

NOTES

TURN OFF THE DANGER: THE LACK OF ADEQUATE SAFETY INCENTIVES IN THE THEATRE INDUSTRY

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This Note uses the Broadway musical Spider-Man: Turn Off the Dark as a case study to examine the legal and nonlegal systems in place to deter unsafe working conditions in the theatre industry. In little over a year of rehearsals and performances, seven members of the Spider-Man cast were injured, one very seriously. (An eighth cast member was then seriously injured as this Note was being prepared for print, approximately two years later.) This Note argues that Spider-Man illustrates how the current regime does not deter unsafe conditions. It argues that the workers' compensation exclusivity bar to a civil suit—which provides employers a complete defense with respect to covered injuries, unless an injury is the result of an intentional tort—should be lowered to create better incentives for producers to ensure the safety of their actors.

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INTRODUCTION

“I was falling and I saw the darkness of the stage. I turned . . . real quick, so I wouldn’t hit my head, so I crashed on my back[.]”

Christopher Tierney, *Spider-Man* cast member¹

Spider-Man: Turn Off the Dark (*Spider-Man*) is by far the most expensive musical ever produced on Broadway.² It has suffered legal disputes, technical problems, and serious injuries to its performers,³ yet it is grossing an enormous amount of money.⁴ It is also extremely technically complex, involving “27 aerial sequences of characters flying and scores of pieces of moving scenery.”⁵ This technical complexity has been a significant reason for the incidence of injuries.⁶

¹ Dana Tyler, *CBS 2 Exclusive: The Fall of ‘Spider-Man,’* CBS NEW YORK *Jan. 3, 2011), <http://newyork.cbslocal.com/2011/01/03/tonight-at-11-exclusive-interview-with-spider-man-stuntman/> (interviewing Christopher Tierney on his twenty-to-thirty-foot free fall into the *Spider-Man* pit).

² Patrick Healy, *Turn on the Cash: After a Year, ‘Spider-Man’ Earns Its Keep*, N.Y. TIMES, Nov. 28, 2011, at C1, available at <http://theater.nytimes.com/2011/11/28/theater/spider-man-a-year-after-first-preview-is-on-solid-ground.html> (“At \$75 million the technically elaborate New York production is far more expensive than any show in history; most Broadway musicals cost between \$5 million and \$15 million.”); see also Kevin Flynn & Patrick Healy, *How the Numbers Add Up (Way Up) for ‘Spider-Man,’* N.Y. TIMES, June 23, 2011, at A1, available at <http://theater.nytimes.com/2011/06/23/theater/spider-man-by-the-numbers-breaking-down-its-costs.html> (explaining why the musical cost “more than twice as much as any production in Broadway history”).

³ E.g., Robert Simonson, *Playbill Picks: The Top Theatre Stories of 2011—From Spider-Man to Sondheim to Site-Specific Shows*, PLAYBILL.COM (Dec. 23, 2011), <http://www.playbill.com/features/article/157980-PLAYBILL-PICKS-The-Top-Theatre-Stories-of-2011-From-Spider-Man-to-Sondheim-to-Site-Specific-Shows> (“*Spider-Man Turn Off the Dark* has generated so many headlines . . . that it feels like it’s been around for a decade. . . . [T]he problems, accidents, actor injuries and delays that plagued the gargantuan musical were enough to make it a top theatre news story of 2010.”); Andrew Gans, *First Preview of Spider-Man Turn Off the Dark Plagued with Technical Problems*, PLAYBILL.COM (Nov. 29, 2010), <http://www.playbill.com/news/article/145330-First-Preview-of-Spider-Man-Turn-Off-the-Dark-Plagued-with-Technical-Problems> (reporting that technical problems caused the first preview to stop five times).

⁴ See Patrick Healy, *Court Papers in ‘Spider-Man’ Suit Could Tarnish Reputations*, N.Y. TIMES, Mar. 5, 2012, at C1, available at <http://theater.nytimes.com/2012/03/05/theater/spider-man-e-mails-revealed-in-taymor-lawsuit.html> (“The \$75 million musical, which opened on Broadway in June after Ms. Taymor’s firing and a subsequent overhaul, is now one of the top-earning shows in New York, grossing \$1.5 million a week on average.”). However, the production is so costly—operating expenses alone are approximately \$1 million a week—that it will require a nearly sold-out, multiyear run just to break even. Flynn & Healy, *supra* note 2 (reporting that, based on June 2011 box office grosses, the producers had estimated *Spider-Man* would need to run for over seven years to recoup the initial investment).

⁵ Patrick Healy, *Concussion Sidelines ‘Spider-Man’ Actress*, N.Y. TIMES ARTSBEAT (Dec. 3, 2010, 3:58 PM), <http://artsbeat.blogs.nytimes.com/2010/12/03/concussion-sidelines-spider-man-actress>.

⁶ See *infra* Part I (detailing these injuries and their reported causes).

The move toward bigger, more spectacular Broadway musicals is an ongoing trend.⁷ Due in part to the rising cost of mounting a Broadway musical, and in part to the recent introduction of corporate producers,⁸ an increasing number of “blockbuster” projects have been developed on Broadway.⁹ *Spider-Man* is merely the latest step in this trend. Given the success *Spider-Man* has found at the box office and the tendency toward spectacle, one can assume that future Broadway productions will follow *Spider-Man*’s example: ever bigger, ever more expensive, and ever more technically complex.

One can also assume that the actors in these productions will be increasingly at risk of injury. A risk of minor to moderate injury—a

⁷ In 1988, *The Phantom of the Opera* was the spectacle of the decade, with a chandelier that came crashing down and a rowboat that appeared to move through the sewers of Paris. STEVEN ADLER, ON BROADWAY: ART AND COMMERCE ON THE GREAT WHITE WAY 18–19 (2004). *Miss Saigon*, which opened in 1991, famously involved an on-stage helicopter. See Jesse McKinley, ‘Miss Saigon’ to End 9-Year Run on Broadway, N.Y. TIMES, Apr. 28, 2000, at E3, available at <http://www.nytimes.com/2000/04/28/movies/miss-saigon-to-end-9-year-run-on-broadway.html> (noting that in Act II “a helicopter descends from the rafters, lands onstage, picks up evacuees and lifts off again”). More recently, *The Little Mermaid* cost over \$15 million to produce and featured mermaids wearing custom “merblades”: dance shoes with a wheel on the heel. The “merblades” allowed the actors to glide around the stage, as if wearing roller skates, and also to perform standard dance steps, such as pirouettes and jetés. See Matthew Gurewitsch, *Learning to Move Under the Sea, on Wheels*, N.Y. TIMES, Dec. 30, 2007, at A32, available at <http://www.nytimes.com/2007/12/30/arts/dance/30gure.html>. Of course, not every show is a large-scale spectacle. For instance, the winner of the 2012 Tony Award for best musical, *Once*, was capitalized for a mere \$5.5 million, and featured a cast of fourteen and a simple set design. Michael Giola & Kenneth Jones, *Raise a Pint! Tony Award-Winning Once Recoups Capitalization in Under Six Months*, PLAYBILL.COM (Aug. 13, 2012), <http://www.playbill.com/news/article/169041-Raise-a-Pint-Tony-Award-Winning-Once-Recoups-Capitalization-in-Under-Six-Months>. The shows that are big, however, seem to be getting larger and larger.

⁸ See ADLER, *supra* note 7, at 67 (discussing the “entry of corporations into what was essentially a boutique industry”).

⁹ See *id.* at 3 (noting that shows today “need to earn blockbuster status to make a profit”). The traditional Broadway investor (a wealthy individual) was driven to produce a Broadway show for idiosyncratic reasons. See *id.* at 59 (explaining the traditional three reasons for investing in Broadway: “Either you actually believe in the work. Or, it may serve your interests to lose some money. Or, you want to be in the club, go to parties, be part of it, have a blast, and maybe make some money. There’s no other reason to do it. . . .”) (quoting Thomas Schumacher). On the other hand, the corporate producer is motivated primarily by profit. See John Persinger, Note, *Opening the Floodgates?: Corporate Governance and Corporate Political Activity After Citizens United*, 26 NOTRE DAME J.L. ETHICS & PUB. POL’Y 327, 352 (2012) (citing *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919)) (“Traditionally, the recognized legal purpose of [for-profit] corporations is to maximize the investments of its shareholders. The law is clear that management’s primary goal should be to increase profits.”). Though *Spider-Man* is significantly more expensive than any other show to date, one commentator suggests that a ten or twelve million dollar capitalization is now common. ADLER, *supra* note 7, at 16. With such high expenses, the perception is that only a “blockbuster” can recoup its initial investment and begin to reap profits. *Id.* at 3. Producer Edward Strong has pointed to a shift in the Broadway audience as another factor influencing what is produced. *Id.* at 137–38.

sprained ankle, a torn ligament, a pulled muscle, broken toes or fingers—is nothing new for stage performers, and dancers in particular.¹⁰ And *Spider-Man* is not the first Broadway show to deal with a devastating, potentially deadly accident. Just prior to a performance of *The Little Mermaid*, for example, an actor fell through an unlocked trapdoor in an elevated set piece, plummeted between twenty and forty feet to the stage below, and broke his back, pelvis, sternum, ribs, wrists, and foot.¹¹ But the *Spider-Man* incidents involved something new and different: The injuries were not routine dancers' injuries; they were acute. And it was not just a one-off accident; the injuries continued to occur. In just over a year of rehearsals and performances, seven of its actors suffered newsworthy injuries; one was injured very seriously.¹² (As this Note was being prepared for print, approximately two years later, an eighth actor was seriously injured.)¹³

In theory, several forces should have been working to prevent this situation: the workers' compensation system, the possibility of a tort suit, federal and state regulation, and the power of the actors' union.¹⁴ But they did not.¹⁵ Many commentators have critiqued the workers' compensation and regulatory systems generally.¹⁶ This Note

¹⁰ See, e.g., *infra* note 25 and accompanying text.

¹¹ See Andrew Gans, *Injured Mermaid Actor Bailey Files Court Petition*, PLAYBILL.COM (May 16, 2008), <http://www.playbill.com/news/article/117787-Injured-Mermaid-Actor-Bailey-Files-Court-Petition> (relating somewhat varying reports of the incident by the *New York Times* and by *The Little Mermaid* producers).

¹² See *infra* Part I (providing a chronological account of the *Spider-Man* injuries).

¹³ See *infra* notes 61–64 and accompanying text (describing Daniel Curry's August 2013 injury).

¹⁴ This Note focuses on Broadway performers and Broadway productions. Non-union national tours raise distinct issues with respect to performer safety given that performers in these tours are not subject to the jurisdiction of the Actors' Equity Association and do not benefit from any role it may play in creating a safer working environment.

¹⁵ Reputation, perversely, seemed to run in the other direction. A show that began as a conceded flop gained notoriety, attracted audience interest, and increased ticket sales as the accidents piled up. See Patrick Healy, 'Spider-Man' Is the Talk of Broadway, and a Punch Line, N.Y. TIMES, Feb. 6, 2011, at A1, available at <http://theater.nytimes.com/2011/02/06/theater/06spider.html> (noting that high ticket sales had been "fueled by the echo chamber of jokes, dinner party chatter and media attention" and that injuries to cast members "generated the bulk of the publicity for the show").

¹⁶ E.g., CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION 65 (2010) ("[T]he system of workers' compensation sets up predictably inadequate incentives to reduce risk. . . . OSHA [the Occupational Safety and Health Administration] enforcement is plagued by low penalties, rare inspections, and long delays, which combine to produce inadequate incentives to take precautions."); William A. Dreier, *Injuries to Production Workers: Reform of the Workers' Compensation Product Liability Interface*, 48 RUTGERS L. REV. 813, 815 (1996) (arguing that workers' compensation inadequately deals with injuries arising from defective equipment); Theodore F. Haas, *On Reintegrating Workers' Compensation and Employers' Liability*, 21 GA. L. REV. 843, 857 (1987) (arguing that workers' compensation results in both undercompensation and underdeterrence); Thomas J. Kniesner & John D. Leeth,

focuses specifically on workplace safety in the theatre industry, and uses *Spider-Man* as a case study to examine these legal and nonlegal systems. I argue that the injuries to *Spider-Man* cast members illustrate the inadequacy of the current legal and regulatory regime in deterring unsafe working conditions for Broadway actors and dancers in technically complex productions, assuming that future productions imitate *Spider-Man*'s technically ambitious approach. In its place, I advocate for reform to the workers' compensation system and tort law to allow more employees to bring tort suits against their employers. The problems I identify and the solutions I propose may be applicable to other industries; however, this Note makes no claims about workplace safety beyond the Broadway stage. In other arenas, certain factors may adjust for the underdeterrence of workers' compensation.¹⁷ Also, in other industries, a wage premium might be an appropriate way to deal with increased risk of injury across the board.¹⁸ This Note focuses only on the safety of Broadway performers.

In Part I, I detail *Spider-Man*'s accident history, describing the incidents and their reported causes. In Part II, I review the regimes that could have prevented these injuries but did not. I discuss workers' compensation, tort law, regulation, and the authority of the stage actors' union, as applied to the particulars of the *Spider-Man* saga. Through this discussion, I illustrate the inadequacy of the current system's incentives. In Part III, I analyze what actions, if any, could be taken to better incentivize safety precautions. I argue that the exclusivity of workers' compensation should be limited to allow for tort suits in cases of egregious employer behavior falling short of actual intentionality. In conclusion, I note that these changes would send an important message that our society values the safety of its actors.

Abolishing OSHA, REGULATION, no. 4, 1995, at 46, 46 ("OSHA can never be expected to be effective in promoting worker safety . . ."); Eston W. Orr, Jr., Note, *The Bargain Is No Longer Equal: State Legislative Efforts to Reduce Workers' Compensation Costs Have Impermissibly Shifted the Balance of the Quid Pro Quo in Favor of Employers*, 37 GA. L. REV. 325, 331 (2002) (advocating increasing employers' tort liability in response to workers' compensation reforms).

¹⁷ See *infra* Parts II.A, III.C (describing the underdeterrent effect of workers' compensation's exclusivity and partial compensation and arguing that additional deterrence through the tort system is necessary to incentivize producers to take adequate safety precautions).

¹⁸ See *infra* Part III.A (arguing that a wage premium is not an appropriate way to deal with the risk of injury in the theatre industry).

I

BACKGROUND: WHAT HAPPENED

In this Part, I chronologically detail the injuries to the *Spider-Man* cast, and I relate their reported causes. The timeline is striking due to the number of incidents and the fact that the incidents continued even after both a potentially deadly fall and the issuance of safety violation citations by state and federal regulators. The sheer number of “accidents” and the timeline suggest that something went wrong: namely, a failure of the legal and nonlegal regimes that should have induced safety precautions sufficient to prevent these injuries.

