAI, included), or petty offense in a municipal code provided no imprisonment is authorized and no crime is also charged:
  o Then 15 days before trial, unless defense files a written motion to get earlier
• 911 caller information is withheld and DA intends to call that person
  o Then 15 days - or as soon as practicable - before trial or hearing, only the name and contact information. Not clear whether we can file a motion for earlier disclosure (245.20(1)(g))

RIGHT OF AUTOMATIC NON-DISCLOSURE now extends beyond confidential informants, and includes identify of 911 callers, victims and witnesses in Article 130 offenses, sex trafficking, or other crimes involving a substantiated affiliation with a criminal enterprise (e.g.,
gang cases). DA IS NOT REQUIRED TO SEEK A PROTECTIVE ORDER. But absent “good cause” the prosecutor must disclose that the information is being withheld -in writing. If the defense knows 911 call was made, we may move for disclosure.

- **LIMITED DISCLOSURE:**
  - Under (g) “electronic recordings, etc.” Prosecution does not have to disclose names or identifying information of 911 callers UNLESS it intends to call such person
  - Under (f) “expert opinion, etc.” – the prosecutor needs only provide a “list” of proficiency tests and results – not the actual substantive tests.
  - Under (j) “scientific tests, reports, etc.” – the prosecutor does not need to disclose “results” of exams or tests until completed. No more “summaries.”

**PROTECTIVE ORDERS EXPANDED:**

- 911 calls do not have to be turned over. Instead, a transcript can be disclosed. (“good cause” standard still applies)
- If charge is VIOLENT FELONY or any CLASS A FELONY (other than drugs), hearing can be conducted in camera – upon prosecutor’s request and good cause.

OCA MUST PUBLISH **ANNUAL REPORTS** about the impact and implementation procedures.

**WAIVERS OF DISCOVERY:**

- Court must make inquiry about the waiver on the record (no written or signed waiver).
- Court may not force defense counsel to advise client about waiver and refuse to take plea if counsel refuses (to sign any form).
- Waiver can’t be conditioned on 440 repleaders.

**CERTIFICATE OF COMPLIANCE** and **SPEEDY TRIAL:**

- Prosecutor can file coc where certain material is lost or destroyed.
- Court can find prosecution ready for trial if non-disclosure resulted from lost, destroyed or “otherwise unavailable” material:
  - But there must be diligent, good faith efforts to locate and disclose such material – and those efforts must additionally be reasonable under the circumstances.
  - Sanctions still available for such non-disclosures
- No discovery conferences (?) - **challenges or questions** about a coc must be addressed by motion (not clear if must be in writing).

### III. OTHER CHANGES

**Subway offender ban**

- Gives the court the discretion to ban a person from using or entering MTA’s services and facilities for up to three years for the following offenses:
  - A crime involving assault or attempted assault against MTA personnel;
  - A person convicted of a crime involving sexual assault against a customer, passenger or MTA personnel
- Court can suspend, modify or cancel in the interest of justice if a person depends on the MTA for necessary trips (medical, legal, school, employment)
- Unclear how this will be enforced.
- See text at Part VVV here.

**Change in terrorism laws**
- Terrorism offenses added to list of hate crimes
- Two new terrorism offenses created:
  - Domestic act of terrorism motivated by hate in the first degree
    - A-I felony
    - Mandatory sentence of life without parole
  - Domestic act of terrorism motivated by hate in the second degree
    - A-I felony
- See full text at Part R here.
Summary of Changes to Bail and Discovery Reform
On April 3, 2020, changes were made to the bail and discovery laws in New York State. This was done as part of the state budget. See L 2020, ch 56, Part UU and Part HHH at https://legislation.nysenate.gov/pdf/bills/2019/A9506B. NYSDA's statement on the bail and discovery law rollbacks is available at https://www.nysda.org/resource/resmgr/pdfs--other/NYSDA_statement_on_bail_and_.pdf.

Bail Changes: While a “dangerousness” standard was not included, there are substantial changes to conditions of release and an expansion of qualifying offenses for which a person may be detained on bail, effective in 90 days (July 3, 2020). Some of the changes are briefly summarized here and include:

- additional restrictions on travel and the ability of the court to order relinquishment of passport;
- stay away orders expanded allowing court discretion and the ability to order individuals to stay away from and not associate with witnesses and co-defendants;
- placement into pretrial services for mandatory programming, including counseling, treatment, and intimate partner violence intervention programs;
- court can remove a person under Mental Hygiene Law section 9.43;
- court can require “diligent efforts” to maintain employment, housing, enrollment in school or educational programs;
- expand conditions on stay away orders with consideration for “safety of victim” and may add specific conditions at the request of the complaining witness; and
- the expansion of electronic monitoring, allowing municipalities to contract with private companies for monitoring equipment and other items.
The list of qualifying offenses has now been expanded to include certain misdemeanors, and non-violent and violent offenses. (Summary of New Budget Amendments, Bail, Discovery and More – Credit and thanks to Yung-Mi Lee, Brooklyn Defender Services) Also included was a provision that a person forfeits their right to get court notification if they refuse to provide contact information.

**Discovery Changes:** While defenders have been adapting to the newly enacted discovery laws in CPL article 245 since Jan. 1, 2020, there are now significant adjustments made effective in 30 days (May 3, 2020). Some of those adjustments include changes to timelines for initial disclosure; disclosure for persons IN custody must be made in 20 days and disclosure for those OUT of custody must be made in 35 days. Voluminous discovery (body camera footage, surveillance, and dashboard camera video) may be stayed an additional 30 days without motion. For simplified information and traffic infractions, discovery must be turned over no later than 15 days before trial, but note the defense may still make a request for earlier disclosure. Protective orders have now been expanded, and there are items which have been previously disclosed that are now subject to more limitations and later disclosure requirements including 911 calls, complaining witness contact information, and 911 caller information. Under certain types of criminal charges, the DA is no longer required to seek a protective order. There have also been changes to expert witness disclosures, including providing only a list of proficiency tests and results, instead of the substantive tests. Please note this is just a brief synopsis of the changes and more substantive information can be provided by the Backup Center. Please look out for future training opportunities as well.

**30.30 Changes:** The court may find the prosecution’s Certificates of Compliance valid in the absence of lost, destroyed, or unavailable evidence (but there is still a good faith showing with remedies available for nondisclosure). Challenges to Certificate of Compliance and readiness must be made by motion.

**SCR - From “Some Credible Evidence” to “A Fair Preponderance of the Evidence”**
For the family defense community the one bright shining star in this year’s state budget, at Part R of the bill noted above, is an amendment to the Social Services Law, which will raise the standard of proof before someone can be placed on the State Central Register (SCR). For an “indicated” case of child maltreatment, the requirement is elevated from the bare minimum standard of “some credible evidence” to a “fair preponderance of the evidence.” Other highlights include the staying of any request to amend an “indicated” report, whether it be for maltreatment or abuse, during the pendency of a Family Court Act Article 10 case arising from the same allegations. When the final outcome of the child welfare case is favorable because “child protective services withdraws such petition with prejudice, where the family court dismisses such petition, or where the family court finds on the merits in favor of the respondent, there shall be an irrebuttable presumption in a fair hearing ... that said allegation as to that respondent has not been proven by a fair preponderance of the evidence.” This should result in the indicated report being amended to unfounded. Of significance to our family court clients, is the effective sealing of “indicated” reports of child maltreatment after 8 years from the date the “indication” occurred: “any such indication of child maltreatment shall be deemed to be not relevant and reasonably related to employment.” Those who have been found by the court to have committed abuse will still have their names on the Register for up to 28 years, depending on the age of the child at the time of the incident.

Perhaps most disappointing to our clients is that these changes do not go into effect until Jan. 1, 2022. Therefore, anyone who is the subject of a child protective services investigation commenced prior to that date is still subject to being “indicated” based on the minimal standard of “some credible evidence.” It is unclear how those placed on the SCR prior to Jan. 1, 2022, will be affected by the new law. NYSDA is analyzing the new law with an eye to what arguments might be made to assist clients in the nearly two-year interim.

Attorneys are encouraged to contact Family Court Staff Attorney Kimberly Bode at the Backup Center.
COVID-19: Breaking News: Judge Grants Release to Several in NYC
Under New York's due process test with regard to confinement conditions, a court "weighs the benefit sought by the government from a condition against the harm that the condition imposes on inmates," notes New York County Supreme Court Judge Mark Dwyer in People ex rel. Stoughton v Brann, decided on Apr. 6, 2020. The court rejected the respondents' contention that the "reasonable care" they have taken to mitigate risks of COVID-19 satisfies due process, stating: "[d]ue process does not excuse prison officials who mean well, but have no effective way to protect inmates from potentially fatal epidemics." After setting out the inability to practice at Rikers Island the measures needed to contain the documented outbreak there, the court ordered the release of 18 petitioners who "are afflicted with conditions acknowledged to endanger them: heart disease, serious respiratory conditions, cancer, diabetes, uncontrolled HIV, and so forth," and some of whom are also relatively old. The remainder of the 32 plaintiffs named in the suit received no relief. These include someone with glaucoma and someone who is HIV-positive, "but the condition is well controlled." People charged with violent crimes cannot be denied release if detaining them puts them "at substantial risk of death or other serious physical injury," the court noted near the conclusion of its decision, describing one person's multiple health risks as warranting release despite the accusation of having committed "a vicious murder." The ordered release is temporary, the court adds, and includes restrictions on liberty such as, for some, home confinement.

Defenders, Others, Seek Releases to Save Lives of Those Incarcerated
Across the state, public defenders and others are trying to stop the spread of the novel coronavirus in jails and prisons. Working to protect individual clients, particularly those at risk, as well as everyone, defenders are filing writs, demanding government action, and seeking to raise public awareness of the threat COVID-19 in facilities poses to those incarcerated, those who work there, and to all communities.