Rehearsals of the *Spider-Man* stunts began in or about July 2010.¹⁹ The first report of an injury appeared on the *New York Post*'s website on October 28th.²⁰ Earlier that day, then-director Julie Taymor presented a flying demonstration to ticket brokers and group sales agents.²¹ Actor Kevin Aubin performed the first stunt. As planned, the “sling-shot” harness he was wearing “catapult[ed]” Aubin from the back of the stage, through the air, and down to the front of the stage.²² Unfortunately, he landed so hard on his hands that he broke both his wrists.²³ After publication of the *Post* story, another actor revealed that he had broken both feet landing the same stunt just one month earlier.²⁴ These two accidents raised red flags, but they were not enough to alarm the Broadway community. Instead, several fellow performers downplayed the gravity of the accidents, noting that fairly minor injuries—such as sprains and broken bones—are not uncommon for dancers and performers.²⁵

One month later, at the first preview performance, actress Natalie Mendoza was struck in the head by a rope that held production

¹⁹ Patrick Healy, *Actor in ‘Spider-Man’ Musical Is Injured*, N.Y. TIMES ARTSBEAT (Oct. 29, 2010, 10:44 AM), <http://artsbeat.blogs.nytimes.com/2010/10/29/actor-in-spider-man-musical-is-injured> (“[T]he actors have been rehearsing the flying techniques since at least July.”).

²⁰ Michael Riedel, *‘Spider-Man’ Safety Scare*, N.Y. POST (Oct. 28, 2010, 11:06 PM), http://www.nypost.com/p/entertainment/theater/spider_man_safety_scare_Z4StFsGWzAGL5ByuimKGzL.

²¹ *Id.*; Healy, *supra* note 19.

²² Riedel, *supra* note 20; Healy, *supra* note 19.

²³ Riedel, *supra* note 20; Healy, *supra* note 19. Aubin was taken to the hospital, and the presentation continued. Riedel, *supra* note 20.

²⁴ Patrick Healy, *Another Actor Speaks of ‘Spider-Man’ Injuries*, N.Y. TIMES ARTSBEAT (Oct. 29, 2010, 4:10 PM), <http://artsbeat.blogs.nytimes.com/2010/10/29/another-actor-speaks-of-spider-man-injuries>. This actor spoke anonymously because of “career considerations.” *Id.*

²⁵ *Id.* (describing content of solicited and unsolicited e-mails from “Broadway dancers and performers”).

equipment.²⁶ After completing the show, Mendoza discovered she had a concussion.²⁷ Although her role involved an upside-down flying sequence, Mendoza performed again just three days later. She was then out of the show for two weeks, presumably due to her injury.²⁸

Three weeks after Mendoza's injury, actor/dancer Christopher Tierney fell twenty to thirty feet from a platform into the orchestra pit.²⁹ He was seriously injured, with four broken ribs, a broken arm and shoulder blade, a bruised lung, several fractured vertebrae, a hair-line skull fracture, and internal bleeding.³⁰ Tierney was choreographed to leap gracefully off the platform, suspended by a tether connected both to Tierney and to the stage. The tether, however, had not been attached properly, so when he jumped he found himself in free fall.³¹ This was later deemed to be the result of "human error"³²—meaning that a crew member attached the tether

²⁶ Healy, *supra* note 5.

²⁷ *Id.*

²⁸ Luchina Fisher, *What's Ailing Spider-Man the Musical?*, ABCNEWS (Dec. 21, 2010), <http://abcnews.go.com/Entertainment/fourth-accident-shut-spider-man-musical/story?id=12449961>; Patrick Healy, *A Lead Actress Departs 'Spider-Man: Turn Off the Dark,'* N.Y. TIMES ARTSBEAT (Dec. 28, 2010, 8:52 AM), <http://artsbeat.blogs.nytimes.com/2010/12/28/a-lead-actress-departs-spider-man-turn-off-the-dark> (noting that the producers and director knew about Mendoza's concussion and allowed her to perform, and adding that, "[b]y the end of the performance on the night she returned, Ms. Mendoza had a headache and nausea; she then took two weeks off to recover").

²⁹ Andrew Gans, *Spider-Man's Christopher Tierney Remains in Serious Condition*, PLAYBILL.COM (Dec. 22, 2010), <http://www.playbill.com/news/article/146065-Spider-Mans-Christopher-Tierney-Remains-in-Serious-Condition> [hereinafter Gans, *Tierney Remains in Serious Condition*] (reporting that Tierney fell twenty to thirty feet off a platform and into the pit); Andrew Gans, *Spider-Man's Christopher Tierney Discharged from Bellevue; Enters Rehab Facility*, PLAYBILL.COM (Dec. 30, 2010), <http://www.playbill.com/news/article/146219-Spider-Mans-Christopher-Tierney-Discharged-from-Bellevue-Enters-Rehab-Facility> [hereinafter Gans, *Tierney Discharged from Bellevue*] (stating that Tierney fell thirty feet); Healy, *supra* note 28 (stating that Tierney fell "more than 20 feet"); Dave Itzkoff & Hamilton Boardman, *'Spider-Man' Cancels Wednesday Matinee After Actor Is Injured*, N.Y. TIMES ARTSBEAT (Dec. 20, 2010, 11:47 PM), <http://artsbeat.blogs.nytimes.com/2010/12/20/performer-is-injured-during-spider-man-performance> (relaying audience descriptions of Tierney's fall into the orchestra pit).

³⁰ Gans, *Tierney Discharged from Bellevue*, *supra* note 29; Gans, *Tierney Remains in Serious Condition*, *supra* note 29; Healy, *supra* note 28; Itzkoff & Boardman, *supra* note 29. Tierney was admitted into intensive care, had back surgery, and then spent time in a rehabilitation facility. Andrew Gans, *Spider-Man's Christopher Tierney Will Likely Attend the New Julie Taymor Musical Jan. 7*, PLAYBILL.COM (Jan. 6, 2011), <http://www.playbill.com/news/article/146434-Spider-Mans-Christopher-Tierney-Will-Likely-Attend-the-New-Julie-Taymor-Musical-Jan-7>; Gans, *Tierney Discharged from Bellevue*, *supra* note 29.

³¹ See Tyler, *supra* note 1 (reporting on Tierney's "free-fall . . . into the pit").

³² See Andrew Gans, *Actors' Equity Says Spider-Man Injury Was "Human Error,"* PLAYBILL.COM (Dec. 21, 2010), <http://www.playbill.com/news/article/146044-Actors-Equity-Says-Spider-Man-Injury-Was-Human-Error> (quoting the Actors' Equity Association's third statement regarding the incident, released at 4:42 PM on December 21, the day after Tierney's fall).

improperly and then failed to adequately double-check the attachment.³³ The production closed for two days.³⁴

At this point, the Broadway community, including other *Spider-Man* cast members, began to object to the pattern of injuries.³⁵ Regulatory bodies also became involved: the stage actors' union, the Actors' Equity Association (AEA);³⁶ the New York State Department of Labor (NYDOL), which had already signed off on at least some of the safety procedures;³⁷ and the federal Occupational Safety and Health Administration (OSHA).³⁸ These groups

³³ See *infra* note 39 (explaining that, prior to implementation of additional safety measures after Tierney's accident, one stagehand was responsible for attaching and checking tethers and harnesses).

³⁴ See Patrick Healy, 'Spider-Man' Musical Will Resume Performances, N.Y. TIMES ARTSBEAT (Dec. 23, 2010, 5:40 PM), <http://artsbeat.blogs.nytimes.com/2010/12/23/spider-man-musical-will-resume-performances/> (reporting that *Spider-Man* performances would resume December 23).

³⁵ See Jacob Coakley, *Another Serious Actor Injury on Spider-Man: Turn Off the Dark; Agencies Agree on More Stringent Safeguards*, STAGE DIRECTIONS (Dec. 22, 2010, 11:45 AM), <http://www.stage-directions.com/theatre-buzz/2925-another-serious-actor-injury-on-spider-man-turn-off-the-dark-agencies-agree-on-more-stringent-safeguards.html> (noting online comments by Adam Pascal, Alice Ripley, "an anonymous 'theatrical insider,'" and others that criticized Taymor and the production); Patrick Healy, 'Spider-Man' Shows Are Canceled to Test a New Safety Plan, N.Y. TIMES, Dec. 23, 2010, at A25, available at <http://theater.nytimes.com/2010/12/23/theater/23spider.html> ("A few company members also questioned Ms. Taymor—and in some cases challenged her—about whether the show was as safe as it could be and whether crew members had had enough time to absorb technical changes, and actors enough time to run through them."). When the show re-opened, Mendoza did not perform; instead, she officially left the production soon thereafter. See Healy, *supra* note 28 (noting that Mendoza had not returned to the stage since Tierney's fall and that she would be leaving the production for good). She did not comment on her departure, pursuant to an exit agreement with the producers, but there is speculation that Tierney's injury was the impetus for Mendoza's departure. See Healy, *supra* note 15 (reporting that Mendoza "left the production in late December after signing a confidentiality agreement and being paid an undisclosed amount"); see also Healy, *supra* note 28 (noting that Mendoza was "shaken" by Tierney's accident).

³⁶ I am a member of the Actors' Equity Association (AEA).

³⁷ Patrick Healy, *Curtain to Rise on 'Spider-Man,'* N.Y. TIMES ARTSBEAT (Nov. 28, 2010, 2:12 PM), <http://artsbeat.blogs.nytimes.com/2010/11/28/curtain-to-rise-on-spider-man/> [hereinafter Healy, *Curtain to Rise*] (noting that the New York State Department of Labor (NYDOL) had approved the flying sequences and "had no issues with the safety of the flying maneuvers"). After Tierney's accident, the NYDOL spokesperson did not reveal whether the department had reviewed the tethering specifically. See Patrick Healy, 'Spider-Man' Matinee Is Canceled After Injury, N.Y. TIMES, Dec. 22, 2010, at C1, available at <http://theater.nytimes.com/2010/12/22/theater/22spider.html> (reporting that the NYDOL spokesperson "said he did not know" whether the tethering had been approved by the state inspectors).

³⁸ See Andrew Gans & Kenneth Jones, *Injury at Spider-Man Halts Dec. 20 Performance; Taymor Issues Statement*, PLAYBILL.COM (Dec. 21, 2010), <http://www.playbill.com/news/article/146016-Injury-at-Spider-Man-Halts-Dec-20-Performance-Taymor-Issues-Statement> ("OSHA, Actors [sic] Equity and the New York State Department of Labor have met with the *Spider-Man* company today to discuss additional safety protocols. It was

demanded that the producers develop new safety procedures for all flying stunts.³⁹

NYDOL and OSHA eventually cited *Spider-Man* for safety violations. NYDOL issued two violations, one involving Tierney's fall and one involving the "sling-shot" move that injured Aubin and the other actor.⁴⁰ NYDOL did not impose financial penalties; it merely required the production to continue the safety procedures put in place after Tierney's accident.⁴¹ Referred to as "redundancies," these procedures required that, for any stunt involving a harness and tether or rope, two stagehands as well as the actor performing the stunt independently verify that equipment is properly connected.⁴²

OSHA also identified violations. OSHA cited the producer for three "serious" workplace safety violations based on Tierney's fall, Mendoza's concussion, and the two sling-shot injuries.⁴³ In issuing these citations, OSHA found that "there [was] substantial probability that death or serious physical harm could result from a hazard about which the employer knew or should have known."⁴⁴ Specifically, OSHA found that the actors "were exposed to the hazards of falls or being struck during flying routines because of improperly adjusted or unsecured safety harnesses" and to the hazards of falls "from unguarded open-side floors that lacked fall protection."⁴⁵ OSHA also found that "the company failed to shield employees from being struck

agreed that these measures would be enacted immediately.'" (quoting statement by *Spider-Man* spokesperson)).

³⁹ See Gans, *supra* note 32 ("Further protocols are now being implemented, including redundancies recommended by Equity, the DOL and OSHA, to address this situation as well as other elements of the production. . . ." (quoting AEA statement)); Healy, *supra* note 35 (noting that the producers adopted "safety measures recommended by state and federal officials"). Originally, only one stagehand attached the devices and made sure they were properly rigged. Under the new plan, after one stagehand attaches the devices, a second crew member double-checks the attachments and verifies this to the stage manager before the stunt proceeds; additionally, the actor examines the attachments himself. See Patrick Healy, *New York Issues 2 Safety Violations For 'Spider-Man' Accidents in 2010*, N.Y. TIMES, Feb. 13, 2011, at A26 [hereinafter Healy, 2 *Safety Violations*], available at <http://www.nytimes.com/2011/02/13/nyregion/13spiderman.html> (discussing new safety procedures); Healy, *supra* note 35 (same).

⁴⁰ Healy, 2 *Safety Violations*, *supra* note 39.

⁴¹ *Id.*

⁴² *Id.*

⁴³ See Region 2 News Release: 11-236-NEW/BOS 2011-077, U.S. Dep't of Labor, Office of Pub. Affairs, U.S. Department of Labor's OSHA Cites *Spider-Man* Broadway Musical Production Company Following Injuries to Cast Members (Mar. 4, 2011) [hereinafter OSHA Regional News Release], available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=19362 (noting that violations were based on incidents that occurred on September 25, October 19, November 28, and December 20, 2010).

⁴⁴ *Id.*

⁴⁵ *Id.*

by moving overhead rigging components.”⁴⁶ These initial citations came with a \$12,600 total fine.⁴⁷ When the producers formally settled with OSHA, they paid a total fine of only \$10,630, for one “serious” violation and two “other” violations.⁴⁸

Only two weeks after OSHA issued its citations, actress T.V. Carpio was injured during an onstage fight scene, causing her to leave the show for approximately two weeks.⁴⁹ Eight months later, actor Matthew James Thomas was injured backstage.⁵⁰ The specific cause of Thomas’s injury has not been disclosed, but Thomas received stitches and was unable to complete the performance.⁵¹

Another performer, Richard Kobak announced in April 2012 that he too had been injured while performing in *Spider-Man* the prior year, resulting in holes in both of his knees, whiplash, a concussion, and herniated discs.⁵² Kobak filed a state court petition seeking discovery of documents relating to the stunt equipment and the computer system that operated the stunts from the *Spider-Man* producers.⁵³ Kobak had filled in for Tierney when Tierney was in the

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See UNITED STATES DEPARTMENT OF LABOR, OSHA, INSPECTION: 314883919 – 8 LEGGED PRODUCTIONS, LLC [hereinafter OSHA *Inspection Detail*], available at http://www.osha.gov/pls/imis/establishment.inspection_detail?id=314883919 (listing three “current” penalties of \$3250, \$4500, and \$2880 after “[f]ormal [s]ettlement,” adding up to \$10,630 for total “[c]urrent penalt[ies]”).

⁴⁹ See Patrick Healy, *Another ‘Spider-Man’ Actress Injured*, N.Y. TIMES ARTSBEAT (Mar. 22, 2011, 6:08 PM), <http://artsbeat.blogs.nytimes.com/2011/03/22/another-spider-man-actress-injured> (reporting that Carpio had been injured March 16); Andrew Gans & Kenneth Jones, *Following Injury, Spider-Man Actress T.V. Carpio Returns to Broadway Musical*, PLAYBILL.COM (Apr. 4, 2011), <http://www.playbill.com/news/article/149480-Following-Injury-Spider-Man-Actress-TV-Carpio>Returns-to-Broadway-Musical> (reporting that Carpio resumed performances April 1). OSHA issued its citations March 4. See OSHA Regional News Release, *supra* note 43. The producers did not release more specific information, but a source reported that Carpio might have suffered a neck injury. Healy, *supra*.