Media accounts reflect these efforts. An April 7 account in the Gothamist about the first death of someone held at Rikers Island, a man held there for parole violation, notes that The Legal Aid Society filed a lawsuit against the City and the State. It also notes a comment by the Governor last Friday that the State has no way to reduce the population in state prisons. But a group of public defense programs and law firms have proposed a blueprint for doing so; NYSDA is among the signatories of that April 3 letter to the Governor. Only the day before, another article reported that DOCCS had begun allowing corrections and parole officers, and prison workers, to wear masks; as the spouse of one prison employee observed, "if prison officials could not protect inmates from the potentially deadly coronavirus, they could not protect officers such as her husband."

Activists and family members are also demanding release of people vulnerable to the virus due to age or underlying health issues, as WXXI News reported on March 30. They call for the Governor to grant clemencies and for the Parole Board to release vulnerable people.

One category of cases that lawyers have focused efforts on are those of people held on parole violations. The lawsuit noted above "alleges that New York officials have mostly stopped adjudicating parole violations amid the coronavirus pandemic, leaving hundreds of people waiting in jails as the virus spreads," according to the New York Law Journal on April 4. As noted by the Investigative Post on April 6, "[p]ublic defenders and defense lawyers have started submitting motions seeking bail relief for some inmates held in Erie County jails." NYSDA's Backup Center has been hearing from defenders in other counties who are preparing to file writs.

Check "Coronavirus Efforts to Seek Release" under "More in this Section" on NYSDA's Coronavirus Webpage. Information there is being updated as quickly as possible; lawyers are invited to send pleadings to the Backup Center for sharing either on the page or individually when requests from other lawyers are received.

Social Distancing and CDC Guidelines To Fight Against COVID-19 are Impossible to Achieve Inside Jails and Prisons
A wide range of information sources relevant to people held in detention during the COVID-19 outbreak exist for defenders and others to use. While the CDC has issued specific guidelines relating to prisons and jails, it appears containment and spread of the virus is impossible. The vulnerable prison population has been repeatedly highlighted in recent news as well as various opinions on the opportunity of freeing thousands of inmates to help stop the spread of the coronavirus.

On Monday, Attorney General William Barr sent a memo to top federal prosecutors across the country urging them to consider not only the risks a defendant might face in detention, but the risk inherent in increasing the jail population at a time when cases of the virus are on the increase.

NYC Correction Officers Ordered to Return to Work after Testing Positive for Coronavirus
Despite CDC Guidelines for Correctional Facilities, conditions are dire and officers are being called back to work even when they are symptomatic and confirmed positive for COVID-19. Several Rikers Island correction officers refused to return to their posts the morning of Wednesday April 8th after working 24-hour shifts at a jail with nearly 200 inmates who have coronavirus. “Correction Officers’ Benevolent Association President Elias Husamudeen said the new developments are another indication that the overwhelmed agency has not done enough to protect its personnel.” Correction officers assigned, “are being forced to work triple tours, often missing meals and coming in on their personal days. Officers who have tested positive, who are out sick and who still display symptoms are being told by (the Health Management Division) at DOC that they should come back to work even as their personal doctors have told them otherwise.”

Defenders and Others Should Practice Self-Care
An article entitled "What It's Like to Be a Public Defender During a Pandemic" illustrates the situation defenders are in. The staff at NYS DA understand the considerable amount of stress defenders may be experiencing while trying to balance working as best as you can to assist your clients during this uncertain time with the health and wellness of your own families. We also understand that many of you are trying to be creative in your release advocacy for clients currently detained and your representation of parents whose children have been removed.

Headspace and Governor Cuomo’s Office teamed up to create the "New York State of Mind" website as a mental health resource for residents facing this public health crisis. New Yorkers across the state can now access a specially curated collection of science-backed, evidence-based guided meditations, along with at-home mindful workouts, sleep guidance, and kids content to help address rising stress and anxiety. Available at www.headspace.com/ny, the collection will also feature Headspace co-founder and former Buddhist monk Andy Puddicombe, who will share special video messages with the people of New York to help offer guidance, support, and solidarity.

Association News

Charles F. O’Brien, 1956-2020
It is with the deepest sadness that we announce that NYS DA’s former Executive Director and long-time Managing Attorney, Charles F. O’Brien, died on Mar. 26, 2020, after a long illness. Charlie’s determination to provide to public defense lawyers and programs the support they need to ensure quality representation across the state undergirded NYS DA’s many programs. His quiet passion for justice and his breadth of knowledge and interests influenced the development and success of NYS DA’s Public Defense Case Management System, its well-respected CLE training programs, and other forms of assistance, including direct defender services and publications. His obituary highlights Charlie’s role as a family man. A tribute by NYS DA Board of Directors member Andy Correia, here, evokes the qualities and actions that made Charlie indispensable to the Backup Center’s staff and work and to defenders statewide. NYS DA offers condolences to all who grieve in