⁵⁰ Andrew Gans, *Spider-Man Star Matthew James Thomas Injured Backstage at the Foxwoods Theatre*, PLAYBILL.COM (Nov. 10, 2011), <http://www.playbill.com/news/article/156438-Spider-Man-Star-Matthew-James-Thomas-Injured-Backstage-at-the-Foxwoods-Theatre>.

⁵¹ *Id.*

⁵² Patrick Healy, *‘Spider-Man’ Stuntman, Citing Injuries, Starts Legal Action*, N.Y. TIMES ARTSBEAT (Apr. 5, 2012, 11:57 AM), <http://artsbeat.blogs.nytimes.com/2012/04/05/spider-man-stuntman-citing-injuries-starts-legal-action/>. Richard Kobak works under the stage name Joshua Kobak. Gordon Cox, *More Legal Action for ‘Spidey,’* VARIETY (Apr. 8, 2012, 1:44 PM), <http://www.variety.com/article/VR1118052385/>.

⁵³ See Petition ¶ 3, *Kobak v. 8 Legged Prods., LLC*, Index No. 151390/2012 (N.Y. Sup. Ct. Mar. 28, 2012) [hereinafter *Kobak Petition*], available at <http://iapps.courts.state.ny.us/iscroll/SQLData.jsp?IndexNo=151390-2012> (follow “Petition” hyperlink); Affidavit of Merit ¶¶ 22, 24–25, *Kobak v. 8 Legged Prods., LLC*, Index No. 151390/2012 (N.Y. Sup. Ct. Apr. 3, 2012) [hereinafter *Kobak Affidavit*], available at same (follow “Affidavit”

hospital.⁵⁴ Accordingly, Kobak asserted that the stunts had not been adjusted to account for his height and weight, which caused him to land on the stage “in a much harder and faster manner” than Tierney had.⁵⁵ Kobak stated that he had notified the stunt coordinator of the problem and requested that adjustments be made, but none were made until sixteen performances had passed, causing him to undergo “approximately seventy hard landings on stage.”⁵⁶ Kobak claimed that these seventy landings caused holes to develop in both his knees.⁵⁷

Kobak also asserted that he had suffered another injury several months later. Kobak had been using his own body strength to assist in a landing on a “perch,” rather than trusting the computer program to properly land him without human assistance.⁵⁸ Kobak asserted that when he “reluctantly agreed” to trust the program, as the stunt coordinator wished, it “pulled [him] straight into the wall striking [his] head and face into the wall.”⁵⁹ This allegedly caused Kobak’s herniated discs, whiplash, and concussion.⁶⁰

Finally, as this Note was being prepared for print in August 2013, an eighth serious injury was reported. Early reports indicate that dancer Daniel Curry’s leg or foot was caught in a hydraulic trap door or “stage lift” during a performance and was pinned there until his leg could be sawed out.⁶¹ His injury appears to be fairly severe: He was hospitalized, and an audience member stated that it appeared that the door had closed completely on Curry’s leg.⁶² The *New York Times* originally reported that two persons involved with the production

hyperlink from Apr. 3, 2012); Affirmation in Support ¶¶ 1–3, 6, *Kobak v. 8 Legged Prods., LLC*, Index No. 151390/2012 (N.Y. Sup. Ct. Apr. 3, 2012), *available at* same (follow “Affidavit or Affirmation in Support of Motion” hyperlink).

⁵⁴ *Kobak Affidavit*, *supra* note 53, ¶¶ 4–6.

⁵⁵ *Id.* ¶¶ 7–8.

⁵⁶ *Id.* ¶¶ 9–11.

⁵⁷ *Id.* ¶¶ 12–13.

⁵⁸ *Id.* ¶¶ 15–20.

⁵⁹ *Id.*

⁶⁰ *Id.* ¶ 21. Kobak recently sued both the company that supplied the stunt-related equipment and the company that was “responsible for the design, creation, manufacture, fabrication, installation, maintenance, repair and upkeep” of certain items. Tim Kenneally, ‘Spider-Man’ Stuntman Sues for \$6M over Injuries, *THE WRAP* (Feb. 18, 2013, 1:22 PM), <http://www.thewrap.com/culture/article/spider-man-stuntman-sues-6m-over-injuries-78126>.

⁶¹ See Adam Hetrick, *Following Injury of Actor Daniel Curry*, Spider-Man Turn Off the Dark Will Resume Aug. 16; *Actors’ Equity Responds*, *PLAYBILL.COM* (Aug. 16, 2013), <http://www.playbill.com/news/article/181203-Following-Injury-of-Actor-Daniel-Curry-Spider-Man-Turn-Off-the-Dark-Will-Resume-Aug-16-Actors-Equity-Responds> (reporting that “Curry’s foot was caught in one of the mechanical stage lifts”); Allan Kozinn, *Musical Resumes Shows After Injury*, *N.Y. TIMES*, Aug. 17, 2013, at C1, *available at* <http://theater.nytimes.com/2013/08/17/theater/spider-man-resumes-shows-after-injury.html> (reporting that Curry’s “leg became pinned in a trap door”).

⁶² Kozinn, *supra* note 61.

(speaking anonymously) told the *Times* that they believed the accident was due to either a malfunction of the computerized set or human error;⁶³ the following day, an official spokesperson for the production stated that no computer malfunction had occurred, and Curry's injury was caused solely by human error.⁶⁴ Perhaps more information will be revealed in the weeks or months to come.

Spider-Man's former director, Julie Taymor, has blamed the producers for the sling-shot injuries.⁶⁵ She suggested that they were caused by improper synchronization of two computer programs, one which controlled the set movements and one which ran the flying stunts.⁶⁶ Taymor stated that producers should have known the systems were not properly synchronized and the producers "failed to take appropriate steps to ensure the safety" of the systems.⁶⁷ "After the second accident, an encoder . . . finally was installed to prevent further accidents."⁶⁸ (Taymor attributed Tierney's injury to "a stage-hand [having] neglected to attach a safety tether" to Tierney, calling it an "undoubtedly unintentional . . . accident."⁶⁹)

If Taymor's claims are true, the injuries suffered by Aubin, the other (anonymous) actor injured performing the sling-shot feat, and Kobak do not seem to be true "accidents," but rather the result of gross negligence or recklessness on the part of the producers and/or the stunt coordinator. Tierney's fall, though likely an accident on the part of the stagehand, suggests that the desire of the creative team and producers to get a technically complex production up and running may have led to corner-cutting—such as assigning too many tasks per crew member—and ultimately, to the stagehand's error. At the very least, the sheer number of accidents indicate that *something* went

⁶³ *Dancer Hurt During 'Spider-Man' Performance*, N.Y. TIMES, Aug. 16, 2013, at A21, available at <http://artsbeat.blogs.nytimes.com/2013/08/15/dancer-injured-during-spider-man-performance>.

⁶⁴ Kozinn, *supra* note 61.

⁶⁵ Answer of Plaintiffs Julie Taymor and LOH, Inc. to Counterclaims of Defendants 8 Legged Productions, LLC, Goodbye Entertainment, LLC, Savior Productions, LLC, Michael Cohl and Jeremiah Harris ¶ 208, *Taymor v. 8 Legged Prods., LLC*, No. 1:11-cv-08002-KBF (S.D.N.Y. Mar. 2, 2012) [hereinafter *Taymor Answer*], available at <http://www.scribd.com/doc/83562006/taymor>; see *supra* notes 22–24 and accompanying text (describing "sling-shot" injuries).

⁶⁶ *Taymor Answer* ¶ 208, *supra* note 65.

⁶⁷ *Id.*; see also *id.* ¶ 207 ("Through no fault of Taymor's, the production suffered a series of setbacks, including accidents that injured performers.").

⁶⁸ *Id.* ¶ 208.

⁶⁹ *Id.* ¶¶ 208–09. Taymor did not acknowledge the injuries of Mendoza, Carpio, Thomas, or Kobak in this March 2, 2012 filing. See generally *id.* Kobak's alleged injury was not announced publicly until he filed a discovery request in New York State court in April 2012. See Healy, *supra* note 52.

wrong with this production⁷⁰—something that should have been, but was not, prevented by the laws in place to incentivize workplace safety precautions.

II

THE PROBLEM: FAILING SAFETY REGIMES

In Part I, I detailed the injuries that have plagued the cast of *Spider-Man*, and I suggested that they indicated a failing of the legal safety regime. Had a properly functioning deterrent been in place, they would not have been inevitable: Negligence and recklessness are avoidable by definition.⁷¹ In this Part, I examine the regimes that should have prevented these injuries, namely workers' compensation, tort law, regulation, and the presence of the actors' union. By examining how these systems interacted with the *Spider-Man* production, I argue that they are ill-situated to ensure sufficient safety precautions in today's theatre industry.

A. Workers' Compensation and Tort Law

1. Workers' Compensation

All fifty states have some form of workers' compensation statute.⁷² The state laws vary, but there is a general framework: Employees with injuries "covered" by the regime are guaranteed some—but not full—relatively quick compensation without having to prove employer fault, which would be required to recover from the

⁷⁰ Because of its recent occurrence and the limited amount of information available, I will not draw conclusions regarding Curry's injury in this Note.

⁷¹ Recklessness is "[c]onduct whereby the actor does not desire harmful consequence but nonetheless foresees the possibility and consciously takes the risk." BLACK'S LAW DICTIONARY 1385 (9th ed. 2009). Since the reckless party "foresees the possibility," it necessarily follows that she is able to avoid taking the risk from which harm follows. Negligence may not be avoidable in a particular instance, but the amount of negligence in society generally is minimized by the negligence standard and its incentive effect through the tort system. *See, e.g.,* Herring v. United States, 555 U.S. 135, 153 (2009) (Ginsburg, J., dissenting) (noting that "a foundational premise of tort law [is] that liability for negligence, *i.e.*, lack of due care, creates an incentive to act with greater care"); *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 848 (E.D.N.Y. 1984) (Weinstein, C.J.) ("One of the purposes of imposing tort liability is the 'strong incentive' that the imposition provides 'to prevent the occurrence of future harm.'" (quoting *In re Agent Orange Prod. Liab. Litig.*, 506 F. Supp. 762, 793 (E.D.N.Y. 1980))); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 4 (5th ed. 1984) (noting that an important purpose of tort liability is to incentivize potential defendants to prevent harm).

⁷² *See* Arthur Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 233 (1952) ("By 1920 all but eight states had adopted Compensation Acts, and on January 1, 1949, the last state, Mississippi, came under the system.").

employer in a tort suit.⁷³ Most states require that employers pay for medical treatment needed as a result of the injury⁷⁴ and also provide cash compensation. This compensation is typically a weekly percentage of wages during a period of temporary inability to work and scheduled benefits to compensate for permanent disability.⁷⁵ New York's statute is typical: The employer must pay for needed medical treatment,⁷⁶ and while the employee is temporarily unable to work, she will be compensated at two-thirds her "average weekly wages,"⁷⁷ subject to a maximum weekly benefit cap that was \$772.96 in 2012.⁷⁸

The workers' compensation system does not incentivize employers to take sufficient safety precautions.⁷⁹ Workers' compensation was not designed to be a deterrent; rather, it was intended to compensate injured workers (up to a point) so that they would not become destitute.⁸⁰ Notably, workers' compensation operates without regard to fault, such that an employer must compensate an employee with a "covered" injury irrespective of whether the injury was due to a true accident or, instead, due to the employer's negligence or

⁷³ See MARION G. CRAIN ET AL., *WORK LAW: CASES AND MATERIALS* 953 (2d ed. 2010) (discussing prompt, but limited, compensation under the New York Workmen's Compensation Law). A "covered" injury is one "arising out of and in the course of employment." *Id.* at 965; see also, e.g., N.Y. WORKERS' COMP. LAW § 10 (McKinney Supp. 2013) (limiting liability to those injuries "arising out of and [happening] in the course of the employment").

⁷⁴ CRAIN ET AL., *supra* note 73, at 953–54; see also, e.g., N.Y. WORKERS' COMP. LAW § 13 (McKinney Supp. 2013) (requiring employer to "promptly provide" medical and similar treatment for as long "as the nature of the injury or the process of recovery may require").

⁷⁵ CRAIN ET AL., *supra* note 73, at 954.

⁷⁶ N.Y. WORKERS' COMP. LAW § 13 (McKinney Supp. 2013).

⁷⁷ N.Y. WORKERS' COMP. LAW § 15 (McKinney Supp. 2013). In New York, an employee who suffers permanent total disability will also receive two-thirds her average weekly wages going forward. *Id.* Temporary partial disability is compensated at two-thirds the difference between the employee's average weekly wages prior to the accident and her "wage earning capacity after the accident"; permanent partial disability is compensated via a schedule under which distinct losses are assessed at a certain number of weeks of two-thirds the employee's average weekly wages. For instance, a lost arm is "worth" 312 weeks of two-thirds the weekly wage; a lost second finger is "worth" thirty weeks of the same. *Id.* "[A]verage weekly wages" are defined in section 14. Though the definition is rather technical, the colloquial meaning of the term is generally applicable. See N.Y. WORKERS' COMP. LAW § 14 (McKinney Supp. 2013) (explaining how to determine "average weekly wages" in various contexts).

⁷⁸ See *Workers' Compensation: Benefits, Coverage, and Costs, 2010*, NAT'L ACAD. OF SOC. INS., 92 tbl.1 (Aug. 2012), http://www.nasi.org/sites/default/files/research/NASL_Workers_Comp_2010.pdf (listing New York benefits); *id.* at 87 (explaining that data in table represent state laws as of January 2012).

⁷⁹ See Larson, *supra* note 72, at 212–13 (characterizing the workers' compensation regime as one of compensation, as distinguished from the tort system).

⁸⁰ See *id.* at 213 ("[T]he amount of compensation awarded may be expected to go not much higher than is necessary to keep the worker from destitution.").

recklessness.⁸¹ These laws were thus based on a need for certain compensation, not a need for deterrence.⁸² One commentator has argued that the workers' compensation system ultimately rests the costs of workplace injuries on the consumer, suggesting that the system does little to induce employer precautions.⁸³

One might argue that, because these costs can be passed along to the consumer, market competition should suffice to create the desired level of deterrence. However, Broadway productions do not appear to be competing with each other on a lowest-price basis.⁸⁴ Moreover, even if price competition is a concern, the failure of workers' compensation to fully compensate for injuries⁸⁵ means that any such effect will still underdeter.⁸⁶ Consider the cost of an orchestra-level ticket to *Spider-Man*: On October 5, 2013, a *Spider-Man* orchestra seat cost between \$158.75 for a "full price" ticket and \$325 for a "VIP" seat

⁸¹ See *supra* note 73 and accompanying text (describing workers' compensation no-fault system).

⁸² See Larson, *supra* note 72, at 209 ("The ultimate social philosophy behind compensation liability is belief in the wisdom of providing . . . financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obliged to provide in any case in some less satisfactory form . . .").

⁸³ *Id.* at 206 ("[T]he employer is required to secure his liability through private insurance, state fund insurance in some states, or 'self-insurance'; thus the burden of compensation liability does not remain upon the employer but passes to the consumer, since compensation premiums . . . will be reflected in the price of the product."); *id.* at 215 ("In compensation theory, liability is not supposed to hurt the employer as it helps the employee, since the loss is normally passed on to the consumer.").

⁸⁴ Instead, as one show's ticket prices increase, other shows' ticket prices tend to increase as well. Between 2008–09 and 2012–13, average Broadway ticket prices increased by over 20%, from \$77.66 to \$98.42. See *Broadway Season Statistics at a Glance*, BROADWAY LEAGUE, http://www.broadwayleague.com/editor_files/broadway_statistics_at_a_glance.pdf (last visited July 21, 2013). In the week ending May 12, 2013, nine Broadway shows had an average ticket sale of over \$100, compared to only one in the same week of 2008. *Compare Broadway Grosses Week Ending 2008-05-11*, PLAYBILL VAULT, <http://www.playbillvault.com/Grosses/Week/2008-05-11> (last visited June 5, 2013), *with Broadway Grosses Week Ending 2013-05-12*, PLAYBILL VAULT, <http://www.playbillvault.com/Grosses/Week/2013-05-12> (last visited June 5, 2013). See also Pascal Courty, *An Economic Guide to Ticket Pricing in the Entertainment Industry*, 66 RECHERCHES ECONOMIQUES DE LOUVAIN/LOUVAIN ECON. REV. 167, 172 (2000) (noting the "price stickiness" in the entertainment industries generally, meaning that less popular productions generally do not lower prices to compete, nor do highly successful shows raise ticket prices).

⁸⁵ See *supra* notes 73–80 and accompanying text (explaining workers' compensation's partial compensatory structure).

⁸⁶ See Ariel Porat, *Misalignments in Tort Law*, 121 YALE L.J. 82, 135 tbl.1 (2011) (illustrating that regardless of whether the standard of care is set too low, too high, or efficiently, damages that are too low will underdeter); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 359 (2003) ("Ideally, from a deterrence perspective the law should require a defendant to internalize the full expected cost of its conduct to others. In so doing, the law gives the defendant, and others like it, appropriate incentives to avoid such conduct in the future.").

including a backstage tour.⁸⁷ (The mid-range “landing zone” cost \$261.50.)⁸⁸ Additionally, during the week ending May 12, 2013, *Spider-Man* grossed over \$1 million in ticket sales.⁸⁹ Meanwhile, the current weekly minimum salary for Broadway actors is \$1754.⁹⁰ Most of the injured *Spider-Man* performers would also qualify for a \$20/week “extraordinary risk” payment, for a total weekly minimum of \$1774.⁹¹ Taking that number as the “average weekly wages” for the purpose of the workers’ compensation calculation, if there were no cap on benefits, the producers would be required to pay \$1183 per week (two-thirds of \$1774) to a performer temporarily disabled and unable to work due to her show-related injury for the duration of the disability.⁹² And due to benefit caps, the actual payment would be only \$772.96 per week. This is less than 0.08% of a \$1 million weekly gross, and less than three “landing zone” tickets.⁹³ It is reasonable to assume that this level of compensation is not sufficiently high to incentivize the *Spider-Man* producers to change their conduct.

⁸⁷ I found these prices on the orchestra seating map for *Spider-Man*’s 8:00 PM show on Saturday, October 5, 2013, on the Ticketmaster website, by placing the cursor over various available seats. October 5, 2013 Interactive Seat Map for *Spider-Man: Turn Off the Dark*, TICKETMASTER, <http://www.ticketmaster.com/event/03004A3EE9FCDE3E> (last visited July 11, 2013).

⁸⁸ *Id.*

⁸⁹ NYC Grosses, BROADWAY LEAGUE, http://www.broadwayleague.com/index.php?url_identificier=nyc-grosses-11&gross=38213 (last visited June 5, 2013).

⁹⁰ See ACTORS’ EQUITY ASS’N & DISNEY THEATRICAL PRODS., EQUITY/DTP PRODUCTION CONTRACT ¶ 63(A)(2) (Sept. 26, 2011) [hereinafter EQUITY/DTP PRODUCTION CONTRACT] available at [http://www.actorsequity.org/docs/rulebooks/Production_\(Disney\)_Rulebook_2011-2015.pdf](http://www.actorsequity.org/docs/rulebooks/Production_(Disney)_Rulebook_2011-2015.pdf) (setting forth minimum Actor Performance Salary effective 10/1/12); ACTORS’ EQUITY ASS’N & BROADWAY LEAGUE, EQUITY/LEAGUE PRODUCTION CONTRACT ¶ 63(A)(2) (Sept. 26, 2011) [hereinafter EQUITY/LEAGUE PRODUCTION CONTRACT], available at http://www.actorsequity.org/docs/rulebooks/Production_Rulebook_League_11-15.pdf (same). These two contracts govern all commercial Broadway productions, including *Spider-Man*, which is governed specifically by the Equity/League Production Contract. See *infra* note 148.

⁹¹ EQUITY/DTP PRODUCTION CONTRACT, *supra* note 90, ¶ 63(E)(1); EQUITY/LEAGUE PRODUCTION CONTRACT, *supra* note 90, ¶ 63(E)(1). It is possible that some of these actors may have been paid above minimum, but I use these numbers both because they are available and because many actors are paid at the minimum rate.

⁹² See *supra* note 77 and accompanying text (explaining that New York statute provides for two-thirds replacement wages in the case of temporary permanent disability). The *Spider-Man* cast members likely were kept on salary while they recovered from their injuries, rather than being paid at the two-thirds rate via workers’ compensation. See Healy, *supra* note 19 (reporting that a spokesperson from *Spider-Man* had stated, after Aubin’s accident, that Aubin “is on salary with the show, so no workman’s compensation is necessary”).

⁹³ See *supra* text accompanying notes 87–88 (listing orchestra ticket prices). This payment is also less than 0.28% to 0.77% of the \$100,000 to \$300,000 weekly net income that was reported around November 2011. See Healy, *supra* note 2 (reporting the production’s net income).

2. *Exclusivity*

The workers' compensation system, while failing to push employers to take safety precautions,⁹⁴ also prevents employees from bringing a negligence claim against their employers. The exclusivity of workers' compensation remedies provides a complete defense to any tort suit filed against the employer so long as the employee's injury is "covered" by worker's compensation—an injury that "arises out of and in the course of employment"⁹⁵—unless the injury was the result of an intentional tort.⁹⁶ From an economic perspective, the tort system is intended to encourage optimal precautions through the negligence standard.⁹⁷ By eliminating this mechanism for covered injuries, workers' compensation statutes have eliminated this deterrent in that context.

In New York, as in many states, the courts have created an intentional tort exception to the exclusivity bar.⁹⁸ Most courts that have created this exception have reasoned that, because workers' compensation statutes mandate coverage of "accidental" injuries, and "[b]ecause intentional torts are not accidental, . . . the exclusivity bar

⁹⁴ See *supra* notes 79–92 and accompanying text (discussing workers' compensation's focus on compensation, not deterrence).

⁹⁵ CRAIN ET AL., *supra* note 73, at 965; see also, e.g., N.Y. WORKERS' COMP. LAW § 10 (McKinney Supp. 2013) (employing the "arising out of" language).

⁹⁶ See, e.g., N.Y. WORKERS' COMP. LAW § 11 (McKinney Supp. 2013) ("The liability of an employer [under the workers' compensation law] shall be exclusive and in place of any other liability whatsoever . . ."); see also Martin Minkowitz, Practice Commentaries, in 64 McKinney's Consolidated Laws of New York Annotated 443, 446 (2005) ("Another exception to the exclusive liability rule is where the injury results from an intentional tort perpetrated by or at the direction of the employer. . . . The employee must prove that the employer's acts were deliberate and intentional, not merely reckless.").

⁹⁷ See *supra* note 71; see also WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 10 (1987) (explaining that tort judgments deter future misconduct); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1828 (1997) (arguing that the primary goal of negligence law is to prevent injuries through deterrence and that its secondary goal is to compensate for injuries that are not prevented). *But see* Mark Geistfeld, *Negligence, Compensation, and the Coherence of Tort Law*, 91 GEO. L.J. 585, 587 (2003) (arguing that a compensation rationale more coherently explains tort law as a whole).

⁹⁸ See *Lavin v. Goldberg Bldg. Material Corp.*, 87 N.Y.S.2d 90, 93–94 (App. Div. 1949) ("The Workmen's Compensation Law deals not with intentional wrongs but only with accidental injuries. . . . It would be abhorrent to our sense of justice to hold that an employer may assault his employee and then compel the injured workman to accept the meagre allowance provided by the Workmen's Compensation Law."); *De Coigne v. Ludlum Steel Co.*, 297 N.Y.S. 636, 641 (App. Div. 1937) (finding action against employer for intentional poisoning of employee not barred by workers' compensation exclusivity); CRAIN ET AL., *supra* note 73, at 980–81 ("Most states recognize an exception to exclusivity for intentional torts. In some states, the exception for intentional torts is spelled out in the statute. In others, the exception is created judicially.").

does not apply.”⁹⁹ Some states have applied a “substantial certainty” standard to the intentional tort exception, rejecting a test of actual intent because it “provides employers virtually absolute immunity” and “encourages an employer, motivated by economic gain, to knowingly subject a worker to injury in the name of profit-making.”¹⁰⁰

New York, however, has rejected the “substantial certainty” of injury or death test. In New York, “[i]t is not enough that an injury is ‘substantially certain’ to occur in order to hold an employer liable” in tort; rather, an employee must prove “an intentional or deliberate act by the employer directed at causing harm to [the] particular employee” to overcome the exclusivity bar.¹⁰¹ For example, New York courts have found the intentional tort exception met where a supervisor intentionally assaulted the plaintiff-employee,¹⁰² where an employer’s officers had the plaintiff-employee poisoned,¹⁰³ and where an employer affirmatively prevented a third party from administering needed CPR to the plaintiff’s decedent.¹⁰⁴

Conversely, in scenarios in which the employer has directed an employee to engage in an activity that the employer knows is extremely likely to cause injury, New York courts find only gross negligence or recklessness—not intent—and dismiss tort suits under the exclusivity doctrine.¹⁰⁵ In *Acevedo v. Consolidated Edison Co. of New York*, for example, the plaintiff-employees who sought medical monitoring due to their exposure to asbestos while cleaning up the site of a steam pipe explosion that spewed toxic friable asbestos were

⁹⁹ CRAIN ET AL., *supra* note 73, at 981. This exception is very narrow. *See id.* at 981 (noting that “[e]ven cases involving egregious employer conduct, such as knowingly ordering employees to perform extremely dangerous work, willfully violating safety statutes, or deliberating removing safety devices, have been held to fall within the exclusive remedy rule”).

¹⁰⁰ *Delgado v. Phelps Dodge Chino, Inc.*, 34 P.3d 1148, 1152, 1154 (N.M. 2001); *see, e.g.*, *Woodson v. Rowland*, 407 S.E.2d 222, 226–30 (N.C. 1991) (deciding to implement substantial certainty standard for similar reasons); *Millison v. E.I. du Pont de Nemours & Co.*, 501 A.2d 505, 514 (N.J. 1985) (“In adopting a ‘substantial certainty’ standard, we acknowledge that every undertaking, particularly certain business judgments, involve some risk, but that willful employer misconduct was not meant to go undeterred.”).

¹⁰¹ *Crespi v. Ihrig*, 472 N.Y.S.2d 324, 324–25 (App. Div. 1984) (reversing lower court’s determination that tort liability “could be predicated upon a finding that [a co-employee] displayed . . . psychopathic symptoms during his employment to cause [the employer] to be reasonably certain that [the co-employee] would assault the plaintiff”), *aff’d*, 469 N.E.2d 526 (N.Y. 1984).

¹⁰² *Lavin*, 87 N.Y.S.2d at 92–93.

¹⁰³ *De Coigne*, 297 N.Y.S. at 641.

¹⁰⁴ *Barnes v. Dungan*, 690 N.Y.S.2d 338, 340 (App. Div. 1999).

¹⁰⁵ *See, e.g.*, *Acevedo v. Consol. Edison Co. of N.Y.*, 596 N.Y.S.2d 68, 71 (App. Div. 1993); *Ferrara v. American ACMI*, 505 N.Y.S.2d 964, 965 (App. Div. 1986); *Orzechowski v. Warner-Lambert Co.*, 460 N.Y.S.2d 64, 66 (App. Div. 1983); *Finch v. Swingly*, 348 N.Y.S.2d 266, 267–68 (App. Div. 1973).

unable to take advantage of the intentional tort exception.¹⁰⁶ The plaintiffs brought claims for battery and intentional infliction of emotional distress, alleging that the defendant had ordered them to clean the debris without (1) informing them of any potential danger associated with exposure to the asbestos or (2) providing protective clothing or equipment.¹⁰⁷ The plaintiffs' allegations, however, were insufficient to demonstrate that Con Ed's conduct met the required standard of intentionality.¹⁰⁸

In *Finch v. Swingly*, the plaintiff was injured when, while working under an automobile hoist, the lift collapsed.¹⁰⁹ The plaintiff argued that the intent standard for a tort suit was met; he alleged that the employer had acted willfully and wantonly in directing him to use a hoist that the employer knew was defective and would likely fail, without warning the employee of the defect.¹¹⁰ But the court found that to allege an intentional tort, the employee would have to claim that the employer had intentionally caused the hoist to collapse on the employee.¹¹¹

Thus, under New York law, it would be virtually impossible for any of the injured *Spider-Man* actors to sue the producers in tort. Kobak, for instance, would have to allege that the stunt coordinator's and/or producers' failure to make necessary adjustments to the computer program was not the result of laziness, recklessness, or an economic desire not to cancel any additional performances, but rather because they intended to injure him in the process. He would have to allege that the coordinator had actually intended for Kobak to collide with the wall.¹¹² Tierney would have to allege that the crew member had actually intended that he fall off the platform, or, at least, that whoever established the process for checking safety tethers had actually intended that *Spider-Man*'s tether would unfasten and that the actor in the role would be injured.¹¹³ Aubin and the other sling-shot performer would have to allege that the producers failed to

¹⁰⁶ 596 N.Y.S.2d at 69–71.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 71 (“While the conduct alleged might rise to the level of gross negligence, it cannot be said to meet the necessary threshold of a willful intent to harm the particular employee-plaintiffs.”).

¹⁰⁹ 348 N.Y.S.2d at 267.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 268 (“In order to constitute an intentional tort, the conduct must be engaged in with the desire to bring about the consequences of the act. . . . The complaint cannot be interpreted to allege that the defendant intentionally caused the lift to collapse on plaintiff.”).

¹¹² See *supra* notes 52–60 and accompanying text (describing Kobak's claims).

¹¹³ See *supra* notes 29–33, 39, 69 and accompanying text (describing cause of Tierney's injuries).

synchronize the computer systems because they intended for an actor performing the stunt to be injured.¹¹⁴ Mendoza would have to allege that the producers “failed to shield employees from being struck by moving overhead rigging components”¹¹⁵ because they hoped someone would be hit. As demonstrated, a tort claim by these actors would be impossible.

B. Regulation

Two government agencies are involved with regulating safety in New York theatres: the federal Occupational Health and Safety Administration and the New York State Department of Labor.

1. OSHA

OSHA is charged with overseeing the safety of all the nation’s private workplaces—today, over eight million sites.¹¹⁶ In New York, the state itself exercises jurisdiction over all public sector employers through its Public Employee Safety and Health Bureau, but OSHA continues to regulate all private sector workplaces in the state.¹¹⁷

Commentators overwhelmingly criticize OSHA as ineffective.¹¹⁸ A major problem is that OSHA lacks sufficient resources to carry out its mission.¹¹⁹ First, promulgating regulations is incredibly onerous—it

¹¹⁴ See *supra* notes 23–24 and accompanying text (explaining sling-shot injuries); notes 65–68 and accompanying text (describing Taymor’s contention that the producers were to blame for these accidents).

¹¹⁵ OSHA Regional News Release, *supra* note 43; see *supra* notes 26–28 and accompanying text (describing Mendoza’s concussion); *supra* notes 43–46 and accompanying text (noting OSHA citations).

¹¹⁶ CRAIN ET AL., *supra* note 73, at 1000–01.

¹¹⁷ See U.S. DEP’T OF LABOR, *New York Plan*, OSHA, http://www.osha.gov/dcspp/osp/stateprogs/new_york.html (last visited June 5, 2013) (noting that OSHA “maintains jurisdiction over all private sector workplaces” in New York).

¹¹⁸ See CRAIN ET AL., *supra* note 73, at 1000 (“Today OSHA is perhaps best known for being one of the most criticized of all federal agencies, certainly the most criticized agency that regulates the workplace.”); ESTLUND, *supra* note 16, at 65 (“OSHA’s preventive regime has not picked up the slack.”); Kniesner & Leeth, *supra* note 16, at 46 (concluding that “OSHA can never be expected to be effective in promoting worker safety; that an expanded OSHA will cost jobs as well as taxpayer dollars; and that other means currently keep workplace deaths and injuries low and can reduce them even more”); Lily Whiteman, *Ignored Lessons from Petrochemical, Construction, and Grain Handling Disasters: The Case for a National Industrial Safety Board*, 2 WIS. ENVTL. L.J. 47, 50 (1995) (arguing that OSHA has failed to provide safe working conditions in the petrochemical, construction, and grain handling industries); see also Rena Steinzor, *The Truth About Regulation in America*, 5 HARV. L. & POL’Y REV. 323, 327 (2011) (noting that “[p]rogressives and conservatives alike criticize the protector agencies for their ineptitude”).

¹¹⁹ See CRAIN ET AL., *supra* note 73, at 1001 (noting that, with over eight million workplaces and approximately 1000 inspectors, it would take between 70 and 100 years for OSHA to inspect all workplaces under its jurisdiction); ESTLUND, *supra* note 16, at 65 (“OSHA is notoriously hobbled by a lack of inspectors and resources.”); see also *Death on*

takes, on average, six years to promulgate a new standard.¹²⁰ As a result, OSHA generally relies on the “general duty clause” of the Occupational Health and Safety Act (OSH Act), which requires an employer to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employee.”¹²¹ OSHA has no theatre-industry-specific standards,¹²² and it relied in part on the general duty clause when issuing *Spider-Man’s* citations.¹²³

Second, OSHA has difficulty carrying out inspections, due to both a lack of resources and the need for an administrative warrant. Some empirical evidence indicates that OSHA inspections do have an impact on injury rates at inspected businesses; however, this effect does not extend to employers who do not face personal inspection.¹²⁴

the Job: The Toll of Neglect, AFL-CIO 1 (Apr. 2012), <http://www.aflcio.org/content/download/22781/259751/DOTJ2012nobugFINAL.pdf> [hereinafter AFL-CIO](reporting that, with 892 federal OSHA inspectors and 1286 state inspectors, “[f]ederal OSHA can inspect workplaces on average once every 131 years; the state OSHA plans can inspect them once every 73 years”).

¹²⁰ CRAIN ET AL., *supra* note 73, at 1004.

¹²¹ 29 U.S.C. § 654(a)(1) (2006) (general duty clause). Congress enacted the Occupational Safety and Health Act (the OSH Act) in 1970; the OSH Act created OSHA and delegated to it power to promulgate health and safety standards, and to enforce the OSH Act’s central requirement that employers maintain safe workplaces. CRAIN ET AL., *supra* note 73, at 1000, 1004–07.

¹²² For examples of industry-specific standards, see 29 C.F.R. §§ 1910.261–272 (2012) (Special Industries Standards); *id.* §§ 1915–1918 (Maritime Standards); *id.* § 1926 (Construction Standards); *id.* § 1928 (Agriculture Standards).

¹²³ See Violation No. 314883919, Citation 1001, DEPARTMENT OF LABOR, OSHA (Mar. 4, 2011), http://www.osha.gov/pls/imis/establishment.violation_detail?id=314883919&citation_id=01001 (citing general duty clause); *supra* note 44 and accompanying text (using language from general duty clause in explaining citation). OSHA also found violations of standard 1910.132, “Personal Protective Equipment: General requirements,” and standard 1910.23, “Walking-Working Surfaces: Guarding floor and wall openings and holes.” See Violation No. 314883919, Citation 1003, DEPARTMENT OF LABOR, OSHA (Mar. 4, 2011), http://www.osha.gov/pls/imis/establishment.violation_detail?id=314883919&citation_id=01003 (citing Standard 1910.132); Violation No. 314883919, Citation 1002, DEPARTMENT OF LABOR, OSHA (Mar. 4, 2011), http://www.osha.gov/pls/imis/establishment.violation_detail?id=314883919&citation_id=01002 (citing Standard 1910.23). For the full names of the standards, see 29 C.F.R. § 1910.132 (2012) (personal protective equipment, general requirements); 29 C.F.R. § 1910.23 (2012) (guarding floor and wall openings and holes).

¹²⁴ See Thomas O. McGarity & Sidney A. Shapiro, *OSHA’s Critics and Regulatory Reform*, 31 WAKE FOREST L. REV. 587, 597 (1996) (citing studies that show decreases in injuries at inspected businesses but much lower aggregate decreases industry-wide, and concluding that there is little spillover effect of OSHA visits on uninspected businesses). *But see* John Hood, *OSHA’s Trivial Pursuit: In Workplace Safety, Business Outperforms the Regulators*, 73 POL’Y REV. 59, 62 (1995) (arguing that OSHA plays “little to no role in business decisions about safety”); Kniesner & Leeth, *supra* note 16, at 50 (concluding that OSHA was likely responsible for less than a four-to-five percent decrease in total workplace injuries between 1970 and 1993).

OSHA is responsible for over eight million workplaces and has only approximately 1000 inspectors; accordingly, it would take between 70 and 100 years for OSHA to inspect all workplaces under its jurisdiction.¹²⁵ Additionally, although the OSH Act was written to permit surprise, warrantless inspections, the Supreme Court has held that the Fourth Amendment requires OSHA to obtain a warrant to conduct a search absent employer consent.¹²⁶ Due to these factors, in 1991, OSHA inspected only 42,000 of the five million sites over which it had jurisdiction.¹²⁷ Thus, most employers will likely assume they will never be inspected and act accordingly.

Although NYDOL did inspect the *Spider-Man* workplace prior to most of these incidents (though not prior to the sling-shot injuries), OSHA's inspections came only after, and as a result of, Tierney's accident.¹²⁸ After Tierney's injury, both NYDOL and OSHA required the producers to implement new procedures to prevent another injury like Tierney's.¹²⁹ However, even after these citations, new procedures, and NYDOL's presumably continued inspections,¹³⁰ other accidents and injuries continued to occur.¹³¹ The possibility of inspection—even for

¹²⁵ CRAIN ET AL., *supra* note 73, at 1001; *see also* AFL-CIO, *supra* note 119, at 1 (noting that, with 892 federal OSHA inspectors and 1286 state inspectors, OSHA's capacity to inspect is limited).

¹²⁶ *See* *Marshall v. Barlow's Inc.*, 436 U.S. 307, 311 (1978) (holding provision of OSHA authorizing warrantless inspection of workplaces unconstitutional). “[W]arrants are routinely granted where there is ‘specific evidence of an existing violation’ or where the inspection is conducted pursuant to a valid regulation (such as for a programmed inspection).” CRAIN ET AL., *supra* note 73, at 1006 (quoting *Marshall*, 436 U.S. at 320); *see also* *Marshall*, 436 U.S. at 334 (Stevens, J., dissenting) (arguing that the administrative warrant requirement is a “formalit[y] which merely place[s] an additional strain on already over-taxed federal resources” and “adds little in the way of protection [to employers] to that already provided under the existing enforcement scheme”).

¹²⁷ McGarity & Shapiro, *supra* note 124, at 597.

¹²⁸ *Supra* text accompanying notes 29–34, 38–48 (describing how OSHA became involved after Tierney was injured). Moreover, the “sling-shot” injuries occurred before even state regulators visited the production in November 2010. *See* Patrick Healy, *Inspectors Haven't Seen Enough Flying for 'Spider-Man' Safety to Pass Muster*, N.Y. TIMES ARTSBEAT (Nov. 3, 2010, 6:13 PM), <http://artsbeat.blogs.nytimes.com/2010/11/03/inspectors-havent-seen-enough-flying-for-spider-man-safety-to-pass-muster/> (explaining that inspectors had visited in November); *supra* notes 20–24 (describing injuries that had occurred in September and October); *see also* OSHA *Inspection Detail*, *supra* note 48 (categorizing federal OSHA inspection as “referral” type).

¹²⁹ *Supra* notes 39–40 and accompanying text.

¹³⁰ *See* Healy, 2 *Safety Violations*, *supra* note 39 (“State safety officials would perform unannounced inspections of the production for the foreseeable future, as they had this winter, the official said.”).

¹³¹ *See supra* text accompanying notes 49–60 (describing injuries to Carpio, Thomas, and Kobak, which occurred after issuance of citations). Kobak complained of incidents both in December 2010 (after Tierney's fall and after implementation of new safety measures, but prior to issuance of citations) and in April 2011 (after issuance of citations). Kobak Affidavit, *supra* note 53, ¶¶ 4–21.

a production that had already been inspected numerous times, and even for a production that had been cited for violations—was still insufficient to prevent further incidents.

A third problem is that OSHA imposes only modest penalties when it does find a violation.¹³² In this case, OSHA's three citations came with only a \$12,600 proposed fine,¹³³ and the producers eventually paid only \$10,630.¹³⁴ *Spider-Man* was capitalized for \$75 million.¹³⁵ It is very unlikely that a fine constituting 0.014% (\$10,630) or even 0.017% (\$12,600) of the show's capitalization would in any way affect the producers' behavior.¹³⁶

2. State Law

The NYDOL Commissioner has authority under state law to adopt health and safety standards to the extent that no federal OSHA standard is applicable.¹³⁷ Additionally, a specific provision in the state's Arts and Cultural Affairs Law requires certain safety devices for any aerial public performance.¹³⁸ Under this statute and the

¹³² The OSH Act authorizes a maximum penalty of \$7000 for each "serious" or "not serious" violation. 29 U.S.C. § 666(b)–(c) (2006). A willful or repeated violation increases the maximum penalty to \$70,000. *Id.* § 666(a). But penalties actually imposed are often quite less than the statutory maximum. For instance, OSHA's three "serious" citations to *Spider-Man* came with only a combined \$12,600 proposed fine, and the producers eventually paid only \$10,630. OSHA Regional News Release, *supra* note 43 (describing proposed fine); OSHA *Inspection Detail*, *supra* note 48 (listing settlement amount). The average penalty in Fiscal Year 2011 for a serious federal OSHA violation was \$2107. AFL-CIO, *supra* note 119, at 2; *see also* ESTLUND, *supra* note 16, at 65 (arguing that "OSHA penalties are capped at levels that are way out of step with both the human costs of workplace hazards and the savings the employers might anticipate from cutting corners"); Thomas McGarity et al., *Workers at Risk: Regulatory Dysfunction at OSHA*, CTR. FOR PROGRESSIVE REFORM 15 (Ctr. for Progressive Reform White Paper No. 1003, Feb. 2010), http://www.progressivereform.org/articles/OSHA_1003.pdf ("Beginning with penalties that have low statutory limits, inspectors and then supervisors . . . regularly exercise their discretionary power to reduce penalties to levels so low that they have little deterrent effect on employers.").

¹³³ OSHA Regional News Release, *supra* note 43.

¹³⁴ OSHA *Inspection Detail*, *supra* note 48.

¹³⁵ Healy, *supra* note 2 and accompanying text.

¹³⁶ *See* Kevin Flynn, "Spider-Man" Cited for Federal Safety Violations, N.Y. TIMES ARTSBEAT (Mar. 4, 2011, 6:46 PM), <http://artsbeat.blogs.nytimes.com/2011/03/04/spider-man-cited-for-federal-safety-violations> (making same argument at time of writing, at which point capitalization was \$65 million).

¹³⁷ N.Y. LAB. LAW § 27(1)–(2)(a) (McKinney 2009); *see also id.* § 27(2)(b) ("The commissioner may require licenses as a condition of carrying on any industry, trade, occupation or process which the commissioner finds contains special elements of danger to the lives, safety or health of employees . . .").

¹³⁸ N.Y. ARTS & CULT. AFF. LAW § 37.09 (McKinney Supp. 2013). The Commissioner is also given rulemaking authority under this section. *Id.* When first passed, this provision was part of the Labor Law, at section 202-a; when the new Arts and Cultural Affairs Law came into existence in 1983 the provision was moved into that compilation, at its current

relevant regulations, the Department of Labor had the authority to review the aerial sequences in *Spider-Man* prior to the first public performance.¹³⁹ A violation under this statute is a criminal misdemeanor; for a first offense, the maximum punishment is a fine of no more than one hundred dollars and/or no more than fifteen days imprisonment.¹⁴⁰

For shows like *Spider-Man*, where performers are engaged in aerial stunts “in which the height of possible fall is more than twenty feet” or that otherwise “create[] a substantial risk . . . of serious injury from falling,”¹⁴¹ this means that certain safety devices are required by state law, and that the NYDOL Commissioner may exercise supervisory authority over the stunts. At a minimum, state law requires that any performer engaged in such an aerial feat must be given *some* “safety belt, life-net, or other device of similar purpose suitably constructed and placed to arrest or cushion his fall and minimize the risk of . . . injury.”¹⁴²

But, as *Spider-Man* illustrates, requiring approval in advance of a public performance does not ensure the safety of performers during the rehearsal period: The sling-shot injuries occurred before the state’s inspections. Moreover, the state’s approval of particular safety devices is not foolproof: Tierney’s accident occurred post-approval.¹⁴³ Nor do the potential penalties for a state law violation give much assurance of sufficient deterrence: After Tierney’s fall, the state agency issued two safety violations but no fine was imposed.¹⁴⁴ As discussed above, OSHA and the OSH Act are often criticized in terms of efficacy, and the ultimate monetary penalty imposed upon the *Spider-Man* producers by OSHA was quite small in comparison to the

location. *Murach v. Island of Bob-Lo Co.*, 717 N.Y.S.2d 469, 472 (Sup. Ct. 2000), *aff’d*, 737 N.Y.S.2d 465 (App. Div. 2002).

¹³⁹ See N.Y. COMP. CODES R. & REGS. tit. 12, §§ 41.1–41.8 (2006) (outlining the safety standards that must be met for the performance to be approved); see also Patrick Healy, *Inspectors to Review Flying Safety for ‘Spider-Man’ Musical*, N.Y. TIMES ARTSBEAT (Nov. 2, 2010, 5:08 PM), <http://artsbeat.blogs.nytimes.com/2010/11/02/inspectors-to-review-flying-safety-for-spider-man-musical/> (noting that “shows like ‘Spider-Man’ are not legally allowed to hold public performances until state inspectors review and approve special effects such as flying”).

¹⁴⁰ N.Y. LAB. LAW § 213 (McKinney 2009) (incorporated by reference into N.Y. ARTS & CULT. AFF. LAW § 37.09(2) (McKinney 2011)).

¹⁴¹ N.Y. ARTS & CULT. AFF. LAW § 37.09(1) (McKinney Supp. 2013).

¹⁴² *Id.*

¹⁴³ See *supra* note 128 (explaining that “sling-shot” injuries occurred before state regulators visited the production in November 2010). Tierney was injured in December, *supra* note 29 and accompanying text, after NYDOL had approved all the flying sequences and “had no issues with the safety of the flying maneuvers,” Healy, *Curtain to Rise*, *supra* note 37.

¹⁴⁴ Healy, 2 *Safety Violations*, *supra* note 39.

show's capitalization.¹⁴⁵ But state law looks even worse. While federal law authorizes OSHA to impose a civil penalty of up to \$7000 per violation,¹⁴⁶ state labor law provides for extremely minimal fines (\$100 and \$500 for a first and second violation, respectively).¹⁴⁷ This makes it less worthwhile for the state to undertake action, and may simply lead the state to forego the imposition of monetary penalties, as occurred in the case at hand.

C. Union Rights

The Actors' Equity Association (AEA), the union representing stage actors, should also play a role in ensuring the safety of the Broadway theatre as a workplace. Its two production contracts¹⁴⁸ include approximately six full pages of provisions governing safety and health.¹⁴⁹ Generally, a producer of any Broadway show must "provide the Actor with safe and sanitary places of employment."¹⁵⁰ More specifically, producers agree to basic guarantees such as handrails, sufficient lighting, and treads in stairways; to guidelines governing the type of smoke or haze that may be used on stage; and not to hold dance rehearsals or any performances on particularly hard flooring.¹⁵¹

Most applicable to the present topic, "inherently dangerous conditions" are prohibited: "No Actor shall be required to perform any feat or act which places [the] Actor in imminent danger or is inherently dangerous, nor shall any Actor be required to perform in a

¹⁴⁵ See *supra* text accompanying notes 118–36.

¹⁴⁶ See *supra* note 132 and accompanying text.

¹⁴⁷ N.Y. LAB. LAW § 213 (McKinney 2009) (imposing a fine of one hundred dollars and/or fifteen days imprisonment for a first "violation of a rule or provision for the protection of the safety or health of employees" and a fine of one hundred to five hundred dollars and/or thirty days imprisonment for a second violation).

¹⁴⁸ The production contracts govern all commercial Broadway productions and some national tours. ACTORS' EQUITY ASS'N, ABOUT EQUITY 34 (2010), http://www.actors-equity.org/docs/about/AboutEquity_web.pdf [hereinafter ACTORS' EQUITY ASS'N, ABOUT EQUITY]. There are currently two different production contracts, the Equity/League Production Contract and the Equity/Disney Theatrical Productions (DTP) Production Contract. Their provisions are extremely similar; most are identical. See generally EQUITY/LEAGUE PRODUCTION CONTRACT, *supra* note 90; EQUITY/DTP PRODUCTION CONTRACT, *supra* note 90. *Spider-Man* is governed by the Equity/League Production Contract.

¹⁴⁹ See EQUITY/LEAGUE PRODUCTION CONTRACT, *supra* note 90, ¶ 62 (setting forth requirements regarding "Safe and Sanitary Places of Employment"); EQUITY/DTP PRODUCTION CONTRACT, *supra* note 90, ¶ 62 (same).

¹⁵⁰ EQUITY/LEAGUE PRODUCTION CONTRACT, *supra* note 90, ¶ 62(A); EQUITY/DTP PRODUCTION CONTRACT, *supra* note 90, ¶ 62(A).

¹⁵¹ EQUITY/LEAGUE PRODUCTION CONTRACT, *supra* note 90, ¶¶ 62(A)(1), 62(E)(1), 62(H)(2); EQUITY/DTP PRODUCTION CONTRACT, *supra* note 90, ¶¶ 62(A)(1), 62(E)(1), 62(H)(2).

costume or upon a set which is inherently dangerous.”¹⁵² All stunt equipment is subject to inspection before use in each performance, and all stunt coordinators must take steps “to reasonably protect the Actors from injury.”¹⁵³

AEA has the express right to inspect any theatre to ensure that all requirements related to the condition of the premises are being met.¹⁵⁴ Upon inspection, if AEA finds what it believes are violations, and if the producer or its trade group agrees that there is a violation, procedures are set forth under which AEA will inform the theatre owner that rehearsals and/or performances must cease unless violations are corrected.¹⁵⁵ If the producer or the trade group disagrees, the matter goes to arbitration and the arbitrator may “suspend performances until the theatre complies with this rule.”¹⁵⁶ Similarly, if AEA believes that an inherently dangerous condition exists, and the producer does not agree, the matter is submitted to an “industry committee” composed of representatives of both parties; if that group cannot agree, the matter goes to arbitration.¹⁵⁷

As with workers’ compensation, tort law, and regulation, this safety tool did not suffice to protect the actors injured in *Spider-Man*. It is difficult to know how much AEA tried to do—or could have done—in this situation. Official channels defended AEA’s efforts. After Aubin broke his wrists, an AEA spokesperson, speaking to a *New York Times* journalist, claimed that AEA had successfully persuaded the creative team to alter rehearsal practices for safety purposes when it observed that “two different flying sequences were being rehearsed in the air at the same time, close to one another.”¹⁵⁸

¹⁵² EQUITY/LEAGUE PRODUCTION CONTRACT, *supra* note 90, ¶ 62(H)(1); EQUITY/DTP PRODUCTION CONTRACT, *supra* note 90, ¶ 62(H)(1).

¹⁵³ EQUITY/LEAGUE PRODUCTION CONTRACT, *supra* note 90, ¶ 62(I)(4), (9); EQUITY/DTP PRODUCTION CONTRACT, *supra* note 90, ¶ 62(I)(4), (9).

¹⁵⁴ EQUITY/LEAGUE PRODUCTION CONTRACT, *supra* note 90, ¶ 62(M); EQUITY/DTP PRODUCTION CONTRACT, *supra* note 90, ¶ 62(M).

¹⁵⁵ See EQUITY/LEAGUE PRODUCTION CONTRACT, *supra* note 90, ¶ 62(M)(1) (explaining process by which AEA notifies the theatre owner and the League of purported violations, and the League’s representative inspects the theatre and determines if it agrees); EQUITY/DTP PRODUCTION CONTRACT, *supra* note 90, ¶ 62(M)(1) (describing how AEA notifies the theatre owner and the producer (Disney) and how the producer then inspects the theatre). The Broadway League is a trade group of producers, theatre owners, general managers, and others on the production side of the industry. *About the League*, BROADWAY LEAGUE, http://www.broadwayleague.com/index.php?url_identifier=about-the-league-1 (last visited June 16, 2013).

¹⁵⁶ EQUITY/LEAGUE PRODUCTION CONTRACT, *supra* note 90, ¶ 62(M)(2); EQUITY/DTP PRODUCTION CONTRACT, *supra* note 90, ¶ 62(M)(2).

¹⁵⁷ EQUITY/LEAGUE PRODUCTION CONTRACT, *supra* note 90, ¶ 62(H)(1); EQUITY/DTP PRODUCTION CONTRACT, *supra* note 90, ¶ 61(H)(1).

¹⁵⁸ Healy, *supra* note 139.

According to the same spokesperson, AEA oversees actors' safety by reviewing rehearsals, collecting reports from stage managers, and conducting "drive-by spot checks" of performances.¹⁵⁹ After Tierney's accident, anger from AEA members prompted union leadership to release a lengthy, official statement expressing sympathy for Tierney and defending the union. The statement claimed that AEA staff had spent a great deal of time at the Foxwoods Theatre during rehearsals and had likely "forestalled" several "accidents-in-waiting."¹⁶⁰

While the truth of these claims and the extent to which AEA's contractual rights prevented additional injuries is unclear, it is likely that AEA will try to use its contractual authority in a more forceful manner going forward. AEA is a political organization,¹⁶¹ and as such its leadership is subject to pressure from voting members. AEA members responded to Tierney's injuries with anger towards the union, and perhaps this pressure will prompt AEA to take action and make a difference in the future.

III

WHAT IS THE SOLUTION?

In Part III, I explore what could be done to prevent similar events from happening in the future. First, I discuss steps that AEA could take, but explain why those steps are unlikely to create the proper incentives. Second, I consider the possibility that the regulatory system could effectively oversee the industry. Third, I conclude that the most promising route to preventing future injuries of this type is reform of the workers' compensation/tort law paradigm.

A. Union Action

One might argue that the union can and should take on a greater role in addressing safety concerns; however, greater AEA oversight is unlikely to fully address the problem. Certainly, AEA should take steps to ensure the safety of its members, particularly those employed in technically complex productions. AEA should use its full authority

¹⁵⁹ *Id.*

¹⁶⁰ Andrew Gans, *Equity President Nick Wyman Releases Statement About Christopher Tierney's Spider-Man Injury*, PLAYBILL.COM (Jan. 2, 2011), <http://www.playbill.com/news/article/146272-Equity-President-Nick-Wyman-Releases-Statement-About-Christopher-Tierneys-Spider-Man-Injury>.

¹⁶¹ See, e.g., ACTORS' EQUITY ASS'N, CONSTITUTION AND BY-LAWS 5-12 (2006), http://www.actorsequity.org/docs/about/AEA_ConstitutionBylaws.pdf (describing union government structure and basic election requirements); see also ACTORS' EQUITY ASS'N, ABOUT EQUITY, *supra* note 148, at 21 (explaining election procedures, including that all members in good standing may vote for officers and council members).

under the production contracts to inspect theatres and productions.¹⁶² It should make sure its deputies know about the contractual rights and inform the union of any unsafe or inherently dangerous conditions.¹⁶³ AEA should not hesitate to send a matter to arbitration if it believes that a particular stunt or stage movement is “inherently dangerous” and the production refuses to alter the staging.¹⁶⁴ The increasing technical complexity of Broadway musicals does not excuse more accidents. Quite the contrary: The union must hire staff capable of understanding these technologies and who can demand necessary safety precautions.

But it is unlikely that AEA will single-handedly be able to change producers’ larger incentives. It can (and should) wield generalized pressure, and it can (and should) invoke the arbitral process when necessary. But what if a stage movement does not qualify as “inherently dangerous” yet could be made safer if the producers had the incentive to do so?

The issue here is how to affect producers’ economic incentives. In this area, AEA could seek to raise minimum salaries for actors engaged in particularly dangerous roles. Under the current production contracts, the minimum weekly salary is subject to a \$20 increase if an actor is engaged in activity that poses an “extraordinary risk,” including stunts such as those involved in *Spider-Man*.¹⁶⁵ AEA certainly could renegotiate the contracts to provide for an increased extraordinary risk minimum payment.

However, this ignores the real problem. What is needed is prevention of injury through deterrence—which does not rely on greater compensation to performers, but rather requires a felt economic impact when an actor is unnecessarily injured. The producer then has an economic motivation to make sure that these injuries do not

¹⁶² See *supra* notes 154–57 and accompanying text (describing AEA rights under League and Disney Theatrical Productions contracts).

¹⁶³ See *supra* notes 150–52 and accompanying text (describing producers’ responsibility to provide “safe . . . places of employment” and prohibition of “inherently dangerous conditions”). The cast of every production elects one cast member to serve as Equity Deputy. The deputy is responsible for informing AEA of any “possible rule infractions [or] complaints,” so that AEA can take appropriate action. See ACTORS’ EQUITY ASS’N, ABOUT EQUITY, *supra* note 148, at 31–32.

¹⁶⁴ See *supra* notes 154–57 and accompanying text (describing AEA rights under the production contracts).

¹⁶⁵ EQUITY/LEAGUE PRODUCTION CONTRACT, *supra* note 90, ¶ 63(E)(1) (defining “extraordinary risks” as “performing acrobatic feats; suspension from trapezes, wires, or like contrivances; the use of or exposure to weapons, fire, [or] pyrotechnic devices[:]; and the taking of dangerous leaps, falls, throws, catches, knee drops, or slides”); EQUITY/DTP PRODUCTION CONTRACT, *supra* note 90, ¶ 63(E)(1) (same).

occur.¹⁶⁶ An increased risk rider would essentially indicate that the performer is consenting to accept the risk of serious injury.¹⁶⁷ In some industries, it may make sense to pay additional compensation in return for the assumption of the risk of serious injury or even death. However, the actors and dancers undertaking these roles are not stuntmen who have chosen a career of risk and danger,¹⁶⁸ nor are they miners or iron smelters who arguably have undertaken particularly dangerous employment because of its greater compensation.¹⁶⁹ It does not make sense to deal with the problem through greater compensation. Actors and dancers need to be able to act and dance again in the future. They should not have to assume the risk that a special effect gone wrong will effectively end their careers.¹⁷⁰ If the *Spider-Man* stunts are actually “inherently dangerous” such that no safety

¹⁶⁶ Union actors who are collecting workers’ compensation may also apply for Supplemental Workers’ Compensation Insurance (SWCI) benefits, *see Workers’ Comp, ACTORS’ EQUITY ASS’N*, <http://www.actorsequity.org/Benefits/workerscomp.asp> (last visited May 26, 2013), and therefore may be more protected, in a compensatory sense, than workers in other, non-union industries who are not the beneficiaries of supplemental compensation. SWCI benefits, paid by the Equity-League Health Trust Fund, pay the difference between workers’ compensation payments and either 75% of the actor’s weekly salary (or 56.25% of the current production contract, whichever is less), for performers engaged in an “ordinary risk” activity, or 100% of the actor’s weekly salary (or 75% of the current production contract), for performers who are “injured while performing an extraordinary risk, as defined under the Health Plan.” *Explanation of Benefits Available During Periods of Work Related Disability*, EQUITY-LEAGUE FUND, http://www.equityleague.org/health/health_swc2.html (last visited May 26, 2013).

¹⁶⁷ *Cf.* Martha T. McCluskey, *The Illusion of Efficiency in Workers’ Compensation “Reform,”* 50 RUTGERS L. REV. 657, 911 (1998) (suggesting that the choice to deal with injuries through a compensation regime, such as workers’ compensation, as opposed to permitting a tort lawsuit, is a normative judgment that those injuries are harm that workers “should have to assume as part of the standard work relationship”).

¹⁶⁸ For example, before *Spider-Man*, Tierney danced in ballet companies and performed in the musicals *Dirty Dancing* and *Moving Out* and in Taymor’s movie, *Across the Universe*. Gans, *Tierney Remains in Serious Condition*, *supra* note 29.

¹⁶⁹ Some industries, such as mining, might be “inherently dangerous,” by which I mean that if all available safety precautions are taken, accidents will still inevitably occur. These industries might also be considered “necessary” to society. In such a situation, society might think it proper to offer a wage or risk premium—that is, greater compensation up front to encourage potential workers to undertake these jobs, understanding that some risk will remain, and understanding that should an accident occur, workers’ compensation will be available for partial additional compensation. I am a member of AEA and I performed professionally in several musicals, though not on Broadway. I have never met an actor or dancer who pursued a career in live theatre because of the money. And the stunts occurring onstage in *Spider-Man*, although entertaining, are not “necessary.” Therefore, if the risk of injury cannot be sufficiently reduced through ex ante safety precautions, the proper normative response is not to compensate via a wage premium, but instead to alter the stunts so that sufficient precautions can be taken.

¹⁷⁰ *Cf.* McCluskey, *supra* note 167, at 911 (arguing that the decision regarding what types of injuries are allowed into the tort system reflects a normative judgment about what types of risks society believes employees should have to assume).

measures would be adequate, they should be changed. And if the problem is inadequate safety precautions, those precautions should be taken.

B. Regulation

Could OSHA be made more effective? Some commentators argue that OSHA is a lost cause and recommend abolishing the agency altogether.¹⁷¹ Notably, some proponents of this view are as much (if not more) concerned with the imposition of regulatory costs on businesses as they are with OSHA's ability to create safer workplaces.¹⁷² Still, with safety as the main objective (rather than reducing systematic costs to big business), perhaps regulation is not a lost cause.

Professors McGarity and Shapiro offer a different view and argue that OSHA could be made more effective.¹⁷³ McGarity and Shapiro suggest three proposals to increase OSHA's efficacy: increased funding, a private right of action, and partnering with the states on educational programs. However, all are problematic. First, they argue for better funding, but also acknowledge that Congress had recently cut OSHA's budget.¹⁷⁴ The 113th Congress, post-sequestration and bitterly divided, is no more likely to fund OSHA than it was in 1996 (the year in which McGarity and Shapiro's article was published).¹⁷⁵

¹⁷¹ See Hood, *supra* note 124, at 62 (arguing that OSHA fines play "little to no role in business decisions about safety"); Kniesner & Leeth, *supra* note 16, at 46 (concluding that OSHA simply cannot effectively promote worker safety). *But see* McGarity et al., *supra* note 132, at 24–28 (articulating suggestions for administrative reforms within OSHA); McGarity & Shapiro, *supra* note 124, at 591 (arguing that regulation is "necessary to provide an appropriate level of workplace safety and health").

¹⁷² See Kniesner & Leeth, *supra* note 16, at 51 (comparing OSHA's effectiveness, using calculations for "implicit values workers place on safety," with costs to productivity and required employer expenditures, and finding costs to exceed benefits threefold).

¹⁷³ McGarity & Shapiro, *supra* note 124, at 590–91.

¹⁷⁴ *Id.* at 608.

¹⁷⁵ McGarity and Shapiro's article was published at a time when deregulation was a main priority of the Republican-led Congress. McGarity & Shapiro, *supra* note 124, at 587. In 2013, the Republican Party again holds a majority in the House of Representatives, and although it is a minority in the Senate, that minority is frequently able to prevent the Democratic majority from passing legislation. The two parties are extremely polarized and have evinced an inability to compromise, to pass even legislation that is considered pressingly important by both sides. See Jonathan Weisman, *Bills on Cuts Compete, and Both of Them Lose*, N.Y. TIMES, Mar. 1, 2013, at A12, available at <http://www.nytimes.com/2013/03/01/us/politics/senate-shoots-down-competing-bills-to-undo-cuts.html> (describing congressional inability to compromise to avert the sequester cuts disliked by both political parties). The sequester, providing for automatic cuts in defense, domestic, Medicare, and other spending, was intended to incentivize Congress to pass a deal to cut \$1.5 trillion over ten years, but the federal lawmakers failed to do so. Dylan Matthews, *The Sequester: Absolutely Everything You Could Possibly Need to Know, in One FAQ*, WASHINGTON POST, WONKBLOG (Mar. 1, 2013, 3:00 PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/02/20/the-sequester-absolutely-everything-you-could-possibly-need-to-know>

Second, they suggest that Congress could amend the OSH Act to allow for a private right of action, permitting a worker injured by an alleged OSHA violation to sue for civil penalties and attorneys' fees. But again, they recognized that congressional action was unlikely (as it is now, albeit under somewhat different political circumstances).¹⁷⁶ Notably, a private right of action would not alone solve the problem that penalties-per-violation are too small to impact employer conduct. Additionally, the limited amount that can be recovered is likely insufficient to encourage any such private attorney general to bring an action. That dollar amount would have to be increased to provide incentives both to employers (to adjust their behavior) and to potential private plaintiffs (to bring suit). Finally, McGarity and Shapiro suggest that OSHA partner with states to "educate employers to find additional ways to protect workers," through, for example, "develop[ing] model educational materials that could then be distributed by state workers' compensation agencies."¹⁷⁷ This might help create a safer workplace if a particular employer is personally motivated to take precautions; but if an employer is instead financially motivated to cut corners and take risks, an economic incentive is needed to deter that behavior. The limitations inherent in these three proposals bode poorly for OSHA's ability to deter inadequate safety conditions when employers are economically motivated to do otherwise.

However, the theatre industry may be better suited for the inspect-and-fine regime than other industries, in part because of union presence. AEA can function as a go-between by (1) informing its members that they should be vigilant, and should not hesitate to inform their deputy and AEA of a possible safety hazard, and (2) passing along concerns to OSHA and formally requesting

in-one-faq/. The current House Republican majority's goal of a shriveled federal government does not correspond with a better-funded OSHA. See Jonathan Weisman, *House Passes Money Bill and Budget Blueprint*, N.Y. TIMES, Mar. 22, 2013, at A18, available at <http://www.nytimes.com/2013/03/22/us/politics/house-passes-plan-to-avert-federal-shutdown.html> (reporting that the House Republicans passed a budget that, among other things, "locks in across-the-board cuts that will usher in the most austere spending limits in decades" and "underfinances important elements of the [P]resident's health care law"); see also Jeremy W. Peters & Jonathan Weisman, *As Senate Passes Spending Measure, Stark Budget Views Are on Display in House*, N.Y. TIMES, Mar. 21, 2013, at A19, available at <http://www.nytimes.com/2013/03/21/us/politics/senate-approves-spending-house-debates-next-budget.html> (citing the "irreconcilable views that the two parties hold on economics, public spending and the role of government").

¹⁷⁶ McGarity & Shapiro, *supra* note 124, at 608; see *supra* note 175 (describing congressional gridlock).

¹⁷⁷ McGarity & Shapiro, *supra* note 124, at 608.

inspections.¹⁷⁸ This could somewhat solve the funding dilemma because OSHA would not have to discover problems on its own, but rather would be notified. (Although OSHA's finite resources limit the total number of inspections it can perform in any given time period, it could at least focus those resources on workplaces where requests have been made.) Additionally, OSHA could be encouraged to impose fines at the high end of its statutory authorization to partially cure the problem of low penalties. Such a policy change, however, might not be politically feasible; it is unclear what type or amount of political pressure would need to be placed upon the White House for this to occur, and from where it might come. When all is said and done, OSHA's lack of resources will likely continue to prevent the occurrence of repeat, systematic inspections. Also discouraging is that OSHA's major problems—limited penalties and limited resources—lie in Congress's hands, where positive change is unlikely.¹⁷⁹

State regulation, for its part, can only work in the small pigeon-hole where OSHA does not reach. Reforming the penalties under the New York Labor Law to be more efficacious, therefore, could only affect performances involving aerial stunts—a reform that may have helped some of the *Spider-Man* performers, but not one that would necessarily apply more broadly to theatrical safety hazards.¹⁸⁰ State law could also be changed to authorize greater financial penalties.¹⁸¹ But regardless of the incremental improvements that might be made in state or federal regulation, government regulation appears to be

¹⁷⁸ Cf. Brooke E. Lierman, 'To Assure Safe and Healthful Working Conditions': Taking Lessons from Labor Unions to Fulfill OSHA's Promises, 12 LOY. J. PUB. INT. L. 1, 2–3 (2010) (asserting that greater unionization in the 1970s played a role in better OSHA enforcement through reporting of possible violations to OSHA). Kniesner and Leeth argue that the main types of work-related deaths that are particularly unsuited to prevention via OSHA's inspect-and-fine regime are car accidents, murders by customers and coworkers, and deaths to self-employed persons. Kniesner & Leeth, *supra* note 16, at 52. The risks present in the *Spider-Man*-style theatre industry are not of these sorts.

¹⁷⁹ See *supra* note 175 and accompanying text (describing the general congressional deadlock).

¹⁸⁰ See *supra* notes 137–42 and accompanying text (describing state regulatory authority over aerial public performances). For example, two of the three citations OSHA imposed on *Spider-Man* itself were given for hazards that NYDOL does not have the authority to regulate: raised platforms lacking protective side-railings, and the "fail[ure] to shield employees from being struck by moving overhead rigging components," i.e., Mendoza's injury. See *supra* text accompanying notes 45–46 (describing OSHA citations); see also OSHA Regional News Release, *supra* note 43.

¹⁸¹ See *supra* text accompanying notes 140, 144–47 (discussing problems with state penalties).

“sufficiently unreliable” such that it needs to be supplemented by a deterrent tort law regime.¹⁸²

C. Exclusivity Reform

Because neither regulation nor AEA seem particularly well-situated to deter unsafe conditions,¹⁸³ the workers’ compensation/tort paradigm is likely the most promising place for reform. As discussed above, the combination of workers’ compensation’s exclusivity and its limited compensatory capacity leads to underdeterrence.¹⁸⁴ New York should therefore reformulate its law to create these missing incentives. There are several ways in which this can be done.

At a minimum, the New York Court of Appeals should adopt a “substantial certainty” test in place of its current actual intent test for the intentional tort exception to exclusivity.¹⁸⁵ Such a change would recognize that the current system is out of step with the reality of workplace injury, and would add some deterrence to the current system by allowing additional cases into the tort system.

Even this, however, might not make a significant deterrent difference: States that have adopted “substantial certainty” require a very high showing to overcome exclusivity.¹⁸⁶ In North Carolina, for instance, this standard is met only “where there is uncontroverted evidence of the employer’s intentional misconduct and where such misconduct is substantially certain to lead to the employee’s serious injury or death.”¹⁸⁷ Taking North Carolina as exemplary, it is unlikely that the injured *Spider-Man* cast members would be able to meet the requisite standard.

In *Woodson v. Rowland*, North Carolina first expanded its intentional tort exception “to include cases in which a defendant employer

¹⁸² See Haas, *supra* note 16, at 888 (arguing that “government regulation is sufficiently unreliable that it should be backed up with the strong general deterrence provided by tort law”).

¹⁸³ See *supra* Part III.A–B (examining possible improvements to these regimes). AEA may be well-situated to create greater ex ante compensation for risky employment, but this will not necessarily prevent injuries from occurring. *Supra* notes 165–70 and accompanying text.

¹⁸⁴ See *supra* notes 79–97 and accompanying text.

¹⁸⁵ See note 101 and accompanying text (describing standard required for intentional tort exception to exclusivity in New York State).

¹⁸⁶ See *Van Dunk v. Reckson Assocs. Realty Corp.*, 45 A.3d 965, 975–80 (N.J. 2012) (conducting New Jersey two-pronged inquiry); *infra* text accompanying notes 187–200 (illustrating North Carolina’s approach); see also *Millison v. E.I. du Pont de Nemours & Co.*, 501 A.2d 505, 513 (N.J. 1985) (“[T]he statutory scheme contemplates that as many work-related disability claims as possible be processed exclusively within the [Workers’ Compensation] Act.”).

¹⁸⁷ *Whitaker v. Town of Scotland Neck*, 597 S.E.2d 665, 668 (N.C. 2003).

engaged in conduct that, while not categorized as an intentional tort, was nonetheless substantially certain to cause serious injury or death to the employee.”¹⁸⁸ An employee was killed when the fourteen-foot-deep trench in which he was working collapsed.¹⁸⁹ The employer had been cited at least four times in the prior six and a half years for violating trenching safety regulations.¹⁹⁰ The court denied the employer’s motion for summary judgment on exclusivity grounds, deciding that “when an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct,” that misconduct “is tantamount to an intentional tort” and should not be barred by workers’ compensation.¹⁹¹

But in a later case, *Whitaker v. Town of Scotland Neck*, the same court pulled back from the opening *Woodson* provided, calling the “*Woodson* exception” a “narrow holding in a fact-specific case” and finding that the plaintiffs had not put forth sufficient evidence to meet this high standard of intentionality.¹⁹² In *Whitaker*, plaintiffs’ decedent had been employed by the municipality as a maintenance worker.¹⁹³ While the decedent was operating a garbage truck its latching mechanism malfunctioned, pinning him against the truck.¹⁹⁴ He died approximately one month later as a result of a “crush injury.”¹⁹⁵

There was evidence that the dumpster was bent, that the latching mechanism was broken, that both of these defects had existed for at least two months prior to the incident, and that both had been reported to the supervisor.¹⁹⁶ Additionally, the North Carolina Department of Labor’s Division of Occupational Safety and Health (OSHANC) investigated the accident; OSHANC found that the accident had resulted from conditions that were not in compliance with OSHA and issued five “serious” violations of state law, for which the town was assessed \$10,500 in penalties.¹⁹⁷ However, the North Carolina Supreme Court found that, as a matter of law, the plaintiffs

¹⁸⁸ *Id.* at 667 (discussing *Woodson v. Rowland*, 407 S.E.2d 222 (N.C. 1991)).

¹⁸⁹ *Woodson*, 407 S.E.2d at 225–26.

¹⁹⁰ *Id.* at 225 n.1.

¹⁹¹ *Id.* at 228.

¹⁹² 597 S.E.2d at 668.

¹⁹³ *Id.* at 666.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* North Carolina is one of several states that have received federal approval to run its own OSHA program, rather than being regulated at the federal level; these citations are equivalent to federal OSHA citations and penalties. See U.S. DEP’T OF LABOR, *North Carolina Area Offices*, OSHA <http://www.osha.gov/oshdir/nc.html> (last visited July 21, 2013).

offered insufficient evidence to come within the *Woodson* exception.¹⁹⁸ The court noted that

[i]n *Woodson*, the defendant-employer's president was on the job site and observed first-hand the obvious hazards of the deep trench in which he directed the decedent-employee to work. Knowing that safety regulations and common trade practice mandated the use of precautionary shoring, the defendant-employer's president nonetheless disregarded all safety measures and intentionally placed his employee into a hazardous situation in which experts concluded that *only one outcome was substantially certain to follow*: an injurious, if not fatal, cave-in of the trench.¹⁹⁹

Despite some facts reminiscent of those in *Woodson*, including the supervisor's knowledge of the defect and serious OSHA violations, the North Carolina court characterized the case as involving "defective equipment and human error that amount[ed] to an accident rather than intentional misconduct."²⁰⁰

Under such a strict approach to "substantial certainty," the *Spider-Man* performers would be unlikely to prevail. Tierney would fall into this "human error" category, and the producers would likely argue that *all* injuries involved "defective equipment . . . amount[ing] to an accident."²⁰¹ The "sling-shot"-injured performers would have a hard time proving that the only outcome substantially certain to follow from the improper computer coding was broken bones, when these stunts were likely performed many times without such injuries.²⁰² Perhaps Aubin, the second actor injured performing the "sling-shot" maneuver, could have argued that, after the first injury, it was substantially certain that eventually this would happen again. It is

¹⁹⁸ *Whitaker*, 597 S.E.2d at 669.

¹⁹⁹ *Id.* at 668 (emphasis added) (citations omitted).

²⁰⁰ *Id.* at 669. In *Delgado v. Phelps Dodge Chino, Inc.*, 34 P.3d 1148 (N.M. 2001), the New Mexico Supreme Court adopted a test with more generous language. It held that exclusivity does not apply when an employer (1) "engages in an intentional act or omission . . . that is reasonably expected to result in the injury suffered by the worker" and (2) "expects the injury to occur, or has utterly disregarded the consequences of the intentional act or omission," and (3) this "intentional act or omission proximately causes the worker's injury." *Delgado*, 34 P.3d at 1150. This seems more like a reckless disregard than a substantial certainty standard. But *Delgado* involved an explosion at a smelting plant that killed the employee decedent, and the plaintiff alleged that the decedent's supervisor had "ordered him to perform a task that . . . was virtually certain to kill or cause him serious bodily injury." *Id.* at 1150. These facts seem more like the strict substantial certainty test. In a later case, the same court held that a plaintiff must "plead or present evidence that the employer met each of the three *Delgado* elements through actions that exemplify a *comparable degree of egregiousness as the employer in Delgado*." *Morales v. Reynolds*, 97 P.3d 612, 617 (N.M. 2004) (emphasis added).

²⁰¹ *Whitaker*, 597 S.E.2d at 669.

²⁰² See *supra* text accompanying note 199.

unclear from the case law whether this approach to substantial certainty would be successful.²⁰³ Kobak could potentially assert there was a substantial certainty that the repeated hard landings would damage his joints;²⁰⁴ but again, it is unclear from the case law whether a repetitive injury grants an employee an exit avenue out of exclusivity and into the tort system. He could not plausibly argue that when Rogers demanded Kobak stop using his strength and instead rely wholly upon the computer program, it was substantially certain that he would run face-first into the wall or be otherwise injured.²⁰⁵ Furthermore, OSHA's administrative findings included knowledge or constructive knowledge on the part of the producers of a "substantial probability that death or serious physical harm" could result from the

²⁰³ Case law is unsettled as to whether the substantial certainty approach requires the certainty be tied to a particular employee and a particular event, date, or time—such that the outcome was substantially certain at that moment—or whether a plaintiff can argue that something was substantially certain to occur eventually, when the conduct was repeated. In *Laidlow v. Hariton Machinery Co.*, the New Jersey Supreme Court appeared to allow the latter approach. 790 A.2d 884, 897–98 (N.J. 2002) (denying employer's motion for summary judgment because, "in light of all surrounding circumstances, including the prior close-calls, the seriousness of any potential injury that could occur, Laidlow's complaints about the absent guard, and the guilty knowledge of [the employer] as revealed by its deliberate and systematic deception of OSHA," a jury could determine that the employer "knew that it was substantially certain that the removal of the safety guard would result eventually in injury to one of its employees"). However, it appears that in most states, where immediacy is lacking and where an employee argues eventual substantial certainty, the court finds a lack of certainty, amounting to a "mere probability." See, e.g., *Fleetwood Homes of Fla., Inc. v. Reeves*, 833 So. 2d 857, 869 (Fla. Dist. Ct. App. 2002) (reversing trial court's denial of summary judgment where trial court "concluded that if this method of transport were used long enough, an accident would be inevitable," and rejecting prospect that employee could "add together small risks of injury in order to reach a combined total where the likelihood of injury to some employee sometime was substantially certain"), *quashed on other grounds*, 889 So. 2d 812 (Fla. 2004); *Burrow v. Delta Container*, 887 So. 2d 599, 602–03 (La. Ct. App. 2004) (finding that a high probability that an employee would eventually be injured by the employer's dismantling of safety mechanism on a machine did not meet substantial certainty requirement); *Brown v. Pennzoil-Quaker State Co.*, 175 S.W.3d 431, 440 (Tex. App. 2005) ("[M]ere knowledge of corrosion, without evidence that Pennzoil had notice that the corrosion had reached the point at which an explosion *in the near future* was substantially certain to occur, is no evidence that an explosion was about to occur.") (emphasis added); see also *Reeves v. Structural Pres. Sys.*, 731 So. 2d 208, 212 (La. 1999) ("Believing that someone may, or even probably will, eventually get hurt if a workplace practice is continued does not rise to the level of an intentional act, but instead falls within the range of negligent acts that are covered by workers' compensation.").

²⁰⁴ See *supra* text accompanying notes 55–57 (describing Kobak's recounting of the first set of incidents).

²⁰⁵ See *supra* text accompanying notes 58–60 (describing Kobak's recounting of the second incident).

aforementioned hazards.²⁰⁶ But *Whitaker* went to lengths to point out the difference between a “substantial certainty” and a “substantial probability.”²⁰⁷ Assuming the accuracy of OSHA’s factual determinations, as a normative matter the producers should face legal consequences for sending their actors into an environment they knew posed a “substantial probability [of] death or serious physical harm.”²⁰⁸ However, under the North Carolina courts’ approach to substantial certainty, this would not be enough.

The second (and better) option is state legislative action. First, the “substantial certainty” approach could be implemented directly through legislation. If other court systems are illustrative, this would allow only a few additional cases into the tort system; as discussed above, the assumed facts underlying the *Spider-Man* injuries are unlikely to meet this high standard. On the other hand, if the New York legislature adopted the test as a rule—rather than the courts creating it as an exception—a court might feel comfortable using the test as an exit path into the tort system more frequently.²⁰⁹ Moreover, allowing at least the most egregious substantial certainty cases into the tort system would add some deterrent effect, which would certainly be an improvement over the current state of the law. Even better, the legislature could permit tort actions in cases of gross negligence or recklessness.²¹⁰

²⁰⁶ See OSHA Regional News Release, *supra* note 43 (“OSHA issues a serious citation when there is substantial probability that death or serious physical harm could result from a hazard about which the employer knew or should have known.”).

²⁰⁷ *Whitaker v. Town of Scotland Neck*, 597 S.E.2d 665, 668 (N.C. 2003) (noting that, in *Woodson*, there had been “sufficient evidence from which a reasonable juror could determine that upon placing a man in [the] trench serious injury or death as a result of a cave-in was a substantial certainty rather than an unforeseeable event, mere possibility, or even substantial probability”) (internal quotation marks omitted); *id.* at 668–69 (“As discussed in *Woodson*, simply having knowledge of some possibility, or even probability, of injury or death is not the same as knowledge of a substantial certainty of injury or death.”).

²⁰⁸ See *supra* text accompanying note 206.

²⁰⁹ When the New Jersey Supreme Court adopted the “substantial certainty” standard, it found that it must “demand a virtual certainty” in keeping with legislative intent. *Millison v. E.I. de Pont de Nemours & Co.*, 501 A.2d 505, 514 (N.J. 1985) (noting that “the statutory scheme contemplates that as many work-related disability claims as possible be processed exclusively within the Act”); see also *Van Dunk v. Reckson Assocs. Realty Corp.*, 45 A.3d 965, 978 (N.J. 2012) (failing to find a substantial certainty of injury or death because doing so would “caus[e] a substantial erosion of the legislative preference for the workers’ compensation remedy”). If the New York legislature itself creates the exception, it may illustrate a legislative intent *not* to process “as many work-related disability claims as possible . . . exclusively within” workers’ compensation. *Millison*, 501 A.2d at 513.

²¹⁰ It does not appear that any state currently permits this. New Mexico’s test of willfulness could be read to allow an exception to exclusivity for gross negligence or recklessness, see John F. Burton, Jr., *An Overview of Workers’ Compensation*, WORKERS’ COMPENSATION POL’Y REV., May/June 2007, at 3, 21–22 (noting the New Mexico exception), but a recent decision of the New Mexico Supreme Court suggests a narrow

A third option—one that has been adopted by several states—would be to incorporate some concept of fault and fault-based payment within the workers' compensation system itself. Compensating injuries that are deemed to be the result of gross negligence or recklessness at a level higher than the usual two-thirds statutory rate would make employer-producers more likely to feel the cost of their wrongful conduct. For instance, California increases the amount of workers' compensation payments by one-half if the employee is injured due to the "serious and willful misconduct" of the employer or a managing or executive officer.²¹¹

Any of these changes would help create the deterrent effect that is missing from the current regime. The New Mexico Supreme Court has explained why, from a policy perspective, the current doctrine is so undesirable:

[T]he actual intent test encourages an employer, motivated by economic gain, to knowingly subject a worker to injury in the name of profit-making. As long as the employer is motivated by greed, rather than intent to injure the worker, the employer may abuse workers in an unlimited variety of manners while still enjoying immunity from tort liability.²¹²

It is safe to assume that, without a change, producers will continue to risk injuries rather than cancelling performances to implement adequate safety measures or making changes to the show that might make the production safer but less appealing to audiences. This is even more likely if producers know that the worst financial outcome is the minimal payments required under the workers' compensation regime and/or keeping actors on salary while they recover.²¹³ Whereas, if a tort suit were permitted, despite some possible

construction of the test, *see supra* note 200. In Texas, gross negligence that results in the death, but not injury, of an employee is actionable in tort. *See Arnold v. Renken & Kuentz Transp. Co.*, 936 S.W.2d 57, 58–59 (Tex. App. 1996) ("A gross negligence case would only apply if Arnold were dead, and he isn't.").

²¹¹ CAL. LAB. CODE § 4553 (West 2012). This refers to conduct "fall[ing] between ordinary negligence and an intentional act," i.e., conduct showing a "reckless disregard" for others' safety. *Magliulo v. Superior Court*, 121 Cal. Rptr. 621, 635 (Ct. App. 1975) (internal quotation marks omitted). Massachusetts has a similar provision: Upon serious and willful misconduct of an employer or supervisor, compensation is doubled, and, if the employer is insured, he must repay out-of-pocket the additional amount to the insurer. MASS. GEN. LAWS ANN. ch. 152, § 28 (West 2012). *See also* Mark Lloyd Frischhertz, *Louisiana Workers' Compensation Scheme: Substantially Certain to Result in an Unsafe Workplace*, 26 WORKERS' COMPENSATION L. REV. 807, 822–25 (2004) (advocating for the Louisiana legislature to adopt a tiered workers' compensation scheme).

²¹² *Delgado v. Phelps Dodge Chino, Inc.*, 34 P.3d 1148, 1154 (N.M. 2001).

²¹³ *See, e.g., Healy, Curtain to Rise, supra* note 37 (reporting that the first preview performance of *Spider-Man* was about to take place after a two-week delay, and quoting Julie Taymor as saying that "a further delay would be too expensive").

reluctance to become persona non grata in the industry, an actor would eventually become sufficiently fed up and sue the producers.

One might counter this argument and posit that actors are unlikely to sue their employers or former employers even if the tort avenue were available. The New York theatre community is small and insular;²¹⁴ being known as litigious could certainly negatively impact an actor's ability to be hired in the future. Notably, however, Kobak was willing to antagonize the *Spider-Man* producers with his court filings for pre-action discovery, and he did sue both the company that supplied the stunt-related equipment and the company allegedly responsible for its upkeep.²¹⁵ It seems likely that, had he been able to bring a negligence-type claim against the producers—if exclusivity had not been a bar—he would have.²¹⁶ Moreover, if accidents of this type continue to occur, it is likely that someone will eventually become paralyzed or die. Such a victim (or her estate) would have no concern about remaining employable within the industry.

CONCLUSION

Viewed in connection with the injuries to *Spider-Man* cast members, the legal landscape appears unfavorable to Broadway performers' safety. Workers' compensation does not sufficiently induce optimal safety precautions, and the regulatory system's fines are negligible in comparison to the huge capitalization of this production. AEA did not manage to exert its influence to prevent these accidents, although it is possible that it may do so in the future.

Ultimately, producers must know that they could be held liable in a tort lawsuit ex post in order to incentivize them ex ante to take all necessary safety precautions. And if a creative decision cannot be safely implemented, producers must have sufficient incentive to

²¹⁴ *But see* ADLER, *supra* note 7, at 15 (noting that the insularity of Broadway has decreased, "replaced by a growing interdependence between Broadway and the rest of the professional theatre scene in America").

²¹⁵ Kenneally, *supra* note 60. The producers showed their irritation with Kobak's legal request: They declined to appear, and Kobak's petition was granted in default. *See* Decision and Order, *Kobak v. 8 Legged Prods., LLC*, Index No. 151390/2012 (N.Y. Sup. Ct. May 16, 2012), available at <http://iapps.courts.state.ny.us/iscroll/SQLData.jsp?IndexNo=151390-2012> (follow "Decision + Order on Motion" hyperlink).

²¹⁶ Kobak stated in his petition for pre-action discovery that he was seeking discovery in order to determine whether he might have a viable claim against a third-party defendant, and he pointed out that there could be no prejudice to the producers in providing such discovery due to the exclusivity of workers' compensation. Kobak Petition, *supra* note 53, ¶¶ 4, 7–8.

refrain from implementing it so as to prevent these accidents from occurring in the first place.²¹⁷

In addition to creating this financial incentive, easing the exclusivity of workers' compensation would make a statement: If the employer is immune from suit, she is told that her conduct is perfectly acceptable—that injuries are a cost of business, rather than something society wants to discourage. But opening up the tort system for egregious conduct falling short of a literally intentional tort would demonstrate that society values the health and safety of our actors and dancers and that these performers are not fungible property. Incorporating a concept of fault into the workers' compensation system would also serve this purpose.

²¹⁷ I do not argue that tort is necessary for compensatory purposes. It is possible that the combination of workers' compensation, SWCI, and AEA minimum salaries could provide sufficient compensation. *See supra* note 166 (explaining SWCI supplemental payments). However, the prospect of a large award for pain and suffering damages, which is not available in the workers' compensation system, would be desirable additional compensation